Importing Constitutional Norms from a "Wider Civilization": *Lawrence* and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation

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The decision of the U.S. Supreme Court in Lawrence v. Texas*, 539 U.S. 558 (2003) is remarkable for many reasons, not the least of which is the Court's reliance on international and foreign law sources in its constitutional interpretation. This Article explores the various ways in which Justices of the Rehnquist Court have used foreign and international law to interpret the domestic Constitution and examines existing attempts to justify these uses. The Article suggests that the Justices have used foreign and international law for three distinct purposes: expository, empirical, and substantive. The Article concludes that the expository and empirical uses are easily supported by conventional theories of constitutional interpretation, but that the substantive use of such norms presents a more difficult and complicated case. Ultimately, this Article concludes that the substantive, or "moral fact-finding," use of foreign and international law in constitutional interpretation lacks an adequate theoretical foundation.*

I. INTRODUCTION

It would be an understatement in the extreme to call the Supreme Court's decision in *Lawrence v. Texas*[1] revolutionary. The Court, overruling a precedent only seventeen years old,[2] held that the Constitution forbids states from criminalizing homosexual sodomy. On the merits, the decision was praised by liberals and libertarians, decried by conservatives, and set the stage for the current debate over the propriety and constitutionality of restrictions on same-sex marriage.

Its holding aside, *Lawrence* may have added a spark to a quieter revolution—a revolution in constitutional interpretation that has been stirring, largely unnoticed, for years. The revolution of which I speak, and to which this paper is devoted, is the Court's recent, and unexplained, embrace of comparative and international law norms as aids to domestic constitutional interpretation.

Distancing itself from its precedent in *Bowers v. Hardwick*, which, of course,

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[1] 539 U.S. 558 (2003).

[2] *See* Bowers v. Hardwick, 478 U.S. 186, 192 (1986).

held that the Constitution did not forbid states from criminalizing homosexual sodomy, the Court in *Lawrence* explained that "[t]o the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere."[3] As evidence of the "wider civilization['s]" rejection of *Bowers,* the Court noted that the European Court of Justice had held, both before and after *Bowers*, that laws forbidding homosexual conduct violated the European Convention on Human Rights.[4] The Court went on to note 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."[5] Indeed, the Court announced, "[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent."[6]

Lawrence was not the first case in recent memory in which the Justices relied upon international or comparative law sources to decide a domestic constitutional case. In 2002, the Court pointed to the opinion of the "world community" in support of its conclusion that the Constitution prohibited execution of the mentally retarded.[7] And individual Justices of the Court recently have invoked international and comparative law norms in opinions supporting the constitutionality of practices as diverse as race-based affirmative action in higher education[8] and federal commandeering of state executive officials.[9] All this comes despite the fact that only seven years ago a majority of the Court endorsed the proposition that "comparative analysis [is] inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one."[10]

Given the Court's recent rejection of foreign and international law as aids to domestic constitutional interpretation, one would expect the proponents of the practice to offer a thoughtful and thorough justification for their adoption of this

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[3] *Lawrence*, 539 U.S. at 576.

[4] *Id.* at 573.

[5] *Id.* at 576.

[6] *Id.* at 577.

[7] Atkins v. Virginia, 536 U.S. 304, 317 n.21 (2002) (noting that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved").

[8] Grutter v. Bollinger, 539 U.S. 306, 344 (Ginsburg, J., concurring). *See also* Gratz v. Bollinger, 539 U.S. 244, 302 (2003) (Ginsburg, J., dissenting).

[9] Printz v. United States, 521 U.S. 898, 976 (1997) (Breyer, J., dissenting).

[10] *Printz*, 521 U.S. at 921 n.11. A similar debate about the relevance of foreign and international law emerged in the late 1980's in the context of deciding the constitutionality of the juvenile death penalty. As explained more fully, *infra* text accompanying notes 48 to 59, a majority of the Court then also rejected the position that foreign and international law was relevant to constitutional decision-making. *See* Stanford v. Kentucky, 492 U.S. 361, 370 (1989).

technique. But they have given none. The majorities in *Lawrence* and *Atkins*, for example, simply cited international conventions and the opinions of foreign and international bodies as if they were well-accepted sources of domestic constitutional interpretation, no more controversial than citations of the Court's own precedent. Yet, as we have seen, such is not the case.[11]

This lack of reflection should alarm us. New forms of constitutional argument have a way of perpetuating themselves. As Professor Vicki Jackson has observed, "if Justices refer more to the constitutional decisions of other courts, this practice to some extent will become self-legitimating, a phenomenon that is already occurring around the world."[12] But before embracing any innovative form of constitutional argument, we should consider whether and how it improves upon our current modes of constitutional decision-making and whether it can be reconciled with our constitutional traditions.

Although the Court's opinions have failed to justify the invocation of international and foreign norms in constitutional interpretation, the extrajudicial speeches and writings of some of the Justices, and scholarly works by several academics, have attempted to fill the void.[13] The Justices and commentators

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[11] This point was raised by the dissenters in both *Lawrence* and *Atkins*, but occasioned no response from the majority. *See Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting); *Atkins*, 536 U.S. at 322, 324–25 (Rehnquist, C.J., dissenting); *id.* at 347–48 (Scalia, J., dissenting).

[12] Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 263 (2001). Indeed, one might argue that this phenomenon has already manifested itself with respect to the practice of citing foreign and international law norms in interpretations of the Eighth Amendment's prohibition on cruel and unusual punishments. *See, e.g.*, *Atkins*, 536 U.S. at 316 n.21 (disregarding, without comment, the opinion of the Court in *Stanford*, which stated that foreign and international law is irrelevant to Eighth Amendment analysis). To the extent the Justices have offered a justification for using foreign and international law to interpret the Eighth Amendment, it has been one grounded in precedent. *See Stanford*, 492 U.S. at 389 (Brennan, J., dissenting) ("Our cases recognize that objective indicators of contemporary standards of decency in the form of legislation in other countries is also of relevance to Eighth Amendment analysis."). But neither the origin of that line of precedent, *Trop v. Dulles*, 356 U.S. 86, 102 (1958), nor subsequent cases relying on it offer any justification for the Court's initial reliance on foreign and international judgments in determining the content of "evolving standards of decency." *See Atkins*, 536 U.S. at 322 (Rehnquist, C.J., dissenting).

[13] *See, e.g.*, Ruth Bader Ginsburg, Remarks for the American Constitution Society, Looking Beyond our Borders: The Value of a Comparative Perspective in Constitutional Adjudication (Aug. 2, 2003) (transcript available at http://www.americanconstitutionsociety.org/pdf/Ginsburg%20transcript%20final.pdf); Stephen Breyer, *Keynote Address*, 97 AM. SOC'Y INT'L L. PROC. 265, 265 (2003); Sandra Day O'Connor, *Keynote Address*, 96 AM. SOC'Y INT'L L. PROC. 348, 350 (2002); William Rehnquist, *Constitutional Courts – Comparative Remarks*, *in* GERMANY AND ITS BASIC LAW 411, 412 (Paul Kirchhof and Donald P. Kommers eds. 1993); Jackson, *Narratives*, *supra* note 12; Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1228 (1999); Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of*

typically suggest that it is appropriate for American judges to look to foreign sources in search of persuasive legal reasoning.[14] That is, just as a U.S. Court of Appeals might find persuasive the opinion of a court in a sister circuit, domestic courts might also look abroad in search of persuasive legal argument. In Justice Ginsburg's words, when it comes to constitutional interpretation, "[w]e are the losers if we do not both share our experience with and learn from others."[15]

Whether and when domestic courts can profitably and legitimately borrow legal reasoning from foreign jurisdictions addressing foreign constitutional questions is an important question, which I hope to address elsewhere. Yet, even if one were to conclude that American courts could profitably borrow constitutional *reasoning* from foreign jurisdictions, that still would not explain or justify the Justices' actual use of foreign and international law in cases like *Lawrence*. Reason-borrowing simply does not describe what members of the Rehnquist Court have done. None of the recent opinions invoking international or comparative law sources has explicitly looked to the reasoning of a foreign decision-maker. Instead, the opinions have used comparative and international law norms for three distinct purposes, which I have labeled expository, empirical, and substantive. Each of these uses requires its own justification, but none, at least as it has actually been employed by the Justices of the Rehnquist Court, can be justified as a form of constitutional reason-borrowing.

The purpose of this Article is two-fold: to describe the Rehnquist Court's

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Comparative Constitutional Interpretation, 74 IND. L.J. 819, 825–26 (1999).

[14] *See, e.g.*, Breyer, *supra* note 13 at 266 ("[W]e find an increasing number of issues, including constitutional issues, where the decisions of foreign courts help by offering points of comparison. . . . Judges in different countries increasingly apply somewhat similar legal phrases to somewhat similar circumstances . . . ."); O'Connor, *supra* note 13 at 350 (lamenting that

> [t]here has been a reluctance on our current Supreme Court to look to international or foreign law in interpreting our own Constitution and related statutes. While ultimately we must bear responsibility for interpreting our own laws, there is much to learn from other distinguished jurists who have given thought to the same difficult issues that we face here.);

Rehnquist, *supra* note 13 at 412:

> (For nearly a century and a half, courts in the United States exercising the power of judicial review had no precedents to look to save their own, because our courts alone exercised this sort of authority. . . . But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.);

Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 601 (1999) (advocating reason-borrowing); Jackson, *Narratives*, *supra* note 12, at 263 (same); Tushnet, *supra* note 13, at 1228 (same); Choudhry, *supra* note 13, at 825–26 (same). There are a few scholars, however, who advocate an alternative approach, which I call "moral fact-finding." The work of these scholars is discussed *infra* Part III.C.

[15] Ginsburg, *supra* note 13, at 3.

actual uses of foreign and international law in domestic constitutional interpretation and to examine the existing attempts to justify these uses. In Part II, I describe the different uses to which the Justices of the Rehnquist Court have put comparative and international law in constitutional decision-making. Not until we have a coherent description of such uses can we begin to frame a normative evaluation of them. In Part III, I explore whether any of these uses has a present justification. I conclude that both the expository and empirical uses of foreign and international materials are easily justified. Yet the Rehnquist Court's approach to using foreign and international law to supply substantive meaning to the Constitution (which I call "moral fact-finding") is more problematic. The Court has offered no justification for employing this technique. Nor have scholars provided explanations that satisfy. Ultimately, I conclude that the moral fact-finding approach remains without constitutional justification.

II. THE USES OF COMPARATIVE AND INTERNATIONAL LAW: A TYPOLOGY

The Rehnquist Court's increased reliance upon international and foreign law in domestic constitutional interpretation has not gone completely unnoticed. Litigants, particularly in individual rights cases, lately have urged the Court to incorporate particular foreign or international law rules into the domestic Constitution.[16] Often, these litigants encourage the Court to rely on the international or foreign law norms they advocate by pointing to prior constitutional cases in which the Court has cited such sources.[17] They thus seek to persuade the Court that foreign and international law have become accepted tools of constitutional interpretation.

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[16] *See, e.g.*, Brief of Amici Curiae Mary Robinson et al. at 3–8, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102) [hereinafter Brief of Mary Robinson in *Lawrence*] (urging the Court to follow the decisions of other nations and international bodies when deciding whether the U.S. Constitution forbids states from criminalizing homosexual sodomy); Brief of Amicus Curiae European Union at 4–11, McCarver v. North Carolina, 533 U.S. 975 (2001) (No. 00-8727); Brief of Amicus Curiae NOW Legal Defense and Education Fund at 10–14, Grutter v. Bollinger and Gratz v. Bollinger, 539 U.S. 982 and 539 U.S. 244 (2003) (Nos. 02-241 & 02-516), *available at* http://supreme.lp.findlaw.com/supreme_court/briefs [hereinafter Brief of NOW Legal Defense in *Grutte*r] (urging the Court to uphold race-based affirmative action programs because such measures are permitted or required by international treaties and the decisions of other nations' high courts). It should be noted, however, that this litigation strategy is not entirely novel; nor has it been the exclusive tool of liberal causes. In the 1980s and 90s, litigants seeking reversal of *Roe v. Wade* adopted a similar strategy, but with no success. *See* Christopher McCrudden, *A Part of the Main? The Physician–Assisted Suicide Cases and Comparative Law Methodology in the United States Supreme Court* 125, 129-30 *in* LAW AT THE END OF LIFE: THE SUPREME COURT AND ASSISTED SUICIDE (Carl E. Schneider, ed. 2000).

[17] *See, e.g.*, Brief of Mary Robinson in *Lawrence*, *supra* note 16, at 3–8 (arguing that "this Court has traditionally used international and foreign law rulings to aid its constitutional interpretation"); Brief of NOW Legal Defense in *Grutter*, *supra* note 16, at 4–6.

The problem with this sort of claim is that the arguments generally fail to analyze and distinguish the function foreign or international law served in the prior case. Although some members of the Rehnquist Court have increasingly cited international and comparative law in constitutional cases, they have not always used these materials for the same purpose. Instead, the Justices have put these sources to three different uses: to explain a domestic constitutional rule, to supply evidence of the effects of a legal rule, and to supply substantive content to the Constitution. When using foreign and international sources to provide substantive content to the domestic Constitution, the Justices have employed a technique that I call "moral fact-finding." Another technique for using foreign and international law to infuse the Constitution with substantive content, which I call "reason-borrowing," is possible, and frequently advocated, but it is not a technique that the Justices of the Rehnquist Court have actually used. In this section, I will explain each of these uses and provide an example of the technique from a Supreme Court case. Understanding these distinct uses of comparative and international law in constitutional decision-making allows for a more precise exploration of the larger theoretical question posed by this Article; that is, which interpretive uses of comparative and international law, if any, are constitutionally justified?

A. *Expository*

The "expository" use of comparative or international law is relatively straightforward. A court uses comparative or international law in this sense when it uses the foreign law rule to contrast and thereby explain a domestic constitutional rule.

A classic example of the expository model is found in Chief Justice Rehnquist's opinion for the Court in *Raines v. Byrd*.[18] The question presented in *Raines* was whether certain Members of Congress had standing to challenge the alleged dilution of their legislative votes brought about by the Line Item Veto Act.[19] Finding neither precedent[20] nor history[21] to support the Congressmen's claim, the Court held that they lacked standing.[22] The Chief Justice acknowledged that "[t]here would be nothing irrational about a system that granted standing in these cases," and noted that "some European constitutional courts operate under one or another variant of such a regime."[23] Nonetheless, the Chief Justice

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[18] 521 U.S. 811 (1997).

[19] The Line Item Veto Act, Pub. L. 104-130, 110 Stat. 1200, 2 U.S.C.A. § 691 (Supp. 1997), was subsequently declared unconstitutional in *Clinton v. City of New York*, 547 U.S. 417 (1998).

[20] *Raines*, 521 U.S. at 825–26.

[21] *Id.* at 826–27.

[22] *Id.* at 830.

[23] *Id.* at 828 (citing Favoreu, *Constitutional Review in Europe*, in CONSTITUTIONALISM AND

explained, such "is obviously not the regime that has obtained under our Constitution to date. Our regime contemplates a more restricted role for Article III courts . . . ."[24]

Why did the Chief Justice cite the standing practices of foreign constitutional courts? Perhaps he simply found them interesting. More likely, he offered these foreign practices as an example of the "expository" approach; that is, as a way of explaining what the United States law of standing *is* by contrasting it with an example of what it is *not*.

B. *Empirical*

The empirical use of comparative and international law norms is more complex than the expository use, but no more problematic in principle. The Justices sometimes use comparative (or, less frequently, international) norms in an empirical sense when the answer to the ultimate constitutional question before the Court is contingent upon the answer to an empirical question. In such situations, the Court may look to a foreign law source for its practical effect. The Court does not rely on the foreign law to supply the rule of decision, *per se*; instead it derives the general rule of decision from domestic sources. But the Court looks abroad to see what the effect of the proposed rule might be in the context of a particular legal system and to ascertain whether the effect of the specific ruling urged upon the Court will comply with the constitutional principle the Court has derived through domestic sources.

The Supreme Court's decision in *Washington v. Glucksberg*[25] exemplifies the "empirical" use of comparative experience.[26] In *Glucksberg*, the Court was asked to decide whether the State of Washington's ban on physician-assisted suicide violated the Due Process Clause of the Fourteenth Amendment.[27] After

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RIGHTS 38, 41 (L. Henkin & A. Rosenthal eds. 1990); Wright Sheive, *Central and Eastern European Constitutional Courts and the Antimajoritarian Objection to Judicial Review*, 26 LAW & POL'Y INT'L BUS. 1201, 1209 (1995); A. STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE 232 (1992); D. KOMMERS, JUDICIAL POLITICS IN WEST GERMANY: A STUDY OF THE FEDERAL CONSTITUTIONAL COURT 106 (1976)).

[24] 521 U.S. at 828.

[25] 521 U.S. 702 (1997).

[26] As Christopher McCrudden has pointed out, the various opinions in *Glucksberg* also put foreign law to some non-emperical uses. McCrudden, *supra* note 16 at 137-38. Professor McCrudden notes, for example, that, in addition to its empirical use, the Chief Justice's opinion for the Court in one instance used foreign experience "to demonstrate that physician assisted suicide is broadly unacceptable internationally." *Id.* at 137. This use looks a lot like what I call moral fact-finding. Yet, as McCrudden acknowledges, *Glucksberg*'s "empirical uses are much more prominent than the non-empirical uses." *Id.* at 140.

[27] 521 U.S. at 705–06.

"examining our Nation's history, legal traditions, and practices,"[28] the Court concluded that the right to physician-assisted suicide was not a fundamental liberty interest protected by the Fourteenth Amendment.[29] That left the Court to determine whether the State's ban on physician-assisted suicide could survive the rational basis review. It was in answering this question that the Court turned to comparative sources.

Washington had claimed an interest in banning physician-assisted suicide to prevent euthanasia[30] and asserted a fear that "permitting assisted suicide w[ould] start it down the path to voluntary and perhaps even involuntary euthanasia."[31] To determine whether this fear was fanciful, the Court looked to the Netherlands, "the only place where experience with physician-assisted suicide and euthanasia has yielded empirical evidence."[32] Turning to the "Dutch government's own study," the Court discovered that

> in 1990, there were 2,300 cases of voluntary euthanasia . . . 400 cases of assisted suicide, and more than 1,000 cases of euthanasia without an explicit request. In addition, . . . the study found an additional 4,941 cases where physicians administered lethal morphine overdoses without the patients' explicit consent.[33]

These data, the Court concluded,

> suggest[] that, despite the existence of various reporting procedures, euthanasia in the Netherlands has not been limited to competent, terminally ill adults who are enduring physical suffering, and that regulation of the practice may not have prevented abuses in cases involving vulnerable persons . . . .[34]

Washington, the Court held, was therefore reasonable in "ensur[ing] against this risk by banning, rather than regulating assisting suicide."[35]

The Court's reliance on the Dutch experience in *Glucksberg* is a good example of the empirical use of foreign law. The Court did not rely on the *fact* of Dutch toleration for physician assisted suicide as a *reason in itself* why the United States should constitutionalize a principle allowing the practice. Nor did it consider

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[28] *Id.* at 710.

[29] *Id.* at 728.

[30] *Id.* at 732 & 728 n.20.

[31] *Id*. at 732.

[32] *Id.* at 785 (Souter, J., concurring in the judgment).

[33] *Id.* at 734 (citing *Physician-Assisted Suicide and Euthanasia in the Netherlands: A Report of Chairman Charles T. Canady*, at 12–13).

[34] *Id.* at 734.

[35] *Id.* at 735. Justice Souter's opinion concurring in the judgment made similar use of the Dutch experience. *See id*. at 785.

the *reasons* articulated by Dutch policymakers for allowing the practice as reasons why the United States Constitution should incorporate a similar rule. Rather, the Court simply looked to the *effect* of the Dutch rule to provide it with an empirical basis for answering the question posed by the domestic constitutional standard: whether Washington's statute bore a rational relationship to the interest it sought to protect. In other words, the Court took evidence, from the only source available, of the likely effect of Washington's legislation to test its conformity with the domestic constitutional rule.

C. *Substantive*

There is yet a third type of domestic constitutional question to which international and comparative law might be relevant. This type of question asks not what the factual *consequences* of a particular rule might be, but rather what the *substantive content* of the constitutional rule is or ought to be. A court using comparative and international law rules in this substantive sense does not derive the constitutional rule exclusively from domestic sources and look outward for factual information bearing upon whether a state rule or action comports with the domestic constitutional norm; it instead reaches out at the first stage—to seek foreign and international guidance in defining the content of the domestic constitutional rule.

One can imagine two ways in which a court might go about using comparative and international law to help formulate a domestic constitutional norm. The first would be to read the opinions of foreign and international courts that have addressed questions similar to the question facing the domestic court and use the foreign courts' reasoning to help shape the domestic constitutional rule. This approach, widely advocated by jurists and scholars,[36] I will call the "reason-borrowing" approach.

Alternatively, a court looking abroad in search of the content of a domestic constitutional rule might look simply to the *fact* that foreign or international jurisdictions have adopted a particular rule as a reason to conform the U.S. constitutional rule to the foreign or international norm. I will call this approach "moral fact-finding."

1. *Reason-Borrowing*

The reason-borrowing approach, although widely advocated by jurists and scholars, has played no discernible role in the Rehnquist Court's recent embrace of foreign and international law as aids to domestic constitutional interpretation.[37] To

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[36] *See supra* note 14 and accompanying text.

[37] Not limiting her observations to the Rehnquist Court, Vicki Jackson has similarly observed that "U.S. constitutional decisions, majority as well as dissenting opinions, lack a rich

my knowledge, no opinion of a Supreme Court Justice in the Rehnquist Court years has actually looked to the *reasons given* by a foreign or international decision-maker to support a domestic constitutional interpretation. To find an example of the reason-borrowing approach, I will have to reach back in time.

Justice Frankfurter's concurring opinion in *Smith v. California*,[38] provides a vehicle to illustrate the reason-borrowing approach. *Smith* held that a California statute making booksellers strictly liable for possession of obscene material violated the First Amendment. In his concurrence, Justice Frankfurter argued that defendants facing obscenity prosecutions were constitutionally entitled to present expert testimony at trial regarding prevailing community standards of decency.[39] In explaining his reasoning, he referred readers to "the recent debates in the House of Commons dealing with the insertion of such a provision" in English law.[40] These debates, he believed, "impressively" explained "[t]he importance of this type of evidence."[41] Of course, it would have been more illuminating if Justice Frankfurter had explained just *which* arguments he found impressive and why. Nonetheless, his opinion does provide an example of a Justice looking to the reasoning of a foreign body to support his constitutional judgment.[42]

2. *Moral Fact-Finding*

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tradition of engagement with the reasoned elaboration of constitutional norms around the world." Jackson, *supra* note 12 at 225. "[E]ven when the Court has considered the constitutional experiences of other nations, it almost never has engaged the reasoning of other constitutional courts." *Id.* at 226.

[38] 361 U.S. 147, 166–67 (1959) (Frankfurter, J., concurring).

[39] *Id.*

[40] *Id.* at 166 (citing 597 Parliamentary Debates, H. Comm., No. 36 (December 16, 1958)).

[41] *Id.*

[42] It might be argued that the majority opinion in *Smith* also employed the reason-borrowing approach. In *Smith*, the Court held that imposing strict liability on booksellers' possession of obscenity would unconstitutionally chill the distribution of protected speech. *Id.* at 153. In reaching this conclusion, the Court did look to the reasoning of the Court of Appeal of New Zealand, remarking that

> [i]t has been well observed of a statute construed as dispensing with any requirement of scienter that: "Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience."

Id. (quoting The King v. Ewart, 25 N.Z.L.R. 709, 729 (C.A.)). Yet, I hesitate to call this a true example of reason-borrowing. The Court's reference to the New Zealand court's predictions about the effect of such a statute might indicate reason-borrowing. Yet, the opinion might also be read as simply bolstering the Court's conclusion that the domestic statute was unreasonable with another court's conclusion that a similar statute was unreasonable. The Court's approach here, thus, seems close to moral fact-finding, an approach I discuss, *infra* at Part II.C.2.

The "moral fact-finding" variant of the substantive use of comparative and international law is much more sweeping and perhaps more problematic than any of the approaches I have discussed previously. Moreover, it is the only approach that Justices of the Rehnquist Court have applied when using comparative or international law to give substantive content to the Constitution, and it was the one applied, without explanation, in *Lawrence*.

Before turning to *Lawrence,* however, consider other examples of the approach. Justice Stevens' plurality opinion in *Thompson v. Oklahoma*[43] and Justice Brennan's dissenting opinion in *Stanford v. Kentucky*[44] are nice places to start. *Thompson* and *Stanford* presented the question whether the Constitution's prohibition of "cruel and unusual punishment"[45] categorically forbade the imposition of the death penalty on a person who was 15 (*Thompson*) or 16 (*Stanford*) years old at the time he committed the capital crime. In both cases, all Justices agreed that, at least as a matter of prevailing doctrine, the Court's determination of "cruel and unusual punishment" was to be guided by the "evolving standards of decency that mark the progress of a maturing society,"[46] and that the views of "today's society" toward the punishment were important to, if not dispositive of, the constitutional question.[47] But the Justices disagreed fundamentally about whose views counted—that is, who made up the "maturing society."

Justice Scalia's dissenting opinion in *Thompson* and his opinion for the Court on this point in *Stanford* emphasized that it was "*American* conceptions of decency that are dispositive."[48] By contrast, Justices Stevens and Brennan concluded that

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[43] 487 U.S. 815 (1988).

[44] 492 U.S. 361 (1989).

[45] U.S. CONST. amend. VIII.

[46] *Thompson*, 487 U.S. at 821 (plurality opinion) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)); *id.* at 848 (O'Connor, J., concurring in the judgment); *id.* at 864–65 (Scalia, J., dissenting); *Stanford*, 492 U.S. at 369 (majority opinion); *id.* at 383 (Brennan, J., dissenting).

[47] *Thompson*, 487 U.S. at 865 (Scalia, J., dissenting); *id.* at 822 n.7 (plurality opinion) ("[C]ontemporary standards, as reflected by the actions of legislatures and juries, provide an important measure of whether the death penalty is 'cruel and unusual.'").

[48] *Stanford*, 492 U.S. at 369 n.1. Justice Scalia's views were even more forcefully articulated in his dissenting opinion in *Thompson*, where he wrote:

> The plurality's reliance upon Amnesty International's account of what it pronounces to be civilized standards of decency in other countries is totally inappropriate as a means of establishing the fundamental beliefs of this Nation. 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. We must never forget that it is a Constitution for the United States of America that we are expounding. The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so "implicit in the concept of ordered liberty" that it occupies a place not merely in our

the relevant society for purposes of assessing whether a punishment was "cruel and unusual" included at least some nations other than our own.[49] "[O]bjective indicators of contemporary standards of decency in the form of legislation in other countries is," they argued, "of relevance to Eighth Amendment analysis."[50] For example, in *Thompson*, Justice Stevens' plurality opinion supported its conclusion of unconstitutionality, in part, by relying on 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."[51] In this regard, he noted that the United Kingdom, New Zealand and the Soviet Union, although retaining the death penalty generally, forbade the execution of minors.[52] Moreover, "[t]he death penalty ha[d] been abolished in West Germany, France, Portugal, The Netherlands, and all of the Scandinavian countries, and [was] available only for exceptional crimes such as treason in Canada, Italy, Spain and Switzerland."[53] "In addition," he reported, "three major human rights treaties explicitly prohibit juvenile death penalties."[54] Justice Brennan repeated and enlarged this survey one year later in *Stanford*, concluding that "[w]ithin the world community, the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disapproved."[55]

> mores but, text permitting, in our Constitution as well. 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. In the present case, therefore, the fact that a majority of foreign nations would not impose capital punishment upon persons under 16 at the time of the crime is of no more relevance than the fact that a majority of them would not impose capital punishment at all, or have standards of due process quite different from our own.

Thompson, 487 U.S. at 868–69 n.4 (internal citations omitted).

[49] For a suggestion that Justices Stevens' and Brennan's approach might be defensible on a textualist and originalist reading of the ban on "cruel and unusual punishment," see Steven G. Calabresi, *Lawrence, the Fourteenth Amendment and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L.J. 1097 (2004).

[50] *Stanford*, 492 U.S. at 389 (Brennan, J., dissenting).

[51] 487 U.S. at 830.

[52] *Id.* at 830–31.

[53] *Id.* at 831.

[54] *Id.* at 831 n.34.

[55] *Stanford*, 492 U.S. at 390 (Brennan, J., dissenting). Specifically, Justice Brennan noted:

> Many countries, of course—over 50, including nearly all in Western Europe—have formally abolished the death penalty, or have limited its use to exceptional crimes such as treason. Twenty-seven others do not in practice impose the penalty. Of the nations that retain capital punishment, a majority—65—prohibit the execution of juveniles. Sixty-one countries retain capital punishment and have no statutory provision exempting juveniles, though some of these nations are ratifiers of international treaties that do prohibit the execution of juveniles. Since 1979, Amnesty International has recorded only eight

These uses of comparative and international law are paradigmatic "substantive" uses of such materials. The opinions did not look to foreign legal regimes to determine what effect would be produced by adopting the foreign rule and match that result to a domestically determined constitutional standard (as in *Glucksberg*). Rather they looked to the judgments and practices of foreign nations and international agreements to determine what the content of the domestic constitutional rule should be. Moreover, these opinions provide an example of the "moral fact-finding" variant of the substantive approach. The opinions took no account of the *reasons given* by the foreign and international jurisdictions for rejecting the juvenile death penalty.[56] Rather, they relied upon the *fact* that many foreign and international jurisdictions disallowed juvenile executions as a reason to adopt that position as the domestic constitutional rule.[57]

Justices Stevens and Brennan were not searching for empirical facts (as in

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> executions of offenders under 18 throughout the world, three of these in the United States. The other five executions were carried out in Pakistan, Bangladesh, Rwanda, and Barbados. In addition to national laws, three leading human rights treaties ratified or signed by the United States explicitly prohibit juvenile death penalties.

Stanford, 492 U.S. at 389–90 (Brennan, J., dissenting) (internal citations omitted).

[56] It is possible to argue that the Stevens and Brennan opinions did implicitly rely on the reasoning of foreign and international bodies: Those bodies had reasoned that the juvenile death penalty was "cruel," and the Justices were persuaded by that reasoning. Two considerations lead me to discount that suggestion, however. First, neither of the opinions even refers to the reasoning of the foreign bodies. That lack of engagement with the foreign analysis leads to the second reason to reject these opinions as examples of reason-borrowing. Without the benefit of any other analysis, Justices Stevens' and Brennan's willingness to pay heed to the fact that other nations have outlawed the juvenile death penalty must be driven either by weight ("many other nations have rejected the juvenile death penalty") or by identity ("the good countries have rejected the juvenile death penalty"). But these have nothing to do with the reasoning of the nations that have rejected the juvenile death penalty. The focus is on outcome, rather than analysis. Accordingly, I place these opinions in the category of moral fact-finding.

[57] I recognize that the text of the Eighth Amendment uniquely seems to command the courts to take account of the number of jurisdictions that employ a particular punishment in order to determine whether that punishment is "unusual." Whether foreign jurisdictions should be included in that calculus is a debated question. *See supra* text accompanying notes 55-63 (setting forth the debate between Justices Scalia, Stevens and Brennan on this point); *see also* Calabresi, *supra* note 49, at 1097 (expressing "sincere[] doubt that James Madison or Alexander Hamilton would have insisted that 'unusualness' be measured without any reference to the practices . . . of Western European nations . . . ."). But even conceding for argument's sake that foreign practices should count for purposes of what is "unusual," the text requires that a punishment be both "cruel and unusual" before it becomes unconstitutional. Whether a practice is "cruel" is, of course, a value judgment. Justices Stevens' and Brennan's opinions expressed the view that foreign laws and practices were relevant to the determination of the cruelty question as well as the unusualness question. *See, e.g., Stanford*, 492 U.S. at 389 (Brennan, J., dissenting) (arguing that "legislation in other countries" was relevant evidence of "contemporary standards of decency.") Nothing in the text of the Eighth Amendment uniquely commands courts to count jurisdictions for purposes of the "cruelty" determination

Glucksberg) or even for persuasive reasoning. Their search, rather, was for value choices reflected in foreign and international legal regimes that *by their very existence* could provide content to the domestic Constitution. Their search, in other words, was not one for empirical but for "moral" facts; it was not a search for reasoning, but for result.[58]

This was also the approach employed by the Court in *Lawrence*.[59] Recall that the Court in *Lawrence* began its discussion of comparative and international law by suggesting that *Bowers* was wrong, both at the time of decision and now, to suggest that prohibitions on homosexual sodomy reflected "values we share with a wider civilization."[60] As evidence, the Court noted that the European Court of Human Rights had held, both before and after *Bowers*, that laws forbidding homosexual conduct violated the European Convention on Human Rights.[61] Although one might question whether the European Court of Human Rights is actually synonymous with the "wider civilization," the jurisprudential move of criticizing the prior reliance on such perceived shared values with evidence to the contrary is unremarkable.[62]

But the Court did not stop there. Instead, it went on to note 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."[63] And, finally, the Court announced, "[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent."[64] It is in these last three

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[58] I thank Professor Steven Hetcher for the phrase "moral fact."

[59] It was also the approach used in *Atkins*. *See supra* text accompanying note 7.

[60] 539 U.S. at 576. *See also id.* at 573 (citing European Court of Human Rights decision, "[a]uthoritative in all countries that are members of the Council of Europe," as being "at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization").

[61] *Id.* at 573, 576.

[62] While the general technique is unremarkable, the *Lawrence* majority may fairly be criticized for conflating Chief Justice Burger's concurring opinion in *Bowers* with the majority opinion, which did not rely on values shared with a "wider" or Western civilization. *See* Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 TEX. INT'L L.J. 353, 355 (2004); *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting) ("The *Bowers* majority opinion *never* relied on 'values we share with a wider civilization,' . . . . *Bowers'* rational-basis holding is likewise devoid of any reliance on the views of a 'wider civilization.'").

[63] 539 U.S. at 576.

[64] *Id.* at 577. Here, it could be argued that the Court employed two of the techniques I have identified. The Court first engages in moral fact-finding, by using the fact that other nations have recognized a right to engage in private homosexual relations as a reason why the United States Constitution should or does recognize that right as well. Next, by pointing out that "[t]here has been no showing that in this country the governmental interest in circumscribing personal choice

sentences that the Court embraces the moral fact-finding approach. For it was the mere *fact* that other nations (and, presumably, the European Court of Human Rights) had accepted the right the petitioners sought that the Court deemed important. Indeed, the Court's last sentence goes so far as to suggest a standard governing the incorporation of international moral facts into the domestic Constitution: if many other nations of the world have recognized a right, and there is no showing of a domestic need to restrict the right that is greater than the need of foreign governments to restrict the right, the right recognized by the foreign community is, at least potentially, a part of domestic constitutional law.[65]

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is somehow more legitimate or urgent," *id.*, the Court might be thought to have employed a form of empiricism—looking to foreign jurisdictions that have recognized the right in question and finding no evidence that the interests articulated by the state would be undermined by invalidating the statute prohibiting sodomy. Because, however, the only interest articulated by the state in *Lawrence* was "enforcement and protection of public morality," it would be difficult for the Court to have evaluated empirically whether the feared harm had materialized.

[65] I say that the right "potentially" becomes a part of the domestic Constitution to reflect the fact that the Court in *Lawrence* did not reveal what weight it was assigning to the views of the "wider civilization." Scholars too have, for the most part, failed to address this question. Of those who have spoken to the question of weight, only a few explicitly claim that foreign or international norms should be binding upon domestic courts. Joan Fitzpatrick's work is particularly forthright in advocating a "dispositive role" for international norms in domestic constitutional adjudication, at least with respect to interpreting the "cruel and unusual punishment" component of the Eighth Amendment. Joan F. Hartman, *"Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. CIN. L. REV. 655, 689 (1983) (arguing that international norms should be used by U.S. courts as a "precise benchmark for the interpretation of the cruel and unusual punishment clause. As such, the Court could turn to the norm for a rule of decision, rather than simply for additional information of equivocal value").

Others appear to claim a less-ambitious role for comparative or international norms in constitutional interpretation, arguing that inconsistency with an international norm should not be fatal, but should instead be treated as "'an argument against the validity of the law.'" Richard B. Lillich, *International Human Rights Law in U.S. Courts*, 2 FLA. ST. J. TRANSNAT'L L. & POL'Y 1, 19–20 (1993) (offering as an example of proper "indirect incorporation" of international human rights law into the Constitution, the opinion of two Justices in *Oyama v. California*, 332 U.S. 633, 673 (1948), who purportedly took this approach); Richard B. Lillich, *The United States Constitution and International Human Rights Law*, 3 HARV. HUM. RTS. J. 53, 76–77 (1990) [hereinafter Lillich, *The United States Constitution*](same). But what does it mean to state that inconsistency with foreign or international norms is merely "an argument against the validity of such law?" It must be that inconsistency with such norms is an interpretive clue that should lead a court to be skeptical of a statute's constitutionality. Thus, courts should treat inconsistency with foreign or international norms as they currently treat inconsistency with the more traditional tools of constitutional interpretation (text, history, precedent, or current domestic consensus)—as a factor that can be used to overcome a statute's presumption of constitutionality. But if non-conformity with such norms is to be treated as an additional item on the list of sources of constitutional judgment, then, in some cases at least, this non-conformity could be decisive. If the more traditional tools of constitutional interpretation were silent or ambiguous, foreign or international norms could, by themselves, dictate the constitutional result. This is, admittedly, a

III. JUSTIFICATIONS FOR THE VARIOUS USES OF COMPARATIVE AND INTERNATIONAL LAW IN CONSTITUTIONAL INTERPRETATION

In the previous Part, I identified three uses to which the Justices of the Rehnquist Court have put international and comparative law in deciding constitutional cases: an expository use, an empirical use, and a substantive use. As with all sources of constitutional judgment, each of these uses of comparative and international law must be justified by some theory of constitutional interpretation. Or, as Mark Tushnet has put it, "the Constitution must *license* the use of comparative [and, presumably international] material for the courts to be authorized to learn from constitutional experience elsewhere."[66] In this Part, I examine whether any well-accepted theory of constitutional interpretation licenses the various uses of comparative and international law that the Justices of the Rehnquist Court have actually employed in their written opinions. I quickly conclude that the expository use fits easily within conventional constitutional interpretation. Likewise, the empirical use is easily defended, at least from a theoretical perspective. Finding a justification for the one variant of the substantive use that the Justices of the Rehnquist Court have actually employed—the moral fact-finding approach—is harder.[67] The Court has not explained its use of this technique, and the literature advocating this approach also disappoints. Few scholars who advocate what I call moral fact-finding have engaged the question of constitutional justification. Those who have, have generally offered one of four explanations for the practice: that importing foreign and international law norms avoids the problem of judicial subjectivity in constitutional interpretation; that such a practice is consistent with original intent or understanding; that the practice will aid U.S. foreign policy; and that the practice will produce good results. I conclude that none of these arguments can justify the moral fact-finding approach. This lack of an adequate theoretical foundation, apart from any other criticism, is devastating

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slightly less aggressive use of international norms than that advocated by Fitzpatrick, since for her, such norms would presumably carry the day in spite of contradictory indications from other sources. Nonetheless, given that scholars have most frequently advocated the use of foreign and international norms in the indeterminate areas of the Constitution, where more traditional sources of constitutional interpretation frequently are ambiguous or silent, the overlap between the approaches seems great.

[66] Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1231–32 (1999) (emphasis in original); Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13, 14–15 (1990) ("Because judges must be able to justify their decisions, they must also be able to justify the means of interpretation that they employ to reach those decisions, particularly if their choice affects the ultimate result or significance of a case.").

[67] As mentioned previously, I leave to one side the question whether the reason-borrowing approach can be justified because the Justices of the Rehnquist Court have not actually employed that technique in their written decisions.

for an interpretive practice that threatens to entrench itself by sheer invocation.

A. *Constitutional Justifications for the Expository Approach*

It is not hard to justify the Court's using foreign and international law to illustrate or explain domestic constitutional law. Indeed, one can question whether judicial references to foreign and international law used in this sense require a theoretical justification, in that they arguably are not even examples of the Court using foreign and international law as tools of constitutional interpretation. Constitutional interpretation typically is thought of as the process by which courts (or other actors) give meaning to the constitutional text.[68] When a court uses foreign and international law sources in the sense that I have termed "expository," it is not typically using that source to inform the meaning of a domestic constitutional provision.[69] Rather, it uses the foreign or international source to *explain* to the readers of the opinion the meaning that the court has determined through other methods. Thus, when the Court in *Raines* pointed to European systems that granted legislative standing where the U.S. Constitution did not,[70] it was not using the European example to inform the meaning of the domestic Constitution. Rather, it was explaining to the readers of the opinion how the domestic constitutional system differed. This very narrow use of foreign and international law seems to present no problems of license.

B. *Constitutional Justification for the Empirical Approach*

The empirical use of comparative and international law also is easily justified. Much of constitutional law depends upon predictions about the likely effect of a rule. For example, a host of constitutional doctrines, from individual rights protection to state regulation of interstate commerce, requires courts to ascertain whether a statute is "rationally related" or "necessary" to fulfillment of a given state interest. Those determinations depend upon the courts' predictions about the effects of legislation: Is it rational to believe that a state's ban on physician-assisted

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[68] *See, e.g.*, Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 3 (2004) (describing problems of constitutional interpretation as "exploring how meaning is properly derived from the Constitution and, insofar as the answer may be different, how *courts* ought to derive such meaning").

[69] The expository use should therefore be distinguished from a seemingly similar way in which a court might use foreign and international norms – that is, a conscious attempt by the court to formulate the domestic constitutional rule in opposition to the foreign or international rule in order to distance the domestic polity from a foreign polity that the court believes to be unworthy of emulation. This use of foreign or international law would more comfortably be described as a substantive use.

[70] *See supra* text accompanying notes 18 to 24.

suicide will prevent euthanasia?[71] Is a state's ban on the importation of live baitfish from other states necessary to protect the local fish population from parasite infestations?[72] Likewise, First Amendment decisions often turn upon whether a given rule is likely to "chill" speech.[73] In each case, some evidence from jurisdictions that had experimented with alternative regulatory schemes, and could provide data regarding their consequences, could help the courts make accurate predictions.

When constitutional law requires courts to make such predictions, there is no theoretical reason why domestic courts should reject good evidence gathered from other nations simply because it is foreign.[74] Indeed, from a constitutional theory perspective, looking to foreign legal systems to gather the factual information necessary to decide a particular constitutional question seems no less legitimate than looking to the consequences of a law adopted in one of the fifty states.[75] There might, of course, be *practical* reasons to object to such evidence. Judges, for example, may well "lack the expertise to properly research, understand, and evaluate foreign [legal materials] even if the only competency required [were] competency in law."[76] And, to the extent that questions of legal comparability are

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[71] *See* Washington v. Glucksberg, 521 U.S. 702 (1997).

[72] *See* Maine v. Taylor, 477 U.S. 131 (1986).

[73] *See, e.g.*, Smith v. California, 361 U.S. 147, 152–55 (1959).

[74] Whether, in any given case, foreign experience can provide good evidence regarding the likely effects of a legal rule adopted domestically will depend on the comparability of the two regimes. Social, political, historical, cultural, and other factors, not readily apparent on the face of foreign legal materials, or from casual examination of a foreign legal system, may produce consequences in one nation that would not replicate themselves in another. For a discussion of the difficulties of determining the comparability of legal systems, particularly in the context of federalism, see Jackson, supra note 12, at 268-71. *See also* McCrudden, *supra* note 16, at 152-53.

[75] For example, in *Batson v. Kentucky*, 476 U.S. 79, 99 (1986) the Court rejected the state's suggestion that subjecting peremptory challenges to equal protection standards would "create serious administrative difficulties." The Court looked to the practical experience of "States applying a version of the evidentiary standard we recognize today," and concluded that courts in those states "have not experienced serious administrative burdens, and the peremptory challenge system has survived." *Id.* at 99 & n.23 (citing People v. Hall, 672 P. 2d 854 (1983) in which "the California Supreme Court found that there was no evidence to show that procedures implementing its version of this standard, imposed five years earlier, were burdensome for trial judges."). Similarly, in *Grutter v. Bollinger*, 539 U.S. 309, 366–67 (2003) (Thomas, J., dissenting) Justice Thomas criticized the Court for failing to look to the "very real experience in California and elsewhere" in which "institutions that have been forced to abandon explicit racial discrimination in admissions" had nonetheless enrolled a significant number of minority students.

[76] Jackson, *supra* note 12, at 268. Justice David Souter, for example, has expressed skepticism about the Court's ability accurately to ascertain what foreign law is and what its effects are. *See Glucksberg*, 521 U.S. at 787 (Souter, J., concurring in the judgment) ("The

influenced by the "broader historical, political, and cultural framework within which" the law operates, the "competency argument assumes larger proportions."[77] Thus, courts should approach any comparative inquiry with caution, and in any given case, the risk of incomplete or inaccurate understanding of foreign legal materials may outweigh the benefits to be gained from studying foreign experience. With these cautions in mind, however, there seems to be little reason to object to the empirical use from a theoretical perspective.

C. *Constitutional Justifications for the Moral Fact-Finding Approach*

As mentioned at the outset, the Justices of the Rehnquist Court have on various occasions employed the moral fact-finding approach to interpret the domestic Constitution. Indeed, in *Lawrence*, a majority thought that the fact that the European Court of Human Rights, and the governments of many nations, had "protected [the] right of homosexual adults to engage in intimate, consensual conduct" spoke to whether the U.S. Constitution forbade states from criminalizing such conduct.[78] The Court explained that the "right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries."[79] That fact alone, quite apart from the reasons *why* those countries had recognized the right, was persuasive to the majority, at least in the absence of any "showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent."[80] The previous Term in *Atkins*, the Court employed much the same methodology, considering relevant to its constitutional decision the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is

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principal enquiry at the moment is into the Dutch experience, and I question whether an independent front-line investigation into the facts of a foreign country's legal administration can be soundly undertaken through American courtroom litigation."). If a Justice of the Supreme Court, with the aid of talented law clerks, high-quality briefing from the parties, and the enormous resources and skill of the Supreme Court research librarians, is concerned about the Court's ability reliably to ascertain the import of foreign legal sources, the problems would seem to be compounded for the court of appeals, district court, or state court judge who may lack such quality research resources. Indeed, Christopher McCrudden has charged that Supreme Court Justices have in fact gotten foreign law "wrong" on occasion, "by citing as persuasive a decision that is not actually apt." McCrudden, *supra* note 16, at 152 and n.175. *See also* Vicki C. Jackson*, Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 595-99 (1999) (discussing the difficulties inherent in constitutional comparativism); *infra* Part III.C.1. (discussing difficulties American judges have experienced in ascertaining the content of customary international human rights law).

[77] Jackson, *supra* note 12 at 268.

[78] Lawrence v. Texas, 539 U.S. 576, 576 (2003).

[79] *Id.* at 577.

[80] *Id.*

overwhelmingly disapproved."[81] Yet, curiously, none of the Justices have explained *why* they believe moral fact-finding to be a legitimate tool of constitutional interpretation.[82]

The Justices do not stand alone in their enthusiasm for moral fact-finding. For years, some legal academics have proposed using international or foreign legal norms to give meaning to discrete provisions of the U.S. Constitution. Susan Bitensky, for example, has advocated using international norms to find a fundamental right to education in the First and Fourteenth Amendments;[83] Jordan Paust has proposed reliance on customary and treaty-made international human rights norms to give enforceable content to the Ninth Amendment;[84] Nadine Strossen has encouraged our courts to look to international human rights principles to interpret the Equal Protection and Due Process components of the Fifth and Fourteenth Amendments;[85] and Joan Fitzpatrick, among others, has urged our courts to defer to international opinion when interpreting the Eighth Amendment prohibition on "cruel and unusual punishment."[86] Like the opinions of the Rehnquist Court Justices,[87] this scholarship is not concerned with reason-borrowing. Rather, for these scholars, the mere existence of a foreign or international law norm is sufficient to make it at least a potential source of domestic constitutional content.[88]

Yet looking for a legitimating theory in the literature advocating moral fact-

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[81] Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002).

[82] As mentioned previously, *supra* note 12, the only explanation offered has been reliance on precedent invoking similar sources. But the precedents cited do not themselves explain or justify the Court's use of foreign or international law.

[83] Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 615–22 (1992).

[84] JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 323–43 (1996) [hereinafter PAUST, INTERNATIONAL LAW]; *see also* Jordan J. Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 CORNELL L. REV. 231, 258–59 (1975) [hereinafter Paust, *Human Rights*].

[85] Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 838 (1990).

[86] Joan F. Hartman, *Unusual Punishment*: *The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. CIN. L. REV. 655, 659 (1983); *see also* Joan Fitzpatrick, *The Relevance of Customary International Norms to the Death Penalty in the United States*, 25 GA. J. INT'L & COMP. L. 165 (1996).

[87] As discussed previously, *supra* text accompanying notes 13–15, some of the Justices' extrajudicial speeches and writings express enthusiasm for constitutional reason-borrowing, yet their opinions have not employed this approach.

[88] *See supra* note 65 (discussing the question of how much weight should be given to these sources).

finding produces disappointing results. Many proponents of this use ignore the licensing question altogether. Those who have attempted to engage the question have touched on it only briefly and have failed to produce a convincing answer. This section will discuss the shortcomings of the four principal arguments advanced in favor of moral fact-finding: that importing foreign and international law norms avoids the problem of judicial subjectivity in constitutional interpretation; that such a practice is consistent with original intent or understanding; that it will aid U.S. foreign policy; and that it will produce good results.

1. *The Objectivity Theory*

The legitimating theory that scholars most commonly offer is what I call the "objectivity theory." The objectivity theory holds that judges should look to comparative and international law for substantive constitutional content because foreign and international law rules are readily ascertainable and are formulated by sources external to the judiciary itself. Thus, the theory asserts, importing such rules avoids the problem of judicial subjectivity in constitutional interpretation.

Jordan Paust's work on the Ninth Amendment and Nadine Strossen's work on the Fourteenth Amendment rely on the objectivity theory.[89] Paust uses international and comparative law norms in an effort to solve one of the great dilemmas of the Ninth Amendment, which is defining precisely what rights are "retained by the people"[90] without allowing judges to make subjective determinations about what those rights should be.[91] Professor Paust argues that judges can legitimately interpret the Ninth Amendment to protect rights that have been recognized by other nations or international bodies because those rights are

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[89] *See also* Randall R. Murphy, *The Framers' Evolutionary Perception of Rights*: *Using International Human Rights Norms as a Source for Discovery of Ninth Amendment Rights*, 21 STETSON L. REV. 423, 445, 449 (1991).

[90] U.S. CONST. amend. IX ("The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.").

[91] PAUST, INTERNATIONAL LAW, *supra* note 84 at 326, 338–39. There are, of course, other dilemmas associated with the Ninth Amendment, most importantly, whether it creates judicially-enforceable rights at all. Others have ably engaged that debate, and I will not do so here. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 34–41 (1980) (surveying the debate and concluding that the Ninth Amendment was intended to create judicially-enforceable rights beyond those enumerated in the Constitution); ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 185 (1990) ("[T]he ninth amendment guaranteed that rights already held by the people under their state charters would remain with the people and that the enumeration of rights in the federal charter did not alter that arrangement."). I will note, however, that the debate over the judicial enforceability of the Ninth Amendment springs, in large part, from the indeterminacy of the rights it protects; thus, the arguments over the content of the rights protected and over the source of enforcement are related.

determinate and do not spring from the domestic judicial process itself.[92] Thus, Paust argues, incorporation of international norms into the Ninth Amendment allows for judicial enforcement of that amendment.[93]

Nadine Strossen similarly argues that "[t]he existence and acceptance of international human rights norms are matters susceptible to objective determination. Such norms are manifested in both written instruments and the actual practices of nations."[94] Therefore, she argues, constitutional interpretation that derives its content from "international human rights norms avoids a significant potential danger involved in judicial interpretations of ambiguous or open-ended positive law provisions: that the judges will rely on their own subjective, individualistic notions of morality."[95]

The first difficulty with the objectivity theory is that it rests on a flawed premise: that comparative and international law norms, particularly as they relate to human rights, are, in fact, determinate, and readily-ascertainable by American judges. That premise appears not to hold true for at least one the two major sources of international human rights norms—customary international law.[96]

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[92] PAUST, INTERNATIONAL LAW, *supra* note 84, at 324 & nn. 6–7.

[93] More specifically, Paust argues that, without falling prey to "the evils of a naturalist school—*e.g.*, adhocery, autonomous concepts, personal viewpoints, arbitrary decisionmaking, and so forth [courts can] robustly enforce the ninth amendment, guided by the readily-ascertainable principles of international human rights law." PAUST, INTERNATIONAL LAW, *supra* note 84, at 326. That is so because

> documented international human rights [provide] one set of indicia of the shared subjectivities and experience of humankind—indicia which are useful, as well, in a comprehensive inquiry into the types of policies, or goal-values, which the Constitution seeks to protect . . . . Documented human rights are sufficiently particularized for such a judicial discovery . . . . They are also sufficiently particularized to give more detailed and useful content to expressions such as "the traditions and collective conscience of our people" or a "universal sense of justice," which our courts are already applying. . . .

Id. at 338–39.

[94] Strossen, *supra* note 85, at 830.

[95] *Id.; see also* Joan Hartman, *supra* note 86, at 691–92

> ([T]he prospect of using established international norms to inform the meaning of constitutional provisions deflects some of the more telling criticisms of noninterpretive review. Pegging constitutional definitions to objectively verifiable customary norms permits progressive development of constitutional law while minimizing the subjective contribution of the individual judge in identifying shared community values.).

[96] Treaties are the other principle source of international law in general, and human rights law in particular. *But see* Bruno Simma, *International Human Rights and General International Law: A Comparative Analysis*, *in* 4 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW, Bk. 2, at 153, 224–29 (1993) (proposing reliance on "general principles" of human rights as a third source of international human rights law). While the content of treaties is relatively determinate as compared to customary international law, questions of interpretation are, of

Customary international law or "CIL" is a set of international norms that "results from a general and consistent practice of states followed by them from a sense of legal obligation."[97] Several scholars recently have highlighted the "considerable difficulty" faced by domestic courts trying to ascertain the content of CIL.[98] According to the accepted definition of CIL, a court's first step is to determine whether a "general and consistent" state practice exists regarding the matter in question.[99] This question raises many subsidiary ones. For example, "How much state practice is enough to create a customary human rights norm? What counts as state practice? To what extent do treaties or non-binding United Nations resolutions affect the content of customary international law?"[100] To these basic questions, the judge will find "no agreed-upon answer[s]."[101] The judge will

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course, always present. *See id*. at 226–27.

[97] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987). Although there is considerable debate about the content of CIL, there is general scholarly agreement about its definition. *See* A. Mark Weisburd, *American Judges and International Law*, 36 VAND. J. TRANSNAT'L L. 1475, 1477 (2003) (citing the RESTATEMENT definition and noting that "[a]lthough this article will take issue with a number of assertions made in the *Restatement*, this definition raises little controversy"); Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 464–65 (2001) (relying on this "widely cited" definition); Simma, *supra* note 96, at 216 ("According to the traditional understanding of international customary law, it was considered to come about through the emergence of a general (or extensive), uniform, consistent and settled practice, more or less gradually joined by a sense of legal obligations, the *opinio iuris*.").

[98] Weisburd, *American Judges*, *supra* note 97, at 1477; s*ee also* Bradley, *supra* note 97, at 460; Simma, *supra* note 96, at 216 (raising similar concerns but not limiting his remarks to problems faced by American judges). J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 450 (2000) (stating that "there is neither a common understanding of how customary international legal norms are formed, nor agreement on the content of those norms").

[99] RESTATEMENT, *supra* note 97, at § 102(2); Weisburd, *supra* note 97, at 1484.

[100] Bradley, *supra* note 97, at 465; s*ee also* Weisburd, *supra* note 97, at 1480–84 (raising similar questions).

[101] Bradley, *supra* note 97, at 465; s*ee also* Jack L. Goldsmith and Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1117 (1999). For divergent opinions regarding the relevance of state practice in the formation of CIL, see Simma, *supra* note 96, at 216–18 (noting that "[a]ccording to the traditional understanding [of customary international law]. . . practice had priority over *opinio iuris*; deeds were what counted, not just words," but that for some, "practice no longer has any constitutive role to play in the establishment of customary law" while "[f]or other writers, it is the notion of 'practice itself' which has undergone a dubious metamorphosis. It has changed from something happening out there, in the real world, after the diplomats and delegates have had their say, into paper practice: the words, texts, votes and excuses themselves."). For differing opinions regarding whether and to what extent the existence of various human rights treaties can or should contribute to the formation of CIL norms, *compare* Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1, 6 (1988) (arguing that treaties are relatively

find no more certainty at the second stage of the process, which asks whether the "general and consistent" state practice is "followed . . . from a sense of legal obligation."[102] Here "it is not enough to know what states have done; it is also necessary to know why they have acted."[103] How is a court to determine whether a nation is acting "from a sense of legal obligation," as opposed to from some other motivation? Again, there is no clear consensus.[104]

Not surprisingly, these uncertainties have lead to divergent views about the actual content of customary international human rights law. As Justice Bruno Simma of the International Court of Justice explained before his elevation to the bench:

> The theory of a customary law of human rights is presented with varying degrees of sophistication—or lack thereof. Some writers state flatly that international human rights law in its entirety or, at least, the whole range of rights enumerated in the 1948 Universal Declaration is now to be regarded as customary law. . . . Then there are more moderate, 'middle-of-the-road' views . . . according to which something like a 'hard core' of human rights obligations is said to exist as customary law. . . .
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> Against the proponents of such a broad-based customary law of human rights stands a group of writers who declare themselves unable to verify the existence of the prerequisites of true custom in presence of so much hypocrisy, double-standards, and second thoughts.[105]

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unimportant), *with* Anthony D'Amato, *Custom and Treaty: A Response to Professor Weisburd*, 21 VAND. J. TRANSNAT'L L. 459, 460 (1988) (arguing that treaties are very important).

[102] RESTATEMENT, *supra* note 97, at § 102(2).

[103] Weisburd, *supra* note 97, at 1483.

[104] Bradley, *supra* note 97, at 465. *Compare* Goldsmith & Posner, *supra* note 101, at 1115 (suggesting that states almost never "comply with CIL because of a sense of moral or legal obligation; rather, CIL emerges from the states' pursuit of self-interested policies on the international stage") *with* Weisburd, *supra* note 97, at 1484 n.23 (disputing the idea that "states motivated by self-interest or fear are, by definition, not acting from a sense of legal obligation").

[105] Simma, *supra* note 96, at 215. Justice Simma would presumably place his own views somewhere between the second and third group. *See id.* at 222. Justice Simma notes that

> if we want to ascertain on the basis of the human rights activities of States and international organizations those processes which may be considered as leading to the emergence of customary law conforming to traditional kinds of evidence, we are able to identify a general *droit de regard* in response to gross infringements of human rights, and a correlative inroad into national sovereignty. A customary law of human rights, therefore, does exist, but it is to be found on the procedural side, so to speak.

Id. Additionally, Justice Simma roughly guesses "that the [list of rights now deemed customary by the Restatement] would shrink considerably if the appropriate customary law criteria were taken seriously." *Id.*

Thus, it is far from clear that international human rights norms, at least in the form of CIL, actually produce the set of "readily-ascertainable" and "particularized" principles the proponents of the objectivity theory would ascribe to them.[106] To the contrary, the swarm of unanswered questions surrounding the content of CIL has led one commentator to call the specification of customary international human rights norms in American courts a "highly creative process"[107] and another to call it "a matter of taste."[108] The major premise of the objectivity theory appears, therefore, to be untrue.[109]

The indeterminacy of customary international human rights law presents serious problems for the objectivity theory as a foil to subjective constitutional interpretation. Scholars who worry about judicial subjectivity in constitutional interpretation are not worried about judicial discretion as an abstract proposition.

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[106] *See* PAUST, INTERNATIONAL LAW, *supra* note 84, at 326, 338–39.

[107] Bradley, *supra* note 97, at 465; s*ee also* Simma, *supra* note 96, at 214 n.169 (calling "the readiness of U.S. courts . . . [to find] violations of customary international law without feeling any particular need to engage in much serious debate about the prerequisites of that source . . . striking, to say the least").

[108] Kelly, *supra*, note 98, at 450. The Supreme Court also has recognized that "a judge deciding in reliance on an international norm will find a substantial element of discretionary judgment in the decision." Sosa v. Alvarez-Machain, 542 U.S. ___ (2004) (slip op. at 31).

[109] It should be noted that some scholars perceive the problem of specifying customary international human rights norms not (or not only) as one of indeterminacy, but as one of accuracy. That is, several scholars have recently questioned whether what is currently called CIL by American courts working in the field of international human rights is actually deserving of that name. Thus, A. David Weisburd has demonstrated that federal courts have "sought to escape th[e] morass" of ascertaining the content of *true* CIL "by relying primarily on academic writings, the *Restatement*, and decisions by U.S. and international courts" to define the content of CIL. Weisburd, *supra* note 97, at 1477. But, as Professor Weisburd points out:

> with respect to some areas of CIL (particularly the law of human rights . . .) neither modern academic writing nor the *Restatement* nor most judicial decisions purport to derive CIL from evidence of what governments actually *do*. Rather, they rely on other academic writings, other decisions of international courts, non-binding resolutions of international bodies, and hazy notions of natural law to justify their assertions regarding this CIL. . . . This approach leads courts to treat as law norms whose legal basis is either more circumscribed than the courts assert or, in some cases, non-existent.

Id. at 1477–78.; s*ee also* Bradley, *supra* note 97, at 467

> (Because of their unfamiliarity with international law and the relative difficulty of doing direct research on international law questions, judges rely heavily on secondary sources in these cases. Thus, for example, they often treat the American Law Institute's Restatement (Third) of Foreign Relations Law as though it were a codification of international law and foreign relations principles, even though its statements are often more aspirational than reflective of settled law.);

Simma, *supra* note 96, at 213–20 (raising similar concerns, but not limiting his remarks to the specification of customary international law by U.S. courts).

Rather, the concern with subjectivity as it relates to constitutional interpretation is grounded primarily in two concerns. The first may be described as a "rule of law" concern, which worries about the arbitrary or unequal application of legal rules. Yet, given the indeterminacy of customary international human rights law, and the great difficulty judges and scholars seem to have agreeing on its content, reliance on such norms seems to exacerbate, not diminish, this problem. But, even if international human rights norms were perfectly determinate, the objectivity theory would still fall short of providing the requisite grounding for the moral fact-finding approach. That is because the objectivity theory fails to appreciate the other central reason why constitutional scholars are concerned about judicial subjectivity: countermajoritarianism.[110]

As the well-known story goes, legitimate government in America must be premised on the consent of the governed.[111] Ordinarily, that consent is reflected through enactments of legislatures composed of elected representatives of the people. Judicial review of legislative decision-making sets the judgment of unaccountable courts against the judgment of accountable legislatures, and is, thus, inherently "countermajoritarian."[112] This "countermajoritarian difficulty" is

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[110] There are, of course, those who dismiss the idea of a "countermajoritarian difficulty." Their arguments take a variety of forms. As explained by Professor Lisa Bressman, some critics claim that "majoritarianism was never the proper understanding of our constitutional structure . . . . " Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 493 (2003). Others, looking at democracy through the lense of public choice theory, claim that majoritarianism is "no longer a feasible" goal. *Id.* Yet another group, while not rejecting majoritarianism, takes the view that countermajoritarianism in the form of judicial review, actually enhances, rather than detracts from, democracy. *Id.*

[111] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 16–18 (1962).

[112] *Id*. at 16; s*ee also id.* at 19

> ([N]othing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process; nor can it be denied that the policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system. Judicial review works counter to this characteristic.);

Michael J. Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 262–63 (1981) ("In our political culture, the principle of electorally accountable policymaking is axiomatic; it is judicial review, not that principle, that requires justification."); Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1177–78 (1977)

> (As a nation, we are committed to the idea that government, to be ethically defensible, requires the consent of the governed. . . . Since pre-Revolutionary times, the active and continuous participation of the governed in their government, either directly or by representation, government "of" and "by" the people, has been understood to be central to the democratic ideal. Courts not only are unable to draw upon this source of legitimacy, but in setting their judgment against that of the legislature, they oppose the very agency of government that is most clearly entitled to do so.);

alleviated, of course, when the Constitution clearly commands a particular result; then judges are simply enforcing against current majorities the value judgments previously made by a supermajority of the people.[113] But constitutional interpretation that invites judicial discretion threatens self-governance because it allows the unaccountable judiciary to substitute its own policy preferences for those of the representatives of the people. Relying on even perfectly determinate pronouncements of foreign governments and international bodies cannot solve the countermajoritarian difficulty, for it merely replaces one domestically unaccountable decision-maker (the judiciary) with another (foreign governments, foreign or international courts, or the international community, as the case may be). Indeed, reliance on foreign and international law, "over which the American people have no control—either directly through the power of election or even indirectly through the process of judicial appointment," may actually exacerbate the countermajoritarian problem.[114] One cannot purport to solve the countermajoritarian difficulty by substituting a new form of countermajoritarianism. It is this fact that deprives the "objectivity theory" of its legitimating force.

2. *The Originalist Argument*

Some commentators have argued that comparative or international law, especially in the field of human rights, should supply substantive content to the Constitution because the Framers intended or understood[115] that it would be so.[116]

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see also Bressman, *supra* note 110, at 478–81 (describing the rise of the "majoritarian paradigm" in constitutional theory).

[113] This may give rise to what Bruce Ackerman has called an "intertemporal" rather than a "countermajoritarian" difficulty. *See* Bruce Ackerman, *Discovering the Constitution*, 93 YALE L.J. 1013, 1023, 1045–49 (1984).

[114] Hon. J. Harvie Wilkinson III, *The Use of International Law in Judicial Decisions*, 27 HARV. J. L. & PUB. POL. 423, 426 (2004); s*ee also* Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. L. STUD. 499, 530 (2000) (raising the concern that "an unelected international elite will subvert elected representatives, with the loss of diversity and a decline in democratic decisionmaking").

[115] For the distinction between intent and understanding as applied to originalist arguments, see ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (1997).

[116] Nadine Strossen, for example, has argued that the "resort to international human rights standards for purposes of construing domestic . . . constitutions is fully consistent with, and justified by . . . the intent of the framers of the U.S. Constitution." Strossen, *supra* note 85, at 825; *see also* Murphy, *supra* note 89, at 460 ("[G]iving the global community's perception of rights weight in the domestic arena is an idea as old as the Republic"; these rights, therefore, "should be given constitutional recognition."); Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3, 6 (1983) ("[M]ost United States courts, both state and federal, show less inclination now than at the

This argument typically begins with the proposition that the Founders of the Constitution believed in natural law and intended to constitutionalize its precepts.[117] The arguments supporting and opposing this claim have been well-rehearsed elsewhere, and it is not necessary to enter the fray here.[118] Instead, assume, for present purposes, that the proponents of this view have the better of the argument. Indeed, go further and assume that the Framers believed in natural law, intended to constitutionalize it, intended to make its mandates enforceable in court, and that the Framers' intent on this matter compels us to interpret the Constitution accordingly. Even making these assumptions, we still do not know the *content* of the natural law to be applied as domestic constitutional law. Adherents to the moral fact-finding school would have us believe that foreign and international law, particularly in the field of international human rights, should supply that

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beginning of the Republic to use sources of foreign, international, and customary law to aid interpretation, especially in constitutional cases"). Others have made a similar argument with respect to the reason-borrowing approach. *See* Ginsburg, *supra* note 13, at 5 ("In the value I place on comparative dialogue – on sharing with and learning from others – I count myself an originalist in this sense."); Jackson, *supra* note 12, at 256 (suggesting that "even an 'originalist' might endorse comparative constitutional reasoning to the extent that a claim of something like universal meaning is plausible").

[117] Murphy, *supra* note 89, at 431; PAUST, INTERNATIONAL LAW, *supra* note 84, at 325 ("It is apparent . . . that the Founders definitely expected that the rights of man *would* be guaranteed under the ninth amendment.") (emphasis in original); *id.* at 337 ("We sometimes forget that certain rights and values did not have to be enumerated with particularity in the eighteenth century, but could be covered by the general language in the ninth [amendment]. Those rights and values were . . . 'natural' rights of man and 'self evident' truths."); Paust, *Human Rights*, *supra* note 84, at 250–51.

[118] For scholarship suggesting that the Founders believed in an unwritten constitution, see for example, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 253–69 (2004); s*ee also* David N. Mayer, *The Natural Rights Basis of the Ninth Amendment: A Reply to Professor McAffee*, 16 S. ILL. U. L.J. 313 (1992); Murphy, *supra*, note 89; Jeff Rosen, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073 (1991); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1127 (1987) ("The framers . . . intended courts to look outside the Constitution in determining the validity of certain governmental actions, specifically those affecting the fundamental rights of individuals."); Thomas C. Grey, *The Original Understanding and the Unwritten Constitution*, *in* TOWARD A MORE PERFECT UNION: SIX ESSAYS ON THE CONSTITUTION 145 (Neil L. York ed. 1988); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 869 (1978). For scholarship skeptical of the notion that the Framers intended enforcement of an unwritten constitution, see Thomas B. McAffee, *A Critical Guide to the Ninth Amendment*, 69 TEMP. L. REV. 61 (1996); Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907 (1993); Thomas B. McAffee, *Prolegomena to a Meaningful Debate of the 'Unwritten Constitution' Thesis*, 61 U. CIN. L. REV. 107 (1992); Perry, *supra* note 112, at 267 ("The historical record simply does not support the proposition that the Framers constitutionalized natural law.").

content.[119] But why? If we are being originalists, why is it not the natural law precepts that the Framers and ratifiers themselves embraced that are binding?[120] Once we turn to original understanding, why are we not bound by that understanding at the most specific level of generalization?

Professor Jeffrey Rosen, for example, claims that the "Founders' conception of which rights were natural is clear."[121] Those rights included the right

> [to] worship God according to the dictates of conscience"; the individual right of "defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety", . . . the right of a majority of the people to "alter and abolish' their government . . . the right to emigrate or to form a new state, the rights of assembly, and the freedom of speech.[122]

If Professor Rosen is right, why doesn't this list represent the exclusive list of judicially enforceable unenumerated rights?[123]

One answer to these questions might be that the Framers understood that these judicially enforceable natural law rights would evolve over time.[124] But even accepting that supposition would not get the proponents of the originalist theory where they aim to go. Many scholars and jurists have theories about where the judiciary should look for specifications of the content of unenumerated constitutional norms. Indeed, not long ago a majority of the Supreme Court in *Washington v. Glucksberg* held that the Court would only recognize unenumerated "fundamental rights and liberties which are, objectively, 'deeply rooted in the Nation's history and tradition,' and 'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if they were sacrificed.'"[125] And in

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[119] *See* Paust, *Human Rights*, *supra* note 89, at 264 (Judges should apply universal values "discoverable in contemporary documentations of international human rights and expectations."); PAUST, INTERNATIONAL LAW, *supra* note 84, at 339 (urging courts to "utiliz[e] standards of fundamental human rights, such as the 1948 Universal Declaration of Human Rights, as a means of *interpreting* the nature and content of rights which already exist and are retained by the people under the ninth amendment . . . .") (emphasis in original); Murphy, *supra* note 89, at 426 (arguing for "judicial acceptance of international human rights norms as a source for Ninth Amendment protections").

[120] Indeed, the Ninth Amendment's use of the phrase "rights *retained* by the people" might be read to suggest that the text refers to a defined set of rights the people actually understood themselves to hold at the time of the Amendment's adoption. Murphy, *supra* note 89, at 430 n.24. B*ut see id.* at 435–58 (disputing this claim).

[121] Rosen, *supra* note 110, at 1079.

[122] *Id.* at 1078–79 (internal citations omitted).

[123] Of course, many of the rights on this list are textually guaranteed.

[124] Murphy, *supra* note 89, at 431–32; Suzanna Sherry, *supra* note 118, at 1164 ("The inherent rights of the people . . . were not thought to be static.").

[125] Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (internal citations omitted).

deciding whether to recognize such an unenumerated right, the Court directed that "*[o]ur Nation's* history, legal traditions, and practices . . . provide the crucial 'guideposts for responsible decisionmaking.'"[126]

Scholars have offered countless variations on, or alternatives to, the view expressed by the Court in *Glucksberg*. Professor Rosen, for example, thinks it "obvious" that the rights secured by a majority of the state constitutions "express the people's contemporary beliefs about which rights are natural and which are not . . . ."[127] Accordingly, he believes, the Constitution "should be interpreted in light of the natural rights enumerated in the state constitutions."[128] Others argue that the Court should "take its cue" not only from state constitutional law, but also "from state-court decisions under the common law . . . thereby finding new constitutional rights in the same sources that the Framers looked to in drafting the Bill of Rights."[129] Yet another scholar argues that the category of constitutionally protected natural rights is a capacious one, "defin[ing] a private domain within which persons may do as they please, provided their conduct does not encroach upon the rightful domain of others."[130] In light of these competing theories regarding the content of evolving natural rights, how are we to know that the true content of these rights is to be found in the laws of other nations, the pronouncements of foreign or international courts, or the dictates of international human rights law?

To answer this concern, some authors have attempted to document an historical link between natural rights as conceived by the Founders and contemporary international human rights treaties and customary norms, by making the case that judicial decisions of the Founding era frequently relied upon

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[126] *Id.* at 721 (emphasis added).

[127] Rosen, *supra* note 118, at 1082–83.

[128] *Id.* at 1083. Many scholars, including Professor Rosen, would ground the judiciary's enforcement of unenumerated constitutional rights in the Ninth Amendment. *See id.* The Court, by contrast, typically has located unenumerated constitutional rights in the Due Process Clauses of the Fifth and Fourteenth Amendments. *See, e.g.*, *Glucksberg*, 521 U.S. at 721–22. The proper textual home for the specification of unenumerated constitutional rights, if such there be, is beyond the scope of this paper.

[129] A.C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C. L. REV. 409, 508 (1999).

[130] BARNETT, *supra* note 118, at 58. Thus, Professor Barnett argues, "within the boundaries defined by natural rights, . . . the rights retained by the people are limited only by their imagination and could never be completely specified or enumerated." *Id.* The liberty protected by the Constitution accordingly

> includes the right to wear a hat, to get up when one pleases and to go to bed when one thinks proper, to scratch one's nose when it itches (and even when it doesn't) to eat steak when one has a taste for it, or take a sip of Diet Mountain Dew when one is thirsty. Make any list of liberty rights you care to and one can always add twenty or thirty more.

Id. at 59.

international norms when resolving domestic cases.[131] Thus, it is claimed that during "the early days of the American Republic, courts as well as other government bodies regularly treated customary law as an enforceable element of domestic law."[132] Accordingly, these scholars argue, the "resort to international human rights standards for purposes of construing domestic . . . constitutions is fully consistent with, and justified by . . . the intent of the framers of the U.S. Constitution."[133]

But an examination of the cases most often cited by these authors reveals weaknesses in the historical claim. For while these cases looked to international law norms, they did not look to international law to define or give content to *constitutional* rights. Relatedly, the cases do not reveal an understanding by the courts that international law even concerned itself with questions of human rights, that is, with the relationships between states and their own citizens, as opposed to the relationship between and among nation states themselves.[134]

Much is made, for example, of *Henfield's Case*.[135] One author claims that

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[131] *See, e.g.*, Murphy, *supra* note 89, at 453–55, 457–49; Strossen, *supra* note 85, at 820, 827–28; PAUST, INTERNATIONAL LAW, *supra* note 84, at 169–82.

[132] Strossen, *supra* note 85, at 819. *See also* Murphy, *supra* note 89, at 458 ("[T]he application of international perceptions of basic rights in United States' courts is not a twentieth century creation, but is as old as the Republic."); *id.* at 459 ("[F]rom the birth of the Republic, international legal principles were applied in domestic courts.").

[133] Strossen, *supra* note 85, at 825; s*ee also id.* at 819 ("The framers' receptivity to incorporating the unwritten law of nations into domestic law is one particular manifestation of their natural law philosophy, under which unwritten fundamental principles were deemed binding and judicially enforceable, notwithstanding the specification of some rights in the Constitution.").

[134] As the Supreme Court recently has explained, "[i]n the years of the early Republic, th[e] law of nations comprised two principal elements, the first covering the general norms governing the behavior of national states with each other" and the second "regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor," *i.e.*, the law merchant and admiralty. *Sosa v. Alvarez-Machain*, 542 U.S. ___ (2004) (slip op. at 19-20). Finally, there was "a sphere in which these rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships," *i.e.* "violations of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 20. Part of the controversy over the content of customary international law and its domestic enforceability stems from the fact that "until a few decades ago, international law permitted States to concern themselves only with the treatment of their own nationals abroad whereas the relationship between foreign governments and 'their' subjects constituted the very core of domestic jurisdiction in which no other State was allowed to meddle." Simma, *supra* note 96, at 167; Ernest A. Young, *Sorting Out the Debate Over Customary International* Law, 42 VA. J. INT'L L. 365, 368 (2002) (noting that "international law's concerns have shifted to emphasize not only the relations among states, but also the relationship between states and their citizens").

[135] Henfield's Case, 11 F. Cas. 1099 (C.D. Pa. 1793) (No. 6360). *See*, *e.g.*, Murphy, *supra* note 89, at 457–58 ("*Henfield's Case* is especially noteworthy because the Chief Justice of the Supreme Court, John Jay, was presiding and delivered the charge to the jury which contained the

Justice Wilson's charge to the grand jury there indicated "that the universal rights of man were at the core of the law of nations" and that he considered "the international communities' perception of rights . . . to be a valid source from which to draw specific principles regarding individual liberties."[136] The case thus is claimed to provide evidence that "giving the global community's perception of rights weight in the domestic arena is an idea as old as the Republic."[137] Accordingly, the author argues, "[t]he global community's perception of rights [which] can be found in human rights law . . . should be given constitutional recognition."[138]

But *Henfield's Case* does not support the proposition that early American courts thought it appropriate to look to foreign and international standards to specify the content of individual rights. Far from it. *Henfield's Case* instead stood for the proposition that U.S. citizens could be indicted for offenses against the law of nations, despite the fact that Congress had not exercised its textually granted power to "define"[139] such an offense.[140] Thus, if anything, *Henfield's Case* stands for the proposition that the common law of nations could *extinguish* a textually guaranteed right, such as the right to have the legislative representatives of the people define the content of certain criminal offenses.[141] Moreover, Justice Wilson's charge to the grand jury in that case, far from equating the "universal rights of man" with the "law of nations," actually distinguished the two. Although he claimed that both "[t]he law of nations as well as the law of nature is of 'origin divine,'" he distinguished between the "law of nations" which is the "law of states and sovereigns" and the "law of nature" which concerns individuals.[142] Thus, at best, *Henfield's Case* supports the proposition that early American jurists believed that international law, as it related to the relationship between nation states, was

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international legal references."); *id.* at 458 ("*Henfield's Case* also sheds light on the broader concepts involved in revolutionary era notions. . . ."); *see also* PAUST, INTERNATIONAL LAW, *supra* note 84, at 182 ("In 1793, while addressing the interrelationship between natural law, the law of nations and individual responsibility, Justice Wilson referred to "the natural rights of man" in *Henfield's Case*).

[136] Murphy, *supra* note 89, at 458.

[137] *Id.* at 460.

[138] *Id.*

[139] *See* U.S. CONST., art. I, § 8 ("The Congress shall have [the] Power . . . To define and punish . . . Offences against the Law of Nations.").

[140] *See Henfield's Case*, 11 F. Cas. at 1108 (Grand Jury Charge of Wilson, Cir. J.).

[141] Happily, Justice Marshall's opinion for the Court in *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812), brought an end to the federal common law of crimes. And, in *Reid v. Covert*, 354 U.S. 1, 17 (1957), a plurality recognized that treaty obligations could not extinguish textually-guaranteed constitutional rights.

[142] *Henfield's Case*, 11 F. Cas. at 1107–08.

enforceable as federal common law.[143] The other cases cited by these authors prove no more.[144] The argument from originalism has simply not been proved.

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[143] Whether in the wake of *Erie v. Tompkins*, 304 U.S. 64 (1938), CIL is enforceable by domestic courts as federal common law has been the subject of intense academic debate. *Compare* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 870 (1997) (CIL not enforceable federal common law), *and* Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997) (same) *with* Harold Hongju Koh, *Is International Law Really State Law?*, 101 HARV. L. REV. 1824 (1998) (CIL is enforceable federal common law), *and* Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (1997) (same), *and* Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393 (1997) (same). *See also* Young, *supra* note 134, at 370 (proposing an "intermediate solution" in which CIL is treated as "general law" that "would not preempt contrary state law policies" but "would remain available for both state and federal courts to apply in appropriate cases as determined by traditional principles of the conflict of laws"). The Supreme Court recently resolved this debate in part, holding that CIL "would provide a cause of action for the modest number of international law violations with a potential for personal liability" in 1789, *i.e.*, "violation of safe conducts, infringement of the rights of ambassadors and piracy," *Sosa*, 542 U.S. at ___ (slip op. at 30); and might, in addition, provide a cause of action for violations of "a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms we have recognized." *Id.* (slip op. at 30-31). Yet even though CIL appears to be, to a limited extent, directly enforceable in federal court, that does not mean that CIL has a role to play in *constitutional* interpretation. Indeed, under the Supremacy Clause, any federal law is subordinate to the Constitution. Moreover, it remains to be seen how much of what advocates claim to comprise the CIL of human rights will meet the test of "acceptance" and "specificity" demanded by the Court. If, however, a particular customary international human rights norm is deemed enforceable as federal common law, then it would seem of its own force to preempt contrary state law, thus rendering much of the discussion about interpreting the Constitution to invalidate these laws moot. *See* Young, *supra* note 134 at 369 (discussing the possibility that if CIL is federal common law, a CIL norm against some forms of the death penalty would preempt inconsistent state death penalty regimes).

[144] Cases cited by Strossen, *supra* note 85, at 819 nn.62–63, include *The Paquete Habana*, 175 U.S. 677, 700 (1900) (not involving constitutional rights and involving an international law norm governing the relationship between nation-states), *Ware v. Hylton*, 3 U.S. (3 Dall.) 1999 (1796) (same), and *The Nereide*, 13 U.S. (9 Cranch) 388, 4234 (1815) (same). Jordan Paust has undertaken a massive survey of the Supreme Court's use of the term "human rights," or its equivalents in an attempt to refute the claim by Judge Robert Bork that "in 1789 there was no concept of international human rights." Tel Oren v. Libyan Arab Republic, 726 F.2d 774, 813 (D.C. Cir. 1984) (Bork, J., concurring). Paust claims that his study proves that international human rights (or, as he prefers, simply "human rights") were considered by the Founders to be "'constitutional' rights" and that "one of the 'international' bases for such rights was reflected in such phrases as the 'law of nations.'" PAUST, INTERNATIONAL LAW, *supra* note 84, at 214 n.2. Moreover, he claims that "[t]oday, most would consider these to be customary and/or treaty-based, and thus human rights under or protected by international law." *Id.* Although a full-scale review of the one-hundred seventy-four cases cited by Paust is beyond the scope of this Article, an examination of the eighteenth century cases he cites reveals that these cases cannot prove the

3. *The Argument from Foreign Policy*

Proponents of the moral fact-finding approach sometimes support their position by arguing that U.S. courts' continued failure to rely on comparative and international norms in deciding constitutional questions could damage U.S. foreign policy.[145] They note the risk of perceived hypocrisy, as the United States acts on

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historical link between the Founders' presumed belief in natural rights as enforceable federal constitutional rights and contemporary international human rights treaties and customary norms. One of the cases Paust cites is *Henfield's Case*, which has been discussed previously. *See supra* text accompanying note 135. Two others deal with a construction of *state* constitutional law, and therefore shed no direct light on whether early courts construed the federal Constitution to incorporate international human rights laws. *See* PAUST, INTERNATIONAL LAW, *supra* note 84, at 182 (citing Commonwealth v. Jennison, *reprinted* in W. CUSHING, NOTES OF CASES DECIDED IN THE SUPERIOR AND SUPREME JUDICIAL COURTS OF MASSACHUSETTS 1772-1789 at 50-51 (Harvard Law School, typescript), *reprinted in part in* W. NELSON, AMERICANIZATION OF THE COMMON LAW 102 (1975).). Finally, Paust cites *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 478 (1793), for the proposition that Chief Justice Jay "used the . . . expression 'rights of men,'" which Paust would translate today to mean international human rights law. PAUST, INTERNATIONAL LAW, *supra* note 84, at 182. But far from supporting the proposition that the early Court thought it proper to import international norms to interpret the domestic Constitution, the passage Paust cites reveals that Justice Jay did not think it "necessary to show that the sentiments of the best writers on Government and the rights of men, harmonize with the principles which direct my judgment on the present question." *Chisholm*, 2 U.S. (2 Dall.) at 478.

[145] *See* Brief of Amici Curiae former U.S. Diplomats Morton Abramowitz et al., *Roper v. Simmons* (No. 03-633) ("Amici believe that persisting in [the] aberrant practice of executing juveniles will further the diplomatic isolation of the United States and inevitably harm foreign policy objectives."); Brief of Mary Robinson in *Lawrence*, *supra*, note 16, at 8 ("To ignore these [foreign] precedents virtually ensures that this Court's ruling will generate conflict and controversies with the United States's closest global allies."); *id.* at 3 ("[T]he Constitution's Framers understood that the United States could not maintain its global position without paying 'a decent respect to the opinions of mankind.'"); Brief of NOW Legal Defense in *Grutter*, *supra* note 16, at 7; Strossen, *supra* note 85, at 825–27; Murphy, *supra* note 89, at 462–63; Lillich, *The United States Constitution*, *supra* note 65, at 79–80. This argument is also sometimes advanced by proponents of the "reason borrowing" approach. Most notably, Justice Ruth Bader Ginsburg has suggested that domestic courts should look to foreign judgments in interpreting the U.S. Constitution "because projects vital to our well being—combating international terrorism is a prime example—require trust and cooperation of nations the world over." Ginsburg, *supra* note 13, at 29.

This argument should not be confused with the argument that the failure of U.S. courts to invoke international and comparative law in their decisions could have institutional repercussions for the courts themselves in terms of diminished international prestige. *See* Jackson, *supra* note 12, at 254 (suggesting that "there may be reputational reasons for U.S. courts to demonstrate greater familiarity with major constitutional developments around the world"); *id*. at 262–63 (raising the possibility that

> U.S. isolation from transnational constitutional law could diminish the stature and influence of the Supreme Court over time. As U.S. decisions come under criticism by foreign courts, and to the extent that U.S. influence in constitutional developments elsewhere were to be

the one hand as an outspoken champion of human rights, criticizing, and sometimes sanctioning, foreign governments for failing to respect their citizens' basic human rights, while on the other hand refusing to employ the full measure of international human rights law at home. The consequence, scholars predict, is that the United States will lose its moral authority in the field of human rights and thus its ability to foster human rights abroad.[146]

Of course, the core of rights protected by international human rights law is already protected by the United States Constitution.[147] Nonetheless, critics charge, the United States still falls short of international standards in important areas.[148] This non-compliance is accomplished domestically through a number of mechanisms. First, the United States has failed to ratify a number of significant human rights treaties—for example, the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women.[149] Second, even when it does ratify human rights treaties, it routinely attaches reservations to them that render the treaties unenforceable as a matter of domestic law.[150] Constitutionalization of comparative or international law norms

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supplanted by such constitutional courts as Canada's, South Africa's, or Germany's, Justices may seek to express their awareness of other constitutional approaches in their opinions (if only to sustain the Court's stature against charges of ignorance).).

[146] *See* Strossen, *supra* note 85, at 825-27; Murphy, *supra* note 89, at 462–63 ("If the courts chose not to embrace international human rights norms as a source of guidance concerning fundamental rights . . . [t]he immediate effect would be that the United States would lose the high moral ground when citing human rights violations by other nations."); Lillich, *The United States Constitution, supra* note 65, at 79 ("To the extent that international human rights law cannot be invoked directly and is not incorporated indirectly into United States constitutional law, the United States eventually will suffer from this self-imposed jurisprudential deprivation, and the impact abroad of 'American constitutionalism' in turn will lessen."); Brief of Mary Robinson in *Lawrence*, *supra* note 16, at 30 ("Left undisturbed, the lower court's parochial analysis will undermine U.S. influence in the global development of human rights and compromise the United States' reputation as 'the world's foremost protector of liberties.'") (citation omitted); Brief of NOW Legal Defense in *Grutter*, *supra* note 16, at 7 ("acknowledging the international context of this Court's decisions helps to ensure the continued intellectual leadership of the United States in human rights issues").

[147] Jack Goldsmith, *International Human Rights Law & the United States Double Standard*, 1 GREEN BAG 2D 365, 366 (1998).

[148] AMNESTY INTERNATIONAL USA, UNITED STATES OF AMERICA: RIGHTS FOR ALL 126 (1998); s*ee also id.* at 130–31 (charging that the United States falls short of international human rights standards through its failure to outlaw the juvenile death penalty; to forbid the use of corporal punishment in schools; to forbid certain conditions of confinement, such as prolonged solitary confinement; to forbid male guards in women's prisons; to ensure an independent (unelected) judiciary in the state courts; and to prohibit indefinite detention of and to provide adequate procedures for aliens facing deportation or extradition).

[149] *Id.* at 128.

[150] *Id.* at 130; Goldsmith & Posner, *supra* note 101, at 1175.

could alleviate this problem since, under the Supremacy Clause, any state or federal legislation or government action contrary to the constitutional norm would not survive. Thus, it is sometimes argued that the courts, interpreting the U.S. Constitution, should do for the United States' position in the world what the political branches have failed to do by their refusal fully to embrace international human rights norms.[151]

But it is not clear by what authority the federal courts are licensed to rehabilitate the foreign policy of the United States.[152] Foreign policy decisions have always been understood to be the domain of the political branches, and matters of foreign affairs are traditionally questions in which the courts are reluctant to intervene. That a decision by the federal courts to decide a case in a particular way may produce happy consequences for U.S. foreign relations is, of course, not objectionable. The political branches might even urge the courts to accept or reject a particular constitutional rule because of the effect they believe that rule will have in the global arena. But for the courts to decide at the urging of private parties or on their own initiative that the political branches have failed adequately to protect the nation's position in the world, and to seek to rectify that policy failing of their own accord, would work a fundamental reallocation of the Constitution's distribution of powers.

4. *The Argument from Result*

Finally, there are those who argue that comparative and international law norms should become domestic constitutional law because such an approach would produce substantive outcomes that the authors view as good.[153] This

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[151] It is interesting here to note that Justice Bruno Simma has suggested that the willingness of American courts, scholars, and human rights advocates to relax the traditional standards for specifying the *content* of customary international human rights norms also "lies in the impatience of the activist human rights movement in the US with the notorious abstinence of the American Government *vis-a-vis* the major international human rights treaties." Simma, *supra* note 96, at 214; s*ee also id.* at 214 n.169.

[152] It is not even clear that they could if they tried. As Professor Jack Goldsmith has pointed out, it is less than obvious that it is the United States' moral, as opposed to its economic, political, and military, authority that causes other nations to accede to demands that they comply with international human rights standards. Goldsmith, *supra*, note 147, at 371–72.

[153] *See, e.g.*, Richard B. Bilder, *Integrating International Human Rights Law into Domestic Law—U.S. Experience*, 4 HOUS. J. INT'L L. 1, 10 (1981) ("What is important is the final result—that domestic human rights protections at least equal international standards. How the courts achieve that result—whether by express incorporation or through the more subtle influence of international standards on domestic law—appears less important."); Murphy, *supra* note 89, at 480 ("[I]nternational human rights norms should be constitutionally recognized because they are fundamentally important, and because they are fundamental they should not be subject to legislative variances."). This is also, of course, the unspoken understanding of those who urge domestic courts to adopt comparative and international law norms in deciding discrete

argument is sometimes augmented by what might be called an argument from broad consensus. This argument posits that a norm that has achieved a high degree of international support—either through adoption in international treaties with numerous signatories, or through its reflection "in widely shared practices around the world"—is more reliable as an indicator of "true" human rights (or, presumably of "good" governmental structure) than the decisions of an individual nation. This is because a norm's acceptance, and perhaps even its incorporation into international law, under these circumstances "requires the acquiescence of numerous societies."[154]

This argument might be deemed a constitutional application of the old maxim that "two heads are better than one." And, as with many old maxims, there is a good deal of sense behind it. If the world's nations, save the United States, have uniformly adopted a particular structural constitutional rule, or have guaranteed their citizens a particular constitutional right, there is some reason to question whether the United States' position is correct as a matter of morality or good public policy—certainly more reason than if the decks were not so unevenly stacked. But, as far as our search for a legitimating constitutional theory goes, this observation is largely beside the point. For the "broad consensus" theory to have any sway with respect to that question, it must attach itself to some theory of constitutional interpretation that both equates the constitutional rule with the "right" or "best" rule and authorizes the courts to be the institution that imposes this rule. I have previously discussed the counter-majoritarian concerns raised by deference to the international community in constitutional interpretation.[155] It remains here to discuss whether the moral fact-finding approach can be justified by the good results it will produce.

The argument that palatability of result is a reason to adopt an interpretive strategy is not, of course, unique to the international and comparative law context. Many constitutional theorists believe that the substantive implications of an interpretive theory should "count as a reason for accepting or rejecting the theory,"[156] and I will accept, for the sake of argument, that palatability of result is itself a sufficient reason to adopt an interpretive theory. But even measured by this benchmark, it is hard to justify the moral fact-finding approach—unless, of course, one is willing to selectively apply the interpretive technique in order to produce desired outcomes in a range of cases. That is because a true aggregation of international positions on a wide range of issues would produce results that run counter to many of our current constitutional doctrines—doctrines which many

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constitutional questions.

[154] Strossen, *supra* note 85, at 830.

[155] *See supra* text accompanying notes 110–112.

[156] *See*, Perry, *supra* note 112, at 294; *see also id.* at 292 ("[O]ne reason for rejecting interpretivist constitutional theory and trying to develop an alternative theory that accepts at least some noninterpretive review is precisely that the implications of interpretivism are so severe.").

Americans believe to be good.

To take seriously the notion of deference to the international community in constitutional interpretation would mean, for example, vast restrictions on the constitutional right to abortion as currently recognized in the United States. Or, to put it another way, deference to the international community would require far greater constitutional protection for fetal life.[157] According to statistics published by the Center for Reproductive Rights, the United States is one of only six countries in the world that allows abortion, without restriction as to reason, until the point of viability.[158] The vast majority of the world's countries[159] (187 of 195) forbid abortion after 12 weeks gestation,[160] and require, at a minimum, that the pregnant woman make some showing of "good reason" to terminate a pregnancy (141 of 195).[161] Indeed, half the countries of the world (98 of 195) either forbid abortion altogether or allow abortions only to save the woman's life or physical health, or in cases of rape or incest.[162] World opinion on abortion thus appears much more restrictive of abortion rights than domestic constitutional law.

Or consider the First Amendment. Deference to the world community here would probably result in abridgment of currently recognized constitutional rights to freedom of speech. Many nations restrict speech far more than is constitutionally permissible in the United States. For example, in the United States, hate speech[163] generally is constitutionally protected unless it amounts to an "incitement of violence."[164] By contrast, many nations, including those that typically recognize

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[157] In the 1980s and 90s, litigants seeking reversal of *Roe v. Wade* in fact pressed such arguments before the Supreme Court. For an overview of the litigants' arguments, see McCrudden*, supra* note 16, at 129-30.

[158] Center for Reproductive Rights, *The World's Abortion Laws*, at http://www.reproductiverights.org/pub_fac_abortion_laws.html (June 2004). The other countries include Canada, China, the Democratic People's Republic of Korea, the Netherlands, and Vietnam.

[159] The data provided by the Center for Reproductive Rights contain 195 "countries." This count exceeds the count of the world's "nations." This is because the data includes "independent states and, where populations exceed one million, semi-autonomous regions, territories and jurisdictions of special status. The [data] therefore include[s] Hong Kong, Northern Ireland, Puerto Rico, Taiwan, and the West Bank and Gaza Strip." *Id.*

[160] *Id.* With the exception of Austria, Belgium, Cambodia, France, Germany, and Romania, which calculate the gestational limit from the day of conception, the gestational limit is calculated from the first day of the woman's last menstrual period, which typically occurs two weeks before conception. *Id.*

[161] *Id.*

[162] *Id.*

[163] Hate speech is often defined as speech that advocates "national, racial, or religious hatred," and that "constitutes incitement to discrimination, hostility, or violence." International Covenant on Civil and Political Rights, March 23, 1976, art. 9, 999 U.N.T.S. 171, Article 20.

[164] *See* Michael Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative*

some measure of protection for the freedom of expression, substantially restrict hate speech. Indeed, most Western democracies prohibit such speech and subject it to criminal sanction.[165] In addition, both the International Covenant on Civil and Political Rights ("ICCPR") and the Convention on the Elimination of All Forms of Racial Discrimination ("Race Convention") contain restrictions on hate speech that are widely thought to be inconsistent with current interpretations of the First Amendment.[166] Although the United States has ratified these treaties, it has attached reservations to them indicating that the United States does not agree to the restrictions on hate speech to the extent that they are inconsistent with First Amendment protections.[167] If, however, the hate speech provisions of the ICCPR or the Race Convention were deemed to represent the consensus of the world community, as indeed they might, given the number of signatories to these conventions who have not reserved against the hate speech provisions, and the prevalence of hate speech restrictions in the laws of other nations, the moral fact-finding approach to constitutional interpretation might suggest (or require)[168] the Court to re-examine current First Amendment doctrine.

Of course, deference to the international community in constitutional interpretation would also suggest or require other outcomes. Deference to world opinion might suggest that the Eighth Amendment be re-interpreted[169] to forbid

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Analysis, 24 CARDOZO L. REV. 1523, 1528–41 (2003).

[165] Elizabeth Defeis, *Freedom of Speech and International Norms: A Response to Hate Speech*, 29 STAN. J. INT'L L. 57, 128–29 (1993); *see also* Rosenfeld, *supra* note 164, at 1541–57 (reviewing legislative and judicial restrictions on hate speech in Canada, Germany, and the United Kingdom, as well as restrictions contained in international human rights conventions and upheld in the judgments of international courts).

[166] *See, e.g.*, NATALIE HEVENER KAUFMAN, HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION 164–70 (1990); *Statements on U.S. Ratification of the ICCPR*, 14 HUM. RTS. L.J. 125, 125 (1993). *But see* Ann Elizabeth Mayer, *Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution Be an Obstacle to Human Rights?*, 23 HASTINGS CONST. L.Q. 727, 760–62 (1996) (noting that the text of the First Amendment does not inevitably compel the results reached by the Supreme Court in the hate speech cases and that the First Amendment could therefore be re-interpreted to permit the restrictions on hate speech required by the ICCPR).

[167] *See* International Convention on the Elimination of All Forms of Racial Discrimination, 140 Cong. Rec. 14326 (1994); International Covenant on Civil and Political Rights, 138 Cong. Rec. 4781 (1992). The ICCPR also contains restrictions on propaganda for war, which are thought to be inconsistent with the First Amendment. The U.S. reservation to the ICCPR also indicates the United States' refusal to consent to that provision to the extent that it conflicts with the First Amendment.

[168] For a discussion of the weight to be assigned to international and foreign law, see *supra* text accompanying notes 141, 143, 151.

[169] In *Stanford v. Kentucky*, 492 U.S. 361 (1989), the Supreme Court held that execution of persons who were at least sixteen years old at the time they committed their crimes did not violate the Eighth Amendment's ban on cruel and unusual punishment, and rejected the position

the execution of persons who were minors at the time they committed a capital crime;[170] and might someday require abolition of the death penalty altogether.[171] For some, this mix of substantive constitutional outcomes would be optimal. Others would undoubtedly disagree. My point is simply that true deference to international opinion would fundamentally alter the constitutional path we have forged for ourselves in the United States, and not all change would point in one direction.

a. *Limiting Techniques*

Of course, the moral fact-finding approach to constitutional interpretation need not apply in all situations. One might devise limiting principles that would soften the harsh blow that an absolutist deference on moral facts would deal to many of our current constitutional doctrines. Such limiting techniques introduce their own difficulties however. I discuss a few possible limiting techniques here.

i. *Limiting the Community*

One technique might be to limit the members of the world community whose opinions would "count" for purposes of the Court's moral fact calculations. The Court might, for example, limit the relevant community to "civilized countries,"[172] the "English-speaking peoples" of the world,[173] the nations of "Continental

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that the views of the international community were relevant to its determination of constitutionality. *See also*, *supra* text accompanying notes 53, 59 (discussing *Stanford* and its predecessor *Thompson v. Oklahoma*). The Supreme Court has granted certiorari to re-examine the constitutionality of the juvenile death penalty. *See* Roper v. Simmons, 112 S.W.3d 397 (Mo. 2003), *cert. granted*, 72 U.S.L.W. 3487 (U.S. Jan. 1, 2004) (No. 03-633).

[170] AMNESTY INTERNATIONAL USA, *supra* note 148, at 130–31.

[171] Amnesty International reports that, as of June 2004, 80 countries had abolished the death penalty for all crimes; 15 retained the death penalty only for "exceptional crimes such as crimes under military law or crimes committed in exceptional circumstances"; and 23 countries were "abolitionist in practice," in that although they "retain[ed] the death penalty for ordinary crimes such as murder . . . they have not executed anyone during the past 10 years and are believed to have a policy or established practice of not carrying out executions." Amnesty International, *Abolitionist and Retentionist Countries* at http://web.amnesty.org/pages/deathpenalty-statistics-eng.

[172] *See* Twining v. New Jersey, 211 U.S. 78, 111–14 (1908) (Proper jurisdiction of the court and notice and an opportunity for a hearing are essential components of due process of law because they "seem to be universally prescribed in all systems of law established by *civilized countries*" but the privilege against self-incrimination is not an "immutable principle of justice" because "[i]t has no place in the jurisprudence of *civilized* and free countries outside the domain of the common law. . . .") (emphasis added).

[173] Rochin v. California, 342 U.S. 165, 169 (1952); Adamson v. California, 332 U.S. 46, 67 (1947); Wolf v. Colorado, 338 U.S. 25, 28 (1949).

Europe,"[174] or perhaps "industrialized" or "Western" nations. Such a limiting principle would have a judicial pedigree, drawn from the Court's previous search for a "universal sense of justice"[175] that would guide its decisions about which provisions of the Bill of Rights should be incorporated against the states through the Fourteenth Amendment's Due Process Clause.[176] A limiting technique of this kind might, in addition, produce more some more pleasing results than those produced by reference to the true global community. Indeed, the Court's opinions in *Lawrence* and *Atkins*, which equate Europe with the "wider civilization" and the

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[174] Palko v. Connecticut, 302 U.S. 319, 326 n.3 (1937) (explaining that due process does not require incorporation of the privilege against self incrimination because "[c]ompulsory self-incrimination is part of the established procedure in the law of Continental Europe").

[175] It is interesting to note that *Betts v. Brady*, 316 U.S. 455 (1942), which first announced the "universal sense of justice" test, limited the relevant "universe" to "the common understanding of those who have lived under the *Anglo-American* system of law." *Betts*, 316 U.S. at 464 (emphasis added). "Relevant data" upon that subject was to be found in "constitutional and statutory provisions subsisting in the *colonies and the states* prior to the inclusion of the Bill of Rights in the national Constitution, and in the constitutional, legislative, and judicial history of the *states* to the present date." *Betts*, 316 U.S. at 465 (emphasis added). Thus, the Court in *Betts* actually engaged in a purely *domestic* search for a "universal sense of justice." *See* 316 U.S. at 462, 475–76.

[176] It might be surprising to some to learn that this search for a "universal sense of justice" rarely resulted in the expansion of individual rights. *See, e.g.*, *Twining*, 211 U.S. at 113–14 (rejecting the claim that the Due Process Clause required incorporation of the federal privilege against self incrimination in state trials on the ground that the privilege "has no place in the jurisprudence of civilized and free countries outside the domain of the common law"); *Palko*, 302 U.S. at 326 n.3 (rejecting the claim that the due process clause required state courts to respect the right against double jeopardy on the ground that "[d]ouble jeopardy . . . is not everywhere forbidden"). Indeed, it was the Warren Court that rejected this internationalist methodology and brought about the "Americanization" of the search for the meaning of Due Process of Law. In *Benton v. Maryland*, 395 U.S. 784 (1969), the Court overruled *Palko* and announced the death of the search for a "universal sense of justice," in defining the dictates of Due Process. The Court explained:

> *Palko* represented an approach to basic constitutional rights which this Court's recent decisions have rejected. It was cut of the same cloth as *Betts v. Brady*, the case which held that a criminal defendant's right to counsel was to be determined by deciding in each case whether the denial of that right was 'shocking to the universal sense of justice.' . . . Our recent cases have thoroughly rejected the *Palko* notion that basic constitutional rights can be denied by the States as long as the totality of the circumstances does not disclose a denial of 'fundamental fairness.' Once it is decided that a particular Bill of Rights guarantee is '*fundamental to the American scheme of justice*,' the same constitutional standards apply against both the State and Federal Governments.

Id. at 793–96 (emphasis added) (citations omitted). Indeed, it seems it was the Warren Court's *Americanization* of the due process inquiry that lead to the eventual incorporation of (almost) all of the Bill of Rights protections against the states.

"world community" appear silently to have adopted this strategy.[177]

There is some appeal to this approach. America's legal, political, and cultural history owes much to England and Continental Europe. Accordingly, British and European sources may be the natural place for judges to turn when searching for moral facts. But such a solution creates its own problems. First, in terms of substantive outcomes, a limiting technique like the one I have described would do little to help preserve American protection of the constitutional rights discussed above, and perhaps others as well. For example, according to the Center for Reproductive Rights, of the twenty-five members of the European Union, only one, the Netherlands, allows abortion until the point of viability, as in the United States.[178] One, Sweden, allows abortion until eighteen weeks' gestation.[179] The rest impose a gestational limit of twelve weeks, with the exception of Ireland, Malta, and Poland, which generally ban abortion altogether.[180] Thus, it would seem that the European nations have coalesced around a standard that is greatly more protective of fetal life, and greatly more restrictive of reproductive autonomy, than the standard constitutionalized in the United States. Similarly, most nations of Europe have hate speech restrictions that are much greater than those allowed under current judicial construction of the First Amendment.[181]

Moreover, difficulties inhere in the very process of determining whose views the courts should count. As Justice Black once famously inquired, why should we "consider only the notions of English-speaking [or, one might ask, European, or Western, or industrial] peoples to determine what are immutable and fundamental principles of justice[?]"[182] A good question in 1952, Justice Black's rhetorical inquiry has even more force today, when nearly ten percent of our own citizens are not English-speakers[183] and many have cultural backgrounds that are neither

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[177] The plurality opinion in *Thompson v. Oklahoma*, also seems to have adopted this approach. *See* 487 U.S. at 830 ("The 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 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.").

[178] Center for Reproductive Rights, *supra* note 158.

[179] *Id.* For information regarding how gestation is calculated in the various countries, see *supra* text accompanying note 160.

[180] Malta forbids abortion altogether, with no explicit exceptions in the law. Ireland prohibits abortion except to save the woman's life. Poland prohibits abortion except to preserve the woman's life or physical health, and in cases of rape, incest, or fetal impairment. Center for Reproductive Rights, *supra* note 158.

[181] *See supra* text accompanying note 163–64.

[182] Rochin v. California, 342 U.S. 165, 176 (1952) (Black, J., concurring).

[183] *See* U.S. Census Bureau, *Ability to Speak English*, *at* http://factfinder.census.gov (Aug. 2004).

Western nor particularly industrial.[184] By what authority does the judiciary get to pick and choose which nations or cultures are "civilized" or have moral values that are worth counting?[185] And, putting aside the question of authority, what criteria should the judges use to decide which nations count, especially given that any suggestion that there are some who properly belong more than others to the global community is likely to be offensive—no less to those who defend the moral fact-finding approach than to others.

ii. *The One-Way Ratchet*

Another potential solution to the problem outlined above would be to invoke a "one-way ratchet." Thus, as Professor Strossen has proposed, "[i]nternational human rights precepts [would] be invoked only to expand, rather than to limit, protections of individual rights under domestic law."[186] This argument is hard to accept on its own. If the principle that is to guide our courts in elaborating the content of indeterminate or unenumerated constitutional rights is substantial deference to the international community, why doesn't that principle apply when it would contract as well as expand rights? After all, if guidance is to be sought in international consensus because the product of that consensus is presumed to be a reliable indicator of the "good," then it seems that courts should re-evaluate their prior conclusions about the content of recognized rights regardless of the direction in which international opinion leads.

That being said, the argument for a one-way ratchet might gain support from the doctrine of *stare decisis*. On a *stare decisis* theory, Supreme Court decisions elaborating the meaning of constitutional provisions would stand, even in the face of countervailing determinations by the international community, unless the ordinary conditions for overcoming the presumption of *stare decisis* were met. But it is not clear that an across-the-board invocation of *stare decisis* principles would produce results consistent with the one-way ratchet Strossen proposes. *Stare decisis* principles apply to all cases, irrespective of whether they are "liberty expanding" or "liberty limiting."[187] Thus, although *stare decisis* might prevent the

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[184] Mark Tushnet has similarly noted that the Court's past references to the "traditions of the Anglo-Saxon people" seems "rather ethnocentric today." Mark Tushnet, *Transnational/Domestic Constitutional Law*, 37 LOYOLA (L.A.) LAW REV. 239, 239 (2003).

[185] Judge J. Harvie Wilkinson has expressed similar concerns, noting that although "our historical connections with our European friends may make reliance on European cases more appealing . . . American citizens come from *all* corners of the globe. I worry that judges will appear to indulge an unfortunate Eurocentrism by overlooking the practices of Asian, Middle Eastern, African, and Latin American states." Wilkinson, *supra* note 114, at 106.

[186] Strossen, *supra* note 85, at 806.

[187] I put to one side the question raised by Justice Scalia's dissent in *Lawrence*—namely, whether the Court's recent applications of the doctrine of *stare decisis* suggest that there is no principle left to the doctrine. *See Lawrence*, 539 U.S. at 587–91 (Scalia, J., dissenting).

erosion of previously recognized constitutional rights, a consistently applied theory of *stare decisis* would also be expected to impede the recognition of new rights that have been previously rejected.

In any event, the very concept of a one-way ratchet may be incoherent; for there is no clear answer regarding what it means to "expand, rather than to limit, protections of individual rights under domestic law."[188] Most claims of right are balanced against denial of a countervailing right. Thus, for example, abortion rights questions pit the woman's claim of reproductive autonomy against the fetal claim to life. Questions involving the regulation of hate speech pit the speakers' and listeners' rights to freedom of speech, expression, and association, against the rights of the targets to "security, dignity, autonomy, and well being."[189] Even questions of capital punishment can plausibly be seen as pitting the rights of the defendant to life or freedom from cruel and unusual punishment against the rights of victims and survivors to finality and justice. The list goes on, making the idea of a one-way ratchet difficult to justify, and perhaps more difficult to apply.

In summary, a review of the justifications advanced by scholars for the "moral fact-finding" approach shows weaknesses in each. The approach does not solve the problem of judicial subjectivity in constitutional interpretation because it fails to remedy either the arbitrariness or counter-majoritarian concerns that cause subjectivity to present a problem. The originalist case for constitutionalizing foreign and international norms has not been proved. The argument that U.S. foreign policy will be aided by the judiciary's independent decision to construe the Constitution in accordance with foreign and international norms turns long-standing presumptions about the constitutional locus of foreign policy control inside out. Finally, there is not even any guarantee that construing the Constitution in such a fashion would produce "good" results. The moral fact-finding approach remains without constitutional justification.

IV. CONCLUSION

Lawrence's invocation of foreign and international law norms to interpret the domestic Constitution exemplifies a broader effort by at least some of the Rehnquist Court Justices to cite international and foreign law in the course of constitutional decisionmaking. Yet the Justices have not put these materials to a consistent use. In some opinions, they have used foreign and international law merely to explain a domestic constitutional rule; in some they have used these materials to gather empirical evidence about the effect of a legal rule, where the domestic constitutional standard demands such evidence; and finally, they have, as in *Lawrence*, used foreign and international law to infuse the Constitution with substantive meaning. Each of these discrete uses requires its own justification, and

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[188] *See* Strossen, *supra* note 85, at 806.

[189] Rosenfeld, *supra* note 164, at 1559.

two of them, the expository and empirical uses, are fairly easily justified. Yet the case for using foreign and international law to supply substantive content to the Constitution—at least as it has been done by the Rehnquist Court—has yet to be made. For, although the extrajudicial speeches and writings of some of the Justices, and the legal writings of many scholars, have advocated looking to foreign and international bodies for persuasive reasoning, the Justices' opinions have not actually employed that technique. Rather, the Court in *Lawrence* and *Atkins*, and the opinions of individual Justices in several other cases have looked to the mere fact that foreign or international bodies have adopted a particular rule as a reason in and of itself to constitutionalize the rule domestically. This "everyone's doing it" approach to constitutional interpretation requires explanation and justification. Yet, to date, neither the Court nor the academy has offered a justification that satisfies. Until they do, it seems we are better off to abandon this particular use of foreign and international law. It is, after all, "a Constitution for the United States of America that we are expounding."[190]

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[190] *Thompson*, 487 U.S. at 869 n.4 (Scalia, J., dissenting).