

THE USE OF INTERNATIONAL LAW IN U.S. CONSTITUTIONAL ADJUDICATION

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INTRODUCTION	198
I. POSSIBLE SOURCES OF INTERNATIONAL AUTHORITY	202
A. <i>International Law</i>	202
1. <i>Treaties</i>	204
2. <i>Customary Law</i>	206
3. <i>Soft Law</i>	208
B. <i>The Regional Law Dilemma</i>	209
II. THE NORMATIVE UNDERPINNINGS OF COMPARATIVE ANALYSIS	210
A. <i>Globalization and Human Rights</i>	212
B. <i>Similar Problems, Similar Backgrounds, and Similar Texts</i>	216
C. <i>Coordinating a Transnational Legal System</i>	218
D. <i>Judicial Dialogue</i>	221
E. <i>Expanding Horizons</i>	222
F. <i>Increasing Self-Awareness</i>	227
G. <i>Impact on the Rest of the World</i>	230
H. <i>Conclusion</i>	234
III. PAST REFERENCES TO INTERNATIONAL LAW	235
A. <i>Eighth Amendment Cases</i>	237
B. <i>Other Cases</i>	241
IV. A FRAMEWORK FOR THE USE OF INTERNATIONAL LAW	244
A. <i>A Note on Foreign Law</i>	245
B. <i>The Three-Pronged Analysis</i>	248
1. <i>International Dimension of the Problem</i>	249
2. <i>Status of Law</i>	254
3. <i>Position of the United States</i>	262
CONCLUSION	266

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INTRODUCTION

The Constitution of South Africa mandates that its Supreme Court use international law to determine the substantive meaning of its own Bill of Rights.¹ The Constitution of the United States does no such thing. Nevertheless, from time to time, the U.S. Supreme Court has taken it upon itself to use international law as persuasive authority to interpret various provisions of the U.S. Constitution.² Indeed, the Court has done so in very high profile cases such as *Lawrence v. Texas*,³ where the Court struck down a Texas anti-sodomy statute as an unconstitutional violation of due process;⁴ *Roper v. Simmons*,⁵ where the Court stated that capital punishment could not be constitutionally applied to those who had committed crimes under the age of eighteen;⁶ and most recently, *Graham v. Florida*,⁷ where the Court ruled that sentencing a juvenile to life imprisonment without the possibility of parole for a non-murder crime was a violation of the Eighth Amendment's prohibition against cruel and unusual punishment.⁸

The high visibility of the cases in which the Court has called upon international law to determine the proper meaning of certain domestic constitutional provisions has brought a lot of attention to this practice. Indeed, this issue has stirred up a lot of academic emotions (such as they are) as well as engendered a passionate response from Congress. It is the lack of a specific interpretative mandate in the U.S. Constitution that has functioned as the springboard for much of the commentary, mostly critical, from the legislative branch of government and academia alike. Much of this criticism boils down to a simple exhortation to abandon this practice altogether because its use supposedly undermines democracy and the sovereignty of the United States.⁹

¹ S. AFR. CONST., 1996 § 39(1)(b). The South African constitution also contains a provision suggesting (but not mandating) that foreign law be consulted in similar circumstances. *Id.* § 39(1)(c).

² See, e.g., Steven G. Calabresi & Stephanie D. Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005) (describing the long history of uses of non-U.S. law in the United States).

³ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁴ See *id.*

⁵ *Roper v. Simmons*, 543 U.S. 551 (2005).

⁶ See *id.*

⁷ *Graham v. Florida*, 130 S. Ct. 2011 (2010).

⁸ See *id.* (quoting U.S. CONST. amend. VIII).

⁹ See Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT'L L. 69, 69 (2004). Other commentators have argued that the concept of "sovereignty" is "rooted in mistake." LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 8 (1995) [hereinafter HENKIN, *INTERNATIONAL LAW*]. Henkin goes further to note that "sovereignty . . . is often a catchword, a

However, this proposed abandonment appears unlikely to happen as it seems that for the foreseeable future the U.S. Supreme Court will be composed of a majority of justices who, in some way or other, favor this practice. Nevertheless, on a specific point, those who criticize the consultation of international law in cases dealing with the interpretative complexities of the U.S. Constitution make a valid argument: the way in which the U.S. Supreme Court pursues this endeavor is seemingly ad hoc and therefore lacks coherence, method, and context.¹⁰

This Article seeks to address this latter category of criticisms and proposes a method for the selection of international law within the framework of U.S. domestic constitutional interpretation. Only a methodological consistency that springs forth from a reasonable theoretical background can begin to quell the anxieties of those who see this form of constitutional interpretative practice as a somewhat veiled (if not overt) threat to the foundations of the Republic.¹¹ Most importantly, a sound methodological approach to this contemporary practice of constitutional reasoning serves one of the most important goals of judicial rulemaking within a democratic framework: plausible predictability. If the accusations of haphazardness and self-interest that accompany the Court's persuasive use of international law as a tool of constitutional interpretation can be set aside via adoption of a cohesive technique, then surely the whole enterprise would be perceived as standing on much firmer ground even by the critics.

Within this context, it is important to differentiate between international law and foreign domestic law. Both of these sources can provide a valuable repository of authority for U.S. courts to consult when formulating a particular doctrine of domestic constitutional law. Indeed, courts regularly utilize both of these sources in this way.¹² However, the separate scopes, underlying policies, and processes of enactment of each of these bodies of law often are considerably different one from the other. Therefore, it makes sense to distinguish them when contextualizing their respective uses within this

substitute for thinking and precision," and that "[f]or legal purposes at least, we might do well to relegate the term sovereignty to the shelf of history as a relic from an earlier era." *Id.* at 8, 10.

¹⁰ See Ramsey, *supra* note 9.

¹¹ This sort of hyperbolic phraseology was indeed used by those seeking to discredit the practice. See Donald E. Childress III, Note, *Using Comparative Constitutional Law to Resolve Domestic Federal Questions*, 53 DUKE L.J. 193, 197 (2003).

¹² See, e.g., *Graham*, 130 S. Ct. at 2033; *Roper v. Simmons*, 543 U.S. 551 (2005); *Lawrence v. Texas*, 539 U.S. 558 (2003).

framework of constitutional law.¹³ Unfortunately, the U.S. Supreme Court has so far failed to make this distinction. This has provided yet another reason for the critics to attack (in this case, most fairly) the whole interpretative enterprise.

The issue of how and when international law should be utilized as persuasive authority within the context of U.S. constitutional reasoning is one of great import and almost equally great complexity. Comparative uses of different bodies of law have grown exponentially over the last twenty years as the world has become more globalized—this trend so far shows no signs of abating. However, the myriad possible combinations within different systems of law have left this enterprise fragmented, disorderly, and without a systemic centrality. Some have suggested that this reflects the reality of the practice and that no further intrastate and interstate coordination can be expected.¹⁴ Others, however, have begun the long and arduous course of giving this comparative enterprise a theoretical and operational contour in the hope of increasing its use and furthering its success.¹⁵

It is from this latter vantage point that this Article arises. Part I offers a brief bird's-eye view of the possible array of sources of international law that exist to which the constitutional interpreters can refer. In doing so, this Part points out the various subtleties that exist in international lawmaking and the effect that the various rulemaking processes that exist within this framework have on the reach and applicability of the promulgated rules. Part II addresses the goals of the comparative enterprise so that the use of international law can be better related to the context in which it is being employed. Part III undertakes a brief overview of the U.S. Supreme Court's recent use of international law as persuasive authority in constitutional interpretation. This Part illustrates the firm factual grounding that critics of the practice are on when they note the apparent lack of methodological consistency that exists in

¹³ A pair of previous articles addressed the propriety of distinguishing between international law and foreign domestic law as sources of persuasive authority for U.S. constitutional interpretation and proposed a methodology for conducting this process with respect to foreign domestic law. See Rex D. Glensy, *Constitutional Interpretation Through a Global Lens*, 75 MO. L. REV. 1171 (2010) [hereinafter Glensy, *Constitutional Interpretation*]; Rex D. Glensy, *Which Countries Count? Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT'L L. 357 (2005) [hereinafter Glensy, *Which Countries Count?*].

¹⁴ See, e.g., Roger Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57 (2004); Richard A. Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFF., July–Aug. 2004, at 40. As is customary, the word “state” in the context of international law refers to a nation.

¹⁵ See Vicki Jackson, *Yes Please, I'd Love to Talk with You*, LEGAL AFF., July–Aug. 2004, at 46; Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999).

the Court's decisions when it comes to the comparative deployment of international law.

Part IV then addresses the concerns of those critics. By drawing on the policy foundations illustrated in Part II and the recent experience of the Court described in Part III, Part IV proposes a structure for the use of international law in this context. This framework consists of the balancing of three factors that the Court should take into account when utilizing international law: (1) the international dimension and ramifications of the case at hand; (2) the nature of the international norms that the Court is seeking to import; and lastly (3) the stated position of the United States, if any, regarding the specific international rule being consulted. Only by taking these factors into account can the process be properly contextualized and thus mature into a developed and mostly predictable endeavor that will go a long way toward immunizing it from the attacks of the critics.

It is fundamental to address what this Article is not suggesting: that international law in any way, shape, or form should function as binding authority in a case revolving around the interpretation of a specific U.S. constitutional provision. In fact, Justice Kennedy recently stated that his use of international law in an Eighth Amendment case “does not control [the] decision.”¹⁶ In other words, the bandying about of the horror scenario where the General Assembly of the United Nations (“UN”) or the International Court of Justice promulgates resolutions or issues decisions that are binding upon the United States on matters of domestic constitutional law is nothing but a rhetorical ruse designed to deflect from the real issues regarding the use of international law.¹⁷ Therefore, all of the issues discussed in this Article are to be solely construed and applied to the context of international law being used as persuasive—in other words, non-binding—authority within the framework of U.S. constitutional decisionmaking and nothing else.

¹⁶ *Graham*, 130 S. Ct. at 2033.

¹⁷ See, e.g., *Confirmation Hearing on the Nomination of John G. Roberts, Jr., to Be Chief Justice of the United States: Hearing Before S. Comm. on the Judiciary*, 109th Cong. 199–201 (2005) (“If we’re relying on a decision from a German judge about what our Constitution means, no President accountable to the people appointed that judge, and no Senate accountable to the people confirmed that judge, and yet he’s playing a role in shaping a law that binds the people in this country.”).

I. POSSIBLE SOURCES OF INTERNATIONAL AUTHORITY

The pantheon of sources of authority that could come under the rubric of international law is expanding rapidly whether one wants to adopt a rigid or a looser definition of the term. Thus, before constructing a theory and methodology upon which the U.S. Supreme Court can rely when consulting international law within the context of domestic constitutional reasoning, a reasonably defined universe of possible sources of international authority should be constructed so that the possible scope of the practice is not infinite. A lot has been written on what should be considered international law, what effect it should have on nations and their populations, as well as how it should be enforced. This Article does not purport to enter into those debates that are largely about the process and substance of international law as binding authority. Because the topic of this Article is about a process for the usage of international law as persuasive authority, the illustrative scope of the range of international law functions simply as a presentation of the repository of law from which it would be legitimate for the U.S. Supreme Court to draw.

A. *International Law*

International law is often considered somewhat of a mystery by those in the legal world who are not accustomed to its substantive rules and practices. A possible reason for this is that its systems of promulgation, recognition, and execution do not closely resemble their equivalent counterparts in domestic law and appear unfamiliar to the outside observer. Probably the most perplexing aspect of international law is that, by and large, it does not bind a nation-state unless this state has by action or inaction consented to its application.¹⁸ Thus, for example, in domestic law, a speed limit on the freeway applies to all drivers whether they consent to be bound by it or not; but in international law, compensation rules for improper expropriation of assets do not apply to the expropriating country unless it has agreed to be bound by such rules.

Equally confounding to those who question the legal status of international rules is the notion that, by definition, international law erodes national sovereignty by limiting the decisional power of a domestic regime within its

¹⁸ HENKIN, *INTERNATIONAL LAW*, *supra* note 9, at 27. This aspect gave rise to the now-famous adage that “almost all nations observe . . . almost all of their [international] obligations almost all of the time.” LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (1979) [hereinafter HENKIN, *HOW NATIONS BEHAVE*].

own territory.¹⁹ Similarly, unlike domestic law, even if a nation has consented to be bound by a particular rule of international law, there appear to be no conventional ways of enforcing compliance with those rules should that nation ignore its undertaken obligations. All of these issues have generated considerable debate among scholars about the nature and place of international law within the repository of all law,²⁰ but such debates, while fascinating and important, do not actually shed much light on the proper methodology to employ in using international law as persuasive authority for U.S. constitutional interpretation.²¹

It is more relevant to simply set out what the possible sources of international law could be under the pertinent rules of recognition dictated by international law itself. Fortunately, on this point, there is considerably more agreement.²² Article 38 of the Statute of the International Court of Justice (“ICJ”),²³ which is the implementing statute of the ICJ (the UN’s highest judicial entity), provides the following guidance:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.²⁴

The above statute makes it clear that international conventions (treaties) and customary law are the first two sources of international law upon which the ICJ relies upon to reach its rulings. Against this foreground, the statute also

¹⁹ HENKIN, *HOW NATIONS BEHAVE*, *supra* note 18, at 29–30.

²⁰ HENKIN, *INTERNATIONAL LAW*, *supra* note 9, at 63–64.

²¹ The particular status of a specific substantive law under international rules is nonetheless a crucial factor in determining whether and how it ought to be employed in the context of constitutional reasoning. *See infra* Part IV.B.2.

²² DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* 13 (2d ed. 2006).

²³ Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

²⁴ *Id.*

exhorts the import of “general principles of law” (background norms)²⁵ and suggests some methods for gleaning where the law might lie.²⁶ Even though these two areas of law still function as the primary sources for the formation of international law, the repeated interaction of quasi-governmental entities such as international organizations, non-governmental organizations, and multinational enterprises²⁷ has given rise to a third source of law that has quickly emerged as an important player in the international law field: so-called soft law.²⁸ The range of these three sources is detailed below.

1. *Treaties*

Treaties are probably the preferred contemporary way of making international law. Although part of most *anciens régimes*, this form of delineating international rules and duties has survived and flourished in the modern era. The reasons for the continued (and increasing) popularity of treaties in today’s world are plentiful. First, the substantive rules of treaties, although open to the usual interpretative variables, are relatively easy to determine (especially compared with the other two sources of international law). Second, the problem of state consent identified above is largely mitigated by treaties because they are usually entered into through a recognizable affirmative act by the nation entering into them (this being an executive signature, a parliamentary statute, or a combination thereof). Third, treaties resemble in form and sometimes in substance, the controlling documents that pertain to domestic governance. Finally, treaties are more familiar to a domestic constituency and therefore might be more favored and accepted by such constituency.²⁹

Treaties come in a wide variety of shapes and sizes—they also can cover every possible relationship and subject matter. Therefore, treaties can be bilateral (between two countries), multilateral (between numerous countries),

²⁵ Doctrines such as *res judicata* and collateral estoppel, which originate within the ambit of domestic law, are often borrowed to resolve international law disputes and are thus examples of those “general principles” adduced by Article 38.

²⁶ BEDERMAN, *supra* note 22, at 13.

²⁷ Naturally, all of these players and others in the international law realm make diverse and often discordant claims of what constitutes “law,” who is rightfully applying it, and who is violating it. These claims only affect tangentially the analysis proposed herein and such effects are discussed in Part IV.

²⁸ C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT’L & COMP. L.Q. 850, 851 (1989).

²⁹ See JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, *INTERNATIONAL LAW NORMS, ACTORS, PROCESS* 36 (2d ed. 2006).

and regional (covering only countries of a certain geographic area).³⁰ Furthermore, subject matters can range from broad scopes such as constitutive documents (for example, the UN Charter³¹ and the Treaty establishing the European Union³²) and global agreements purporting to regulate the environment and human rights,³³ to more narrowly tailored instruments that resolve the claims of warring nations or regulate trading deals between economic partners.³⁴ Needless to say, the sheer array of possibilities regarding treaties, coupled with their increasing popularity, has resulted in their proliferation so much so that the United Nations Treaty Series—the catalogue of all treaties deposited with the UN Secretary-General—contains several tens of thousands of operative examples.³⁵

For the judge attempting to use international law as an aid to interpret the U.S. Constitution, identifying whether relevant law is contained in a treaty is not a complicated matter. The Vienna Convention on the Law of Treaties defines a treaty as “an international agreement concluded between States in written form and governed by international law.”³⁶ That leaves extreme leeway for the rules of recognition pertaining to treaties, even though the Vienna Convention does narrow the scope of state behavior pertaining to treaties by noting that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”³⁷ Thus, treaties represent a mostly reliable indicator of the content of international law. The most notable exception to this is when a treaty is deemed to conflict with a peremptory norm of international law (*jus cogens*), the result of which conflict results in the invalidation of the treaty.³⁸ However, because there are only a few peremptory norms (such as the

³⁰ See *infra* Part I.B.

³¹ U.N. Charter.

³² Consolidated Version of the Treaty on Functioning of the European Union, Sept. 5, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

³³ E.g., Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); BEDERMAN, *supra* note 22, at 141 (discussing various multilateral environmental efforts including the 1979 Convention on Long-Range Transboundary Air Pollution, the 1985 Vienna Convention on the Protection of the Ozone Layer, and the 1992 U.N. Framework Convention on Climate Change).

³⁴ E.g., BEDERMAN, *supra* note 22, at 143 (discussing friendship, commerce, and navigation treaties); HENKIN, *HOW NATIONS BEHAVE*, *supra* note 18, at 77 (discussing the Korean Armistice Agreement).

³⁵ *United Nations Treaty Collection*, UNTC, <http://treaties.un.org/pages/UNTSONline.aspx?id=1> (last visited Apr. 2, 2011).

³⁶ Vienna Convention on the Law of Treaties art. 2, May 23, 1969, T.S. No. 58, 115 U.N.T.S. 331.

³⁷ *Id.* art. 26.

³⁸ *Id.* art. 53.

prohibition of genocide, slavery, piracy, and torture),³⁹ it is indeed rare for a treaty to be voided for that reason, reinforcing the notion it is a safe to consult treaties when seeking to ascertain the content of international law.

2. Customary Law

State practice dictates the contours and substance of customary international law. As a result, customary international law “results from a general and consistent practice of states followed by them from a sense of legal obligation.”⁴⁰ In other words, over the course of time, the practices of countries which repeatedly interact with one another will increasingly grow more convergent until eventually they reach a level of basic uniformity that gives rise to an implicit acknowledgement that such practice has to be followed out of a sense of legal requirement.⁴¹ No formal agreement, treaty, or statement of acquiescence is required for a rule of customary international law to rise to the level of binding authority.⁴² However, a rule of customary international law will not bind a nation that has objected to its substance while such rule was in the process of formation.⁴³ Further, failure to object is considered to be implicit consent in the application of that rule and includes an assumption that the non-objecting nations agree to be bound by it.⁴⁴ There are a couple of exceptions to the ability of states to object to a rule of customary international law. First, nations that come into being after the formation of a customary rule, or for another reason did not have an opportunity to object during that rule’s formation, are precluded from exempting themselves from such a rule.⁴⁵ The only other exception to the ability to object to a rule of customary international law was alluded to in the section above—that is the case of peremptory norms (being a form of über-customary international law) that cannot be derogated by any nation according to the dictates of international law.⁴⁶

While the rules for the formation of customary international law are easy to state, they are slightly less easy to implement, which has been the source of

³⁹ There is wide disagreement as to when a rule of customary law matures into *jus cogens*. DUNOFF ET AL., *supra* note 29, at 59. Nevertheless, there is very little disagreement about the fact that the prohibitions listed in the main text have achieved that status. *Id.* at 59, 946.

⁴⁰ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

⁴¹ This sense of legal obligation is often referred to as *opinio juris*. BEDERMAN, *supra* note 22, at 16–17.

⁴² *Id.* at 16.

⁴³ *Id.* at 21.

⁴⁴ *Id.* at 22.

⁴⁵ *Id.* at 24.

⁴⁶ *Id.*

much scholarly commentary. Generally, state practice can exhibit itself in many different forms such as “diplomatic contacts and correspondence, public statements of government officials, legislative and executive acts, military manuals and actions by military commanders, treaties and executive agreements, decisions of international and national courts and tribunals, and decisions, declarations, and resolutions of international organizations, among many others.”⁴⁷ Most often, some passage of time is required for a practice to ripen into customary law although the actual length of time is undefined and can range from relatively short periods to a span of many years.⁴⁸ Nevertheless, the key to a legal rule having the force of customary international law is the notion that states believe they have to follow such a rule out of a sense of legal obligation.

American courts are very accustomed to dealing with all aspects of customary international law, including, and most relevant to the present discussion, identifying what the rule is and deciding whether it has acquired the status of customary law so that states feel legally obligated to follow it. This process is exemplified in the famous case of *The Paquete Habana*⁴⁹ where the U.S. Supreme Court was called upon to decide whether the condemnation of two seized Spanish fishing boats as spoils of war was synchronous with the then-current understandings of international law.⁵⁰ In a very detailed opinion, where the court examined the practices of many states throughout an almost 600-year history, it invalidated the seizures as being contrary to the “law of nations” and ordered the proceeds of the sale of such boats restored to their owners.⁵¹ Today, such forays into the Jurassic period of law are hardly necessary, as numerous contemporary sources of possible state practice exist. Thus, the court wishing to call upon such sources of international law as aids to constitutional interpretation is easily equipped with

⁴⁷ DUNOFF ET AL., *supra* note 29, at 79.

⁴⁸ BEDERMAN, *supra* note 22, at 19. The International Law Association’s Committee on the Formation of Customary (General) International Law issued in 2000 a Statement of Principles Applicable to the Formation of General Customary International Law, which illustrated how state sovereignty claims to continental shelves adjacent to their territory matured from a unilateral claim by one state (the United States) that went unchallenged by other nations, to other nations following suit, to, several years later, recognized international law concerning a state’s jurisdiction over its proximate continental shelf. INT’L LAW ASS’N, COMM. ON FORMATION OF CUSTOMARY (GENERAL) INT’L LAW, STATEMENT OF THE PRINCIPLES APPLICABLE TO GENERAL CUSTOMARY INTERNATIONAL LAW 20–21 (2000).

⁴⁹ *The Paquete Habana*, 175 U.S. 677 (1900).

⁵⁰ *Id.*

⁵¹ *Id.* at 686–708.

the factual and analytical tools necessary to successfully deploy such resources.

3. *Soft Law*

Treaties and customary law have not always proven ideal in regulating a whole series of modern international interactions. Some international relationships are not suited to the formal and somewhat rigid treaty-making and ratification process, nor are they very susceptible to the protracted ripening of state practices that is necessary for the formation of customary law.⁵² Thus, a third area of international rule-making has emerged that is generally referenced under the moniker soft law.⁵³ This can be defined as a quasi-legal obligation that does not have binding force, but nevertheless is seen by players in the international sphere as a useful guide in determining the range of acceptable international conduct.⁵⁴ Aside from official institutional bodies, non-state actors such as non-governmental organizations or advocacy groups that are playing an increasing and vital position in the administration of international governance have a role in the creation of soft law.⁵⁵

Examples of soft law that come from official institutional bodies are instruments such as UN General Assembly Resolutions, statements from other transnational bodies that are non-binding at inception, and decisions by international administrative agencies.⁵⁶

Other forms of soft law may include . . . joint communiqués and other instruments expressing shared political commitments of particular states, “gentlemen’s agreements” on the composition of international bodies and tribunals, codes of conduct such as those proposed by the apparel industry to regulate working conditions in foreign-owned garment factories, interpretative statements regarding treaties . . . programs of action for multilateral conferences, guidelines and reports prepared by expert groups, and countless others.⁵⁷

⁵² DUNOFF ET AL., *supra* note 29, at 93 (giving the example of foreign direct investment).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 94.

Like many things that pertain to international governance, the status of soft law as law, quasi-law, or something else is debated vigorously.⁵⁸ This debate is somewhat secondary to the discussion in this Article because international law in the context of constitutional interpretation is used as persuasive authority, which is the same as the nature of soft law within the context of international law. Thus, *ab initio*, the main point of relevance to the judge tasked with looking at soft law within the context of international law is to be familiar with its rules of recognition. Once those have been successfully dealt with, the force or import of soft law will become a factor to be weighed among others in deciding whether it should be deployed as persuasive authority to help interpret the U.S. Constitution.⁵⁹

B. *The Regional Law Dilemma*

The lawmaking activities of regional organizations are playing an increasing role in international governance. For the purposes of this Article it becomes paramount to assess whether the law generated by the institutional bodies of these sorts of governing entities forms part of the “international law” equation, or whether it is more akin to the foreign law of single nations and thus to be assessed under different criteria.⁶⁰ This assessment presents a duality of possible outcomes because regional law does indeed have a hybrid nature and therefore does present characteristics of both international law and the law of purely domestic regimes. For example, the constituent documents of many regional organizations such as the European Union are treaties,⁶¹ and thus resemble international law in its purest sense, but within such treaties there are often provisions, such as a bill of rights, that therefore resemble domestic law.⁶² Moreover, even though the rulemaking of these regional organizations often concerns the relationships between the constituent states (resembling

⁵⁸ Steven Ratner, *Does International Law Matter in Preventing Ethnic Conflict?*, 32 N.Y.U. J. INT’L L. & POL. 591, 612 (2000). Much of the debate surrounds the issue of how to determine whether a substantive rule of international governance is soft law or ripened customary law. Several factors have been identified to best determine the answer to this question, including looking at “the form, subject matter, and content of a document, as well as the intention of the parties.” *Id.* at 613.

⁵⁹ See *infra* Part IV.B.2.

⁶⁰ Foreign domestic law is certainly part of those sources that can and should be used comparatively as an aid to U.S. domestic constitutional interpretation, but the methodology of its deployment, given its different generative policy purpose, should not be the same as that presented herein for international law. See, e.g., Glensy, *Which Countries Count?*, *supra* note 13.

⁶¹ See TFEU.

⁶² See, e.g., Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 13, 2007, 2007 O.J. (C 306) art. 6 [hereinafter Treaty of Lisbon] (incorporating and making binding upon all member states the European Convention on Human Rights).

international law), it might also reflect localized cultural effects pertinent to that region of the world (and thus be more domestic in nature).

Even though this topic alone could be the subject of a whole article in its own right, on balance it is preferable to treat the law of regional bodies as international law rather than as domestic law. The paramount reason for doing this is that regional law, like international law, is the product of a coming-together of more than one state at the very least, and, in most circumstances, many different states. Thus it reflects a collective rational choice that is international in its scope, unlike most domestic law. In other words, the international ramifications of a domestic governing choice—be it executive, legislative, judicial, or administrative—are seldom considered (unless the very topic of such choice is international), but the international consequences of the choices of the diverse entities encompassed within the organizational framework of regional bodies are almost always paramount to such choices. Therefore, the jurist contemplating the use of regional law as a source of persuasive authority for interpreting the U.S. Constitution should analyze that law from an international law, rather than a foreign domestic law, perspective.⁶³

II. THE NORMATIVE UNDERPINNINGS OF COMPARATIVE ANALYSIS

The use of international law within the ambit of U.S. domestic constitutional interpretation does not take place in a vacuum. Rather, it exists within the specific context of a global comparative enterprise where governmental bodies of all nations are cross-borrowing materials from both international and foreign domestic law. This enterprise operates with numerous policy goals in mind and has at its heart a theoretical ethos that permeates the whole process.

In general, “[c]omparative legal practice is founded on an underlying idea that the laws of the world are commensurable or comparable, and on an equally fundamental idea that comparison can only continue to take place amidst ongoing diversity.”⁶⁴ That is to say, “the contribution of comparative

⁶³ See *infra* Part IV.

⁶⁴ H. Patrick Glenn, *Comparative Law and Legal Practice*, 75 TUL. L. REV. 977, 1002 (2001); see also Ursula Bentele, *Mining for Gold: The Constitutional Court of South Africa's Experience with Comparative Constitutional Law*, 37 GA. J. INT'L & COMP. L. 219, 221 (2009) (exploring the views of the Justices of the Supreme Court of South Africa and noting that “[w]hether identifying universal norms, or gaining insight into the comparable constitutional provisions, these justices see clear benefits from exploring the opinions of constitutional courts in other parts of the world”).

law emanates not from pseudoscientific information gathering pretense What comparativists share . . . is a passion for looking beyond, an empathy for differences but also for similarities, a faith in the self-transformative task of learning, and an interest in the form of knowledge itself.”⁶⁵ Thus, the aim of comparative law “is less to borrow than to seek the benefit of comparative deliberation.”⁶⁶ Because of this broad scope, comparative law does not merely confine itself to the context of constitutional issues (although the recent spate of articles on this matter seem to limit themselves to this context), but can also be invoked in cases involving statutory or common law questions, so that, in reality, comparative law is not really a separate area of the law at all, but a methodology.⁶⁷ That is not to say that this methodology cannot have its own normative values separate and apart from any normative values pertaining to the substantive areas of the law to which, on a case-by-case basis, comparative principles are applied. But rather, it is a simple acknowledgment of the fact that a better understanding of the normative goals of comparative law can be achieved if one is cognizant of the true nature of the practice.

A true understanding must also take into account the inherent normative values operating within the comparative framework. In other words, when embarking on any comparative endeavor, such as consulting international law to help interpret the U.S. Constitution, the language adopted “affects what [the jurists] say, what they see, how they think, what they feel, and what they are.”⁶⁸ Thus, constitutional interpretation that relies on comparative analysis should not be viewed merely as a tool (which undoubtedly it is), but also as something with intrinsic value, with its own legal and expressive qualities, and possessing a normatively desirable “apolitical sensibility.”⁶⁹ These normative rationales establish the goals that are then to be reflected in the principled way

⁶⁵ Annelise Riles, *Wigmore’s Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT’L L.J. 221, 229 (1999).

⁶⁶ Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191, 197 (2003). Indeed, “[i]t is a poor wit who lives by borrowing the words, decisions, inventions . . . and actions of others.” TREASURY OF SPIRITUAL WISDOM: A COLLECTION OF 10,000 INSPIRATIONAL QUOTATIONS (Andy Zubko ed., 1996) (quoting Johann Kaspar Lavater).

⁶⁷ See P. John Kozyris, *Comparative Law for the Twenty-First Century: New Horizons and New Technologies*, 69 TUL. L. REV. 165, 166–68 (1994).

⁶⁸ JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM 56 (1990) (referring to the language of economics).

⁶⁹ David Kennedy, *The Methods and the Politics*, in COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 345, 345 (Pierre Legrand & Roderick Munday eds., 2003).

in which courts will decide how to use the proper sources of international law as persuasive authority.

A. *Globalization and Human Rights*

A commonplace observation of the present day is that the world is becoming increasingly interdependent. This interdependence manifests itself most notably in areas such as international trade,⁷⁰ multilateral environmental agreements,⁷¹ and the pooling of political and military resources into multinational organizations.⁷² The legal arena too has not been immune to this interdependence,⁷³ and is undergoing a process of “judicial globalization.”⁷⁴ This fact, and the legal challenge it presents, has not been lost on some recent members of the U.S. Supreme Court.⁷⁵

⁷⁰ In the modern era, public institutions such as the U.N. Commission on International Trade Law (“UNCITRAL”) and the Rome International Institute for the Unification of Private International Law (“Unidroit”) have taken on an active role in developing transnational commercial law. *See* BEDERMAN, *supra* note 22, at 147. Similarly, modern NGOs comprised of merchants have “exercised substantial influence in making transnational commercial law.” *Id.*

⁷¹ *See id.* at 141 (discussing various multilateral environmental efforts including the 1979 Convention on Long-Range Transboundary Air Pollution, the 1985 Vienna Convention on the Protection of the Ozone Layer, and the 1992 U.N. Framework Convention on Climate Change).

⁷² *See, e.g., id.* at 229–30 (discussing the 1998–1999 NATO intervention in Kosovo).

⁷³ For example, Sujit Choudhry has noted that a proper understanding of modern constitutions can only be achieved through both local and global perspectives. *See* Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 *IND. L.J.* 819, 824 (1999).

⁷⁴ Judicial globalization is described by Slaughter as a “messy” process of judicial interaction which is both vertical (between national and supranational courts, the former of which may or may not be bound to follow decisions of the latter) and horizontal (between equivalent national courts not bound to follow each other’s decision or bound by any formal mandate). *See* Anne-Marie Slaughter, *Judicial Globalization*, 40 *VA. J. INT’L L.* 1103, 1103 (2000). Slaughter identifies five broad activities that constitute judicial globalization: (1) the interaction between national courts and supranational courts for the creation of a structured pan-national legal system (with emphasis on Europe); (2) the march towards common human rights norms; (3) deference to foreign courts through comity; (4) national constitutional courts referencing each other in matters concerning interpretations of parallel constitutional provisions; and (5) meeting between the personnel of the courts in question. *See generally id.*

⁷⁵ Justice Breyer has stated that

[w]e see all the time, Justice O’Connor and I, and the others, how the world really—it’s trite but it’s true—is growing together. . . . Through commerce, through globalization, through the spread of democratic institutions, through immigration to America, it’s becoming more and more one world of many different kinds of people. . . . And how they’re going to live together across the world will be the challenge, and whether our Constitution and how it fits into the governing documents of other nations, I think will be a challenge for the next generations.

John H. Cushman, Jr., *O’Connor Indicates She Will Remain on Court*, *N.Y. TIMES*, July 7, 2003, at A1.

From the normative standpoint, this increased global interdependence and its effect on the legal arena calls for a parallel increase in the use of international materials as persuasive authority for both pragmatic and substantive reasons. First, it seems common sensical that a jurisprudence that relies, to some extent, on comparative analysis, will better manage global legal relationships in general.⁷⁶ Specifically, in those circumstances involving interpretations of constitutional provisions, seeking the wisdom of international materials is desirable given that “[c]onstitutional experience in other nations has become relevant to U.S. legal culture because of the tighter connections between legal practice in the United States and elsewhere that have developed in the past few decades.”⁷⁷

Second, the increase in communication between nations creates a global community, not just of the courts, but also of structured humankind.⁷⁸ This leads participants in international legal discourse to think about themselves as “juridical citizens of the world,” rather than as representatives of a particular nation.⁷⁹ This self re-identification that transcends institutional relationships creates a heightened sense of common enterprise and kinship that, within the legal consciousness, is expressed by a greater awareness of the international dimensions of those rights “that attach to all persons by virtue of being human”—that is, human rights.⁸⁰ In other words, human rights are based on a commonality of human values that only in recent times has been highlighted

⁷⁶ See generally Andrew Moravcsik, *Conservative Idealism and International Institutions*, 1 CHI. J. INT'L L. 291 (2000) (describing the desirability of global governance through international institutions from a pragmatic perspective).

⁷⁷ Tushnet, *supra* note 15, at 1306.

⁷⁸ See Craig Scott & Philip Alston, *Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise*, 15 S. AFR. J. HUM. RTS. 206, 212–13 (2000); see also Peter J. Spiro, *Treaties, International Law, and Constitutional Rights*, 55 STAN. L. REV. 1999, 2001 (2003) (“Constitutions are community dependent, and the world is, to an increasing extent, a single community working from a shared set of core values when it comes to the definition of baseline human rights.”).

⁷⁹ Scott & Alston, *supra* note 78, at 213.

⁸⁰ See Jackson, *supra* note 15, at 45. In other words, people are governed by law that encapsulates principles that are “common to humanity” and the challenging of this law by foreign sources only strengthens the underlying principles embodied by those laws. See H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261, 298 (1987) (quoting Gaius); see also Lord Patrick Devlin, *Morals and the Criminal Law*, in THE ENFORCEMENT OF MORALS 13 (1965) (“[S]ociety is not something that is kept together physically; it is held by the invisible bonds of common thought.”). From this universalist perspective, comparative law can be seen as “bridging the gap between law and society.” Ahron Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 28 (2002). This follows from the “constantly changing” nature of society. See BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 10–11 (Greenwood Press 1970) (1928).

by the globalization process.⁸¹ Comparative law, in collaboration with international law, helps promote the international human rights agenda by acting within each nation through the voluntary pronouncements of each nation's own state actors (as opposed to international law alone, which superimposes the supranational collective will upon each nation).⁸² Thus, decisions resulting from comparative analysis by domestic courts, as a means for the promotion of international human rights, have the potential to acquire a certain domestic legitimacy⁸³ that rulings from international tribunals—that are far-removed from the general populace—do not.⁸⁴

The normative values that comparative law serves in the promotion of international human rights are both fundamental and egalitarian in nature.⁸⁵ The internationalization of these values is occurring because “[a]round the world, public law concepts are emerging, rooted in shared national norms and emerging international norms, that have similar or identical meaning in every national system.”⁸⁶ Examples of these fundamental rights include “the concept of ‘cruel, inhuman or degrading treatment’ in human rights law, the concept of ‘civil society’ in democracy law, the concept of ‘the internally displaced’ in refugee and immigration law, [and] the concept of ‘transborder trafficking’ of drugs and persons in criminal law.”⁸⁷ Thus, because of the important role played by comparative law in this area, “no longer is it appropriate to speak of the impact or influence of certain courts in other countries, but rather of the

⁸¹ See John A. Perkins, *The Changing Foundations of International Law: From State Consent to State Responsibility*, 15 B.U. INT'L L.J. 433, 447 (1997).

⁸² This view of the role of comparative law squares with Judge Posner's observation that law can be “an instrument for social ends.” RICHARD A. POSNER, *OVERCOMING LAW* 405 (1995).

⁸³ Legitimacy is not solely contingent on the mere use of comparative analysis, but also may depend on methodology of reasoning. See Choudhry, *supra* note 73, at 824. Choudhry, through a detailed examination of comparative interpretative methods (primarily by foreign courts) identifies three “interpretative modes”: the universalist (premised on a commonality of underlying norms and principles), the genealogical (through a shared historic relationship), and the dialogic (a reflective process whereby the normative component of the “home” constitution is identified and then related, or not, to the foreign counterpart). See *id.* at 825.

⁸⁴ Thus, even though the European Court of Human Rights, whose decisions can formulate the interpretation of other human rights conventions and treaties, has a powerful voice as a promoter of international human rights law, see J.G. Merrills, *The Development of International Law by the European Court of Human Rights* 18 (2d ed. 1993), its decisions on their own have relatively little impact on the rest of the world not covered by its jurisdiction.

⁸⁵ As expressed by Aristotle long ago: “We must urge that the principles of equity are permanent and changeless, and that the universal law does not change either, for it is the law of nature, whereas written laws often do change.” Aristotle, *Rhetorica*, reprinted in *THE BASIC WORKS OF ARISTOTLE* 1318, 1374 (Richard McKeon ed., 1941).

⁸⁶ Harold Hongju Koh, *The Globalization of Freedom*, 26 YALE J. INT'L L. 305, 306 (2001).

⁸⁷ *Id.*

place of all courts in the global dialogue on human rights and other common legal questions.”⁸⁸ The impact of using international materials as sources of persuasive authority to aid in domestic decisions pertaining to human rights issues is aptly summarized by former Justice La Forest of the Supreme Court of Canada:

[I]n the field of human rights, and of other laws impinging on the individual, our courts are assisting in developing general and coherent principles that apply in very significant portions of the globe. These principles are applied consistently, with an international vision and on the basis of international experience. Thus our courts—and many other national courts—are truly becoming international courts in many areas involving the rule of law. They will become all the more so as they continue to rely on and benefit from one another’s experience. Consequently, it is important that, in dealing with interstate issues, national courts fully perceive their role in the international order and national judges adopt an international perspective.⁸⁹

That is not to say that the comparative enterprise is an exclusive alternative to international law in the promotion of international human rights.⁹⁰ In fact, international law is “a legitimate and important influence on the development of the common law and constitutional law, especially when international law declares the existence of universal and fundamental rights.”⁹¹ Indeed, “[t]he rising use of international law in domestic courts across jurisdictions constitutes both symptom and cause of this globalization.”⁹² However, because comparative analysis by design passes through domestic gatekeepers (specifically, the local judges who render their decisions), it has the advantage of greater efficiency in that the normative goals are given immediate effect

⁸⁸ Claire L’Heureux-Dube, *Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 40 (1998).

⁸⁹ Gerard V. La Forest, *The Expanding Role of the Supreme Court of Canada in International Law Issues*, 34 CAN. Y.B. INT’L L. 89, 100–01 (1996).

⁹⁰ Like comparative law, the international law component of international human rights jurisprudence is also instinctively egalitarian. See Paul W. Kahn, *Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 CHI. J. INT’L L. 1, 9 (2000) (“International law does not see this world of politics based on power, threat, and sacrifice. Indeed, its contemporary ambition is to overcome this world, to achieve a fundamentally depoliticized global order of equality among states and universal respect for the individual.”).

⁹¹ *Newcrest Mining (WA) Ltd. v. The Commonwealth* (1997) 190 CLR 513, 657 (citing *Mabo v. Queensland* (1992) 175 CLR 42).

⁹² Reem Bahdi, *Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts*, 34 GEO. WASH. INT’L L. REV. 555, 555 (2002).

through a domestic ruling.⁹³ Therefore, the agenda of international human rights is best served by the comparative enterprise, and doubly so if some of the sources of foreign persuasive authority are international law materials (originating from domestic courts or international bodies) that pertain to international human rights.

B. Similar Problems, Similar Backgrounds, and Similar Texts

The “communitarian considerations” that give rise to the usefulness of international persuasive authority in the area of human rights are equally applicable to other areas of the law.⁹⁴ Thus, in more general terms, “as social debates and discussions around the world become more and more similar, so of course, do the equivalent legal debates.”⁹⁵ Consequently, because “[s]tates are intricately linked by shared problems that require multilateral solutions,”⁹⁶ comparative analysis will be useful and desirable as one of the means to shed light on such problems.⁹⁷ More often than not, the similar “problems” encountered by courts of different nations are linked by shared principles that are so common that they create a “normative backdrop,” such backdrop imposing the direction of the resolution.⁹⁸ These common principles form a “family” of ideas all interrelated like a tapestry, such that the “strength of the thread does not reside in the fact that some one fibre runs through its whole length, but in the overlapping of many fibres.”⁹⁹ Reference to international law materials thus functions as the needle, connecting the related threads as a way of dealing with the reality that exists today of easily accessible foreign

⁹³ Justice La Forest of the Supreme Court of Canada describes this process as one of “absorbing international legal norms . . . through our constitutional pores.” La Forest, *supra* note 89, at 98.

⁹⁴ See Bahdi, *supra* note 92, at 589.

⁹⁵ L’Heureux-Dube, *supra* note 88, at 23.

⁹⁶ Kal Raustiala, *Sovereignty and Multilateralism*, 1 CHI. J. INT’L L. 401, 417 (2000).

⁹⁷ See Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 534–36 (1992) (adding that comparative analysis only retains its usefulness if the results are narrowly fitted to take into consideration the needs of the society to be affected by the decision).

⁹⁸ Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 507–08 (1989) (applying this reasoning to the interpretation of statutes). The commonality of such principles has been noted by the U.S. Supreme Court. For example, in *Romer v. Evans*, 517 U.S. 620 (1996), the court indicated that the rights denied by Colorado’s Amendment 2 are “protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.” *Id.* at 633.

⁹⁹ LUDWIG WITTEGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 221 (4th ed. 1963). For example, several international and national declarations, constitutions, treaties, or statutes offer similar protections for the individual that there is, among certain nations, “a wide convergence of paramount constitutional norms.” Michel Rosenfeld, *Constitutional Migration and the Bounds of Comparative Analysis*, 58 N.Y.U. ANN. SURV. AM. L. 67, 69 (2001).

decisions that have previously rendered opinions on issues similar to those being tackled by our domestic courts.¹⁰⁰

Clearly, the connections between the foreign courts that cite international law and domestic ones that do the same will be stronger in certain instances than in others. Like for people, the strongest linkage identified by scholars is that deemed to be among legal “relatives.”¹⁰¹ Thus, a foreign nation found on the same family tree as that of the United States, will possess a “genealogic” link that will make comparative references to the jurisprudence of that foreign nation especially relevant,¹⁰² particularly when those references encompass the utilization of international law as persuasive authority. That would seem to primarily limit comparative references to countries whose law is in part based on the old English common law,¹⁰³ but in light of the influence of U.S. jurisprudence on the rest of the world, courts in this nation need not confine themselves to referencing sources from countries that helped shape the legal landscape in the United States, but rather, domestic courts could similarly benefit from the insight of courts from nations that have received legal input from the United States if those nations shed any light on a proper methodology for the use of international law as nonbinding authority. In either event, referencing international materials being used as persuasive authority by nations with a familial relationship to the United States is normatively justified, and is similar in conception, to one state referencing, as persuasive authority, the laws of a sister state within the union.

¹⁰⁰ In a sense then, one could argue that there is a pragmatic reason to favor referencing foreign materials as persuasive authority. See RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 227 (1999); Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 6 (1998) (explaining the virtues of pragmatist thought). Interestingly, Judge Posner seems to have mixed feelings about whether he favors this type of comparative practice. On the one hand, he has written that comparative law can be useful to the determination of certain cases dealing with Eighth Amendment issues, see Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 14 (1996), but on the other hand, he has recently stated that a court in the United States “should never view a foreign legal decision as a precedent in any way.” Posner, *supra* note 14, at 40. In a similar pragmatic vein, H.L.A. Hart has suggested that the use of comparative law can be part of the penumbral zone of judicial thinking, and in those instances, a decisionmaker can reference foreign materials to reach a conclusion. See H.L.A. HART, *THE CONCEPT OF LAW* 255 (2d ed. 1977).

¹⁰¹ See, e.g., Jackson, *supra* note 15, at 46 (identifying those “relatives” as being “international or foreign texts inspired or influenced by the United States”).

¹⁰² The “genealogic” link is one of the three “interpretative modes” identified by Choudhry. See Choudhry, *supra* note 73, at 824.

¹⁰³ See Posner, *supra* note 14, at 40 (noting that “[a]n English decision from the 18th century might be cited to establish the original meaning of ‘cruel and unusual punishment’ in the Eighth Amendment”); see also Shirley S. Abramson, & Michael J. Fischer, *All the World’s a Courtroom: Judging in the New Millennium*, 26 HOFSTRA L. REV. 273, 277 n.13 (1997) (noting that English law is mostly cited when it is old for historical context and examining Wisconsin citations on the matter).

Equally strong normative justification for referencing international materials arises in those cases where the international authority being scrutinized has interpreted texts similar to those under review by the domestic court.¹⁰⁴ Indeed, it “would be a serious omission . . . to ignore this relevant body of precedents and the considerable judgment and experience they represent as it confronts similar difficult interpretive questions.”¹⁰⁵ Even opponents of this enterprise concede that “[f]oreign materials are relevant to the interpretation of U.S. laws in numerous circumstances, most notably where the foreign courts have interpreted the same or parallel legal texts as those under consideration by the U.S. court.”¹⁰⁶ Therefore, the adage that declaims “two heads are better than one” applies in this context and advises consultation of opinions which turn on similar textual interpretations as those being undertaken by the referencing court. Or, as succinctly put by Justice Breyer, “[i]f here I have a human being called a judge in a different country dealing with a similar problem, why don’t I read what he says if it’s similar enough? Maybe I’ll learn something.”¹⁰⁷ A similar sentiment can be equally applied to a judge sitting on an international tribunal.

C. Coordinating a Transnational Legal System

With the proliferation of international agreements and treaties that has taken place over the last three decades, it was only a matter of time before litigation stemming from these agreements found its way into the domestic courts of participating nations. The application of international norms found in treaties by domestic judges has been relatively uncontroversial because the general opinion is that the ratification of a treaty constitutes a legally significant act, and that domestic courts should strive to hold national governments accountable to their legal commitments embodied by such

¹⁰⁴ See Vicki C. Jackson, *Narratives of Federalism of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 254 (2001); see also Donald P. Kommers, *The Value of Comparative Constitutional Law*, 9 J. MARSHALL J. PRAC. & PROC. 685, 691–95 (1976).

¹⁰⁵ Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 374 (1997).

¹⁰⁶ See *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing on H.R. Res. 568 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 108th Cong. 2d Sess. 21 (2004) (testimony of Prof. Michael Ramsey).

¹⁰⁷ Justice Stephen Breyer and Justice Antonin Scalia, Debate on Foreign Law: Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005), available at <http://www.freerepublic.com/focus/news/1352357/posts>.

ratification.¹⁰⁸ More controversy has arisen by applying this rationale to customary international law because, as critics claim, customary international law is not always formed with the consent of those allegedly bound by it.¹⁰⁹ Regardless of international law's application domestically through treaties or customary law,

[s]tripped of all technicalities . . . government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.¹¹⁰

The application of international law domestically not only serves to hold the government accountable to its people but, more importantly for the purpose of this Article, allows foreign nations to observe that the United States will live up to its international obligations, thus making other nations more willing to engage in a cooperative relationship with the United States. In other words, “[i]f international law does not have any impact on behavior, there is no reason for a country to waste resources on international legal conventions and negotiations.”¹¹¹

Comparative analysis based on international materials aids the further development of this cooperative relationship established by international law and the bodies that administer it. In fact, the “role of international institutions is increasingly, with the spread of liberal democracy, to help coordinate the policies of democratic states to promote common goals, including the full protection of human rights, within a context of substantial underlying

¹⁰⁸ See, e.g., Michael Stokes Paulsen, *The Constitutional Power To Interpret International Law*, 118 YALE L.J. 1762, 1774 (2009) (explaining that “when international treaties become domestic law” via incorporation by the political branches, they become U.S. law that has “legal force . . . [and] give[s] rise to obligations within the legal regime of international law”). This rationale has been termed the “rule of law imperative.” See Bahdi, *supra* note 92, at 560. It is focused on a previously enacted treaty or accepted rule of customary law—in other words, international norms. In this optic “the rule of law framework represents the positivistic expression of state consent.” *Id.* at 565.

¹⁰⁹ For example, Eric Posner has characterized this approach to judicial domestication of international norms as “Transnational Legal Process” (“TLP”). Posner expresses skepticism towards this approach, under which he says “courts act . . . under their own authority to compel citizens and the government to comply with international law that has never been formally incorporated into domestic law by the government . . . often called customary international law.” Eric A. Posner, *Transnational Legal Process and the Supreme Court’s 2003–2004 Term: Some Skeptical Observations*, 12 TULSA J. COMP. & INT’L L. 23, 26 (2004).

¹¹⁰ FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 72 (1944).

¹¹¹ Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1844 (2002).

agreement.”¹¹² Thus, the coordinating necessity brought on by globalization is the source for an increase in the use of international law.¹¹³ This coordination, particularly in the area of international commerce, brings about a redefinition of the notion of the national “we,” because “who we are is harder to define when Japanese firms are major exporters from the United States, American firms produce more overseas than they export, and NGOs and political leaders who pressed for the land mines treaty [which the United States government opposed] included large numbers of Americans.”¹¹⁴ This “changing consciousness” in which the international and domestic courts are mutually reinforcing, leads to an emergence of “international” values that are capable of being applied at the national level, creating a “common language which cuts across boundaries and within societies,” which induces further cooperation and integration.¹¹⁵

The step from a coordinating international law to a coordinating comparative practice is a very small one. Already, national courts are “quasi-autonomous actors in the international system,” acting as “partners in enforcing international rules or as participants in a larger dynamic process of socialization in the service of compliance.”¹¹⁶ This has led to a “blurring of international law into comparative law.”¹¹⁷ Thus, “when a judge in a state that is not party to the European Convention on Human Rights invokes the Convention and its jurisprudence, the Convention has the same non-binding status as foreign law.”¹¹⁸ This merging of comparative law and international governance is a logical consequence in that both confront the same problems of “order above states,” which results in a need for effective cooperation.¹¹⁹

¹¹² Moravcsik, *supra* note 76, at 305.

¹¹³ See, e.g., Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 129 (1994).

¹¹⁴ JOSEPH S. NYE, JR., *THE PARADOX OF AMERICAN POWER* 164 (2002).

¹¹⁵ See Phillippe Sands, *Turtles and Torturers: The Transformation of International Law*, 33 N.Y.U. J. INT'L L. & POL. 527, 554–56 (2001).

¹¹⁶ Anne-Marie Slaughter, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367, 391–92 (1998).

¹¹⁷ Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT'L L. & POL. 501, 525 (2000).

¹¹⁸ *Id.* (emphasis omitted). In other words, the deployment of international law as part of U.S. constitutional interpretation treats international law as a form of foreign law. See Spiro, *supra* note 78, at 2025–27.

¹¹⁹ See David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 545, 557, 614–15 (arguing that in today's project of “international governance,” comparativists seek to act as the “diversity department” to create a depoliticized private law and defend the autonomy of law). The author does recognize an essential difference between the objectives of international law and comparative law: the former seeking to “transcend [rather] than to comprehend

D. Judicial Dialogue

A related goal of comparative analysis to cooperation is to foster an ongoing dialogue between courts around the world. This “global community of law” which consists of “overlapping networks of national, regional, and global tribunals,”¹²⁰ arises as a result of a new self-conception of each participant court as being part of a “larger judicial community” that crosses artificial notions of territoriality,¹²¹ and communicates among itself through judicial opinions and decisions. Thus, “[b]y communicating with one another in a form of collective deliberation about common legal questions, these tribunals [which participate in the dialogue] can reinforce each other’s legitimacy and independence from political interference” and “can also promote a global conception of the rule of law, acknowledging its multiple historically and culturally contingent manifestations but affirming a core of common meaning.”¹²² This “community of law” is characterized by relationships between legal “actors”¹²³ that are consistent with each individual participant’s interests, coupled with the participants’ awareness that the whole process takes place on a nominally apolitical plane.¹²⁴ In sum, “a community of law is a community of interests and ideals shielded by legal language and practice,”¹²⁵ whose desirability arises from the recognition that proper legal practice is not necessarily confined to one system and nation.

The specific content of the dialogue, and the particular motivation of the conversing courts, will vary considerably depending on which courts are “speaking” to one another. Moreover, the type of reception that a particular

difference,” while for the latter the goal is not to transcend difference, but to explore it (to see “what’s in, and out, who’s good and bad, what’s new and old”) in order to decide its relevance and its persuasive capabilities. *See id.* at 546–47.

¹²⁰ Helfer & Slaughter, *supra* note 105, at 282, 370 (noting that judges around the world consider themselves as part of this global legal community “by virtue of either their role in implementing international norms or a common conception of their role and function within domestic legal systems and a common commitment to the rule of law”). This type of self-conception provides for a natural opening to foreign materials as persuasive authority.

¹²¹ *See* Bahdi, *supra* note 92, at 558.

¹²² Helfer & Slaughter, *supra* note 105, at 282.

¹²³ This emphasis on “actors” signifies that, like for many other rationales underlying comparative analysis, a transnational judicial dialogue relies on a notion of horizontal global governance—one consisting of “national government officials rather than international bureaucrats, decentralized and informal rather than organized and rigid.” Anne-Marie Slaughter, *Governing the Global Economy Through Government Networks*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW* 177, 178, 202–03 (Michael Byers ed., 2000).

¹²⁴ *See* Helfer & Slaughter, *supra* note 105, at 367–69.

¹²⁵ *Id.* at 370.

international source will receive in a domestic court will similarly vary considerably in each particular circumstance.¹²⁶ Thus, the “dialogic” process is an interactive one,¹²⁷ where the tenor of conversation might not always be one of agreement.¹²⁸ As noted by Anne-Marie Slaughter,

[W]hereas a presumption of a world of separate sovereigns mandates courtesy and periodic deference between them, the presumption of an integrated system [where judicial dialogue is commonplace] takes mutual respect for granted and focuses instead on how well that system works. It is a shift that is likely to result in more dialogue but *less* deference.¹²⁹

However, the shift to open dialogue implies a greater reflective process by the deciding courts. This should tend to lead to better opinions because “decisions about what ought to be done are improved by reflection, by an exchange of views with others sharing the same problems, and by imagining various situations that might be presented.”¹³⁰

E. Expanding Horizons

The evolution of legal history is replete with highly esoteric discussions concerning the ultimate goal of the law. Notions of order, fairness, justice, utility, structure, and equality (as well as many others) have been tossed around as being the primary engine that drives the legal train.¹³¹ Regardless of the legal philosophy to which one subscribes, it can scarcely be contradicted by anyone that the legal product in any legal system should strive to be as good and correct as it can be. The selective reliance on international persuasive authority goes a long way into achieving this in legal systems, such as ours,

¹²⁶ In other words, “as courts look *all* over the world for sources of authority, the process of international influence has changed from *reception* to *dialogue*.” L’Heureux-Dube, *supra* note 88, at 17, 21 (stating that as courts “*mutually* read and discuss each other’s jurisprudence,” in order to determine new problems, comparative sources become part of the “*broad* spectrum of sources,” used by the courts).

¹²⁷ See, e.g., Neil McCormick, *The Maastricht-Urteil: Sovereignty Now*, 1 EUR. L.J. 259, 265 (1995) (describing the relationship between the European Court of Justice and national supreme courts as “pluralistic rather than monistic, and interactive rather than hierarchical”).

¹²⁸ See, e.g., *Queen v. Keegstra*, [1990] 3 S.C.R. 697, 702 (Can.) (stating where this dialogue resulted in an informed rejection of the foreign source).

¹²⁹ Slaughter, *supra* note 74, at 1115; Slaughter, *supra* note 66, at 194.

¹³⁰ Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 668 (1958). Fuller imagines that such a completeness of deliberation results “not merely [in] a more apt choice of means for the end sought, but a clarification of the end itself.” *Id.*

¹³¹ See generally LUIGI MIRAGLIA, *COMPARATIVE LEGAL PHILOSOPHY APPLIED TO LEGAL INSTITUTIONS* (A.M. Kelley 1968) (1912).

where adjudicators are called upon to use interpretative skills in providing a resolution to a legal problem.¹³²

Specifically, by deploying international law used comparatively, the judge “expands the horizon and the interpretive field of vision,” so that “[c]omparative law enriches the options available.”¹³³ This squares with the comparativist ethos which does not solely aspire to rule, but to understand the underlying nature of each decision.¹³⁴ The quest of understanding inevitably leads to a necessity to have the mind of the jurist be stretched and stimulated, a process that will result in a better legal product.¹³⁵ In the immortal words of Justice Brandeis, “if we would guide by the light of reason, we must let our minds be bold.”¹³⁶

One of the ways in which such stimulation will occur is through access to international materials’ rationales on similar issues to those being treated in the domestic forum. These sources of international law might provide the domestic court with a “fresh, provocative” way to resolve the issue at hand, and thus it will inform, illuminate, and challenge a domestic court’s long-held assumptions.¹³⁷ “[T]he use of comparative law can inspire the interpreter to find the interpretation that is best with regard to his own country’s law” by “provid[ing] the interpreter with new ideas” and by “contribut[ing] to the interpreter’s understanding of the [text] he has to interpret.”¹³⁸ In Bruce Ackerman’s simple words, international law used as persuasive authority can provide some “old-fashioned insight” to a reviewing domestic court.¹³⁹

¹³² The implication is that ours is a system that relies, to a certain extent, on the indeterminacy of legal issues and the jurists role in discovering the answer to a particular set of problems. Thus, the amplification of the discovery process through the use of foreign materials fits into this conception of legal design, most associated with realist legal theory. *See, e.g.,* Knop, *supra* note 117, at 503.

¹³³ AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 197 (2006).

¹³⁴ *See* Kennedy, *supra* note 119, at 555–56.

¹³⁵ *See* Jackson, *supra* note 104, at 259–60 (citing H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 695 (1987)); Michael Kirby, *Think Globally*, 4 GREEN BAG 287, 291 (2001) (stating that this comparison will “stimulate [the] mind with analogous reasoning”).

¹³⁶ *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 520 (1924) (Brandeis, J., dissenting); *see also* *Boy Scouts of America v. Dale*, 530 U.S. 640, 700 (2000) (Stevens, J., dissenting) (quoting Justice Brandeis).

¹³⁷ It is the mere fact of the challenge that in itself enhances the ultimate quality of the final judicial product. *See* THOMAS MUNRO, *TOWARD SCIENCE IN AESTHETICS* 73 (1956) (noting that a judge, “[b]y comparing his judgment with those of others . . . can further discover the extent to which it is in accord with the consensus of social experience [and] [i]f he then still reaffirms his [initial] judgment, it will be a more conscious and tested one, and less a product of blind impulse”).

¹³⁸ Jens C. Dammann, *The Role of Comparative Law in Statutory and Constitutional Interpretation*, 14 ST. THOMAS L. REV. 513, 522–23 (2002).

¹³⁹ *See* Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 775 (1997).

The impact of observing international law practice in a particular circumstance not only ameliorates the specifics of that case, but also contributes to the betterment of the legal system as a whole by bringing to the table new, valuable, substantive ideas. Justice Ginsburg expressed her appreciation of the possibilities of international materials (among other foreign sources) to U.S. jurisprudence in these exact terms when she noted that the Supreme Court could “do better” if it incorporated comparative analysis from other nations “who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.”¹⁴⁰ Similarly, Goldsmith notes that international sources gather their strength through substance (rather than process) and that it is the ideas contained within these sources that contribute to their success.¹⁴¹ In other words, the addition of international materials intrinsically enhances the discourse of the legal system in which such materials are incorporated.

A third form of such expansion that is more pragmatic in nature accompanies the intrinsic and particular expansion of horizons operated by comparative analysis illustrated above. This specific normative impulse relies on the use of comparative materials as a way “to achieve specific ends based on positive reasoning about how those ends may be achieved.”¹⁴² Under this guise, comparative analysis is integrated with other methods of judicial reasoning, so that comparative references to international law not only affect the results of the particular cases but also have an impact in shaping “the system within which [they] operate[.]”¹⁴³ Thus, the practice of referencing international law as persuasive authority expands the panoply of methods that enable judges to adequately explain the rationales behind their opinions, enhancing the level of persuasiveness and legitimacy of the particular decision and the court rendering it. The exploration of international materials within judicial opinions for the sake of strengthening the conclusions reached therein is therefore conceptually pragmatic because pragmatism evaluates “the success of a philosophy not in terms of its correspondence to ultimate eternal truths,

¹⁴⁰ Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1, 5 (2003) (quoting the Court in *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

¹⁴¹ Jack L. Goldsmith, *Should International Human Rights Law Trump US Domestic Law?*, 1 CHI. J. INT'L L. 327, 337 (2000) (referring to the non-binding Universal Declaration of Human Rights and the Helsinki Accords).

¹⁴² Anne-Marie Slaughter, *Interdisciplinary Approaches to International Economic Law: Liberal International Relations Theory and International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 717, 719 (1995).

¹⁴³ Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409, 412 (2003).

but based upon its usefulness as a practical tool to yield better, more satisfying experiences.”¹⁴⁴ That is not to stay that method, or style, is less important than intrinsic merit. In fact, style “is important, not only in the message conveyed to lower courts, but also in what it says about the attitudes of those judges who are choosing between different styles of decision-making.”¹⁴⁵ The pragmatic thought that underlies the use of international materials as persuasive authority merely reflects a “relativistic theory [that] has wisely emphasized the danger of deciding problems of valuation by appeal to any general standards, and has urged instead that each problem be dealt with afresh, in its own terms, by intelligent analysis of the special conditions involved in it.”¹⁴⁶

The expansion of appropriate sources of persuasive authority to include international law also serves the value of encouraging a jurisprudence that moves forward by relying on past experience without foregoing the progressive thrust of cautious experimentation. As stated by Justice Holmes, “[t]he life of the law has not been logic: it has been experience.”¹⁴⁷ Experience is grounded in time, and is both individual and collective, the former being more limited than the latter. As such,

[t]he experience of any moment has its horizon [in that] [e]ach man’s experience may be added to by the experience of other men, who are living in his day or have lived before; and so a common world of experience, larger than that of his own observation, can be lived in by each man¹⁴⁸

Nevertheless, “however wide it may be, that common world also has its horizon; and on that horizon new experience is always appearing.”¹⁴⁹ By opening up to an international experience that has already resolved issues being confronted by domestic courts for the first time, our courts can proceed with an accumulated knowledge that provides the domestic adjudicator with a ready-made illustration of the workability of that particular legal solution,

¹⁴⁴ Michael Sullivan & Daniel J. Solove, *Can Pragmatism be Radical? Richard Posner and Legal Pragmatism*, 113 YALE L.J. 687, 688–89 (2003) (noting the local quality of pragmatism with respect to giving solutions to problems, taking into account the peculiarities of the locality bound by the solution).

¹⁴⁵ Harding, *supra* note 143, at 429.

¹⁴⁶ MUNRO, *supra* note 137, at 78.

¹⁴⁷ OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Harvard ed., 1963) (1881).

¹⁴⁸ SUSANNE K. LANGER, *PHILOSOPHY IN A NEW KEY: A STUDY IN THE SYMBOLISM OF REASON, RITE, AND ART* 5 (3d ed. 1957) (quoting C. Delisle Burns, *The Sense of the Horizon*, 8 PHIL. 301 (1933)).

¹⁴⁹ *Id.*

which, in turn, alleviates the trepidation of being the first to introduce a particular legal concept.¹⁵⁰

Lastly, the limitless horizon brought forth by the experience of international law helps to counter modern “know-nothingism”:¹⁵¹ a disturbing undercurrent, or backwash, present in today’s American legal discourse. This term refers to the implausible belief that the United States cannot possibly benefit from “powerful and sophisticated” arguments of other legal regimes.¹⁵² This unilateral and arbitrary self-confinement only contributes to belittle a legal system.¹⁵³ It is axiomatic that a “lawyer, even in the most mundane practice, will be impoverished if he wears the blinders of his own jurisdiction.”¹⁵⁴ Thus, because “no justice should cut off knowledge and analysis of foreign law if it can help the court reach a better understanding of our own,”¹⁵⁵ aid should be “sought where it may be found, and there are no formal limits to the search.”¹⁵⁶

Limiting persuasive authority solely to the product originating within our borders would fly in the face of prevalent legal theory that has developed throughout the last century and has moved away from excessive formalism. Thus, to the “extent that the law . . . is not definitely made and imposed . . . but is rather chosen . . . in an ongoing process, the underlying notion of law is that of enquiry” and as a consequence “[t]here is never a

¹⁵⁰ See Kai Schadbach, *The Benefits of Comparative Law: A Continental European View*, 16 B.U. INT’L L.J. 331, 390 (1998) (referring to the prior experience of foreign courts as a sort of “field observation” of a country where a specific concept has already been tested).

¹⁵¹ See Kenneth Roth, *The Charade of US Ratification of International Human Rights Treaties*, 1 CHI. J. INT’L L. 347, 352 (2000).

¹⁵² See *id.*

¹⁵³ As observed by Justice Abramson of the Supreme Court of Wisconsin: “If you look at the American law . . . in isolation from the rest of the world, you do not hear or ask [certain] questions” adopted by other people. See Abramson & Fischer, *supra* note 103, at 284.

¹⁵⁴ Kozyris, *supra* note 67, at 168.

¹⁵⁵ Jackson, *supra* note 15, at 46.

¹⁵⁶ Glenn, *supra* note 80, at 267 (noting that judges are “called upon to decide cases or enact norms or give opinions, but the search for law is too important for any potential external source to be eliminated *a priori*”). This “leave no stone unturned” concept is similar to Dworkin’s Judge Hercules, who, when canvassing the whole of the relevant universe, will inevitably look across the oceans to see how foreign courts have coped with similar questions and then square such authorities with the pertinent precedent, the textual provisions, the normative questions, to reach the most informed and authoritative decision. See Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1083 (1975). Some critics of comparative analysis deem Judge Hercules not to be up to the task of comparative analysis. See Charles Fried, *Scholars and Judges: Reason and Power*, 23 HARV. J.L. & PUB. POL’Y 807, 820–21 (2000) (stating that allowing foreign materials into the process of domestic adjudication will “introduce[] a whole new range of materials to the texts, precedents and doctrines from which the Herculean task of constructing judgments in particular cases proceeds”).

closing of sources, never a declaration of satisfaction with existing knowledge, never a pure process of deduction from a single given, never an entire commitment to an exclusive paradigm of law.”¹⁵⁷ In fact, “[t]he nationalization of law has made it vulnerable[:] . . . [i]n seeking to bind it fails to persuade and resistance becomes easier to justify than adherence.”¹⁵⁸ This follows from the fact that “[w]hen one is immersed in his own law, in his own country, unable to see things from without, he has a psychologically unavoidable tendency to consider as natural, as necessary, as given by God, things which are simply due to historical accident or temporary social situation.”¹⁵⁹ Therefore, “[t]o see things in their true light, we must see them from a certain distance, as strangers, which is impossible when we study . . . phenomena of our own country.”¹⁶⁰ Authorities steeped in international law allow us to achieve that distance.

F. *Increasing Self-Awareness*

The analysis of international law materials as persuasive authority helps courts in the United States enhance their knowledge and appreciation for the legal practices of those international regimes being observed. However, together with this increased erudition, comparative analysis of international authority provides a “unique opportunity to generate critical, subversive self-reflections about American law.”¹⁶¹ In other words, comparative law functions

¹⁵⁷ Glenn, *supra* note 80, at 288, 293 (tying the use of persuasive authority to a discrediting of the “declaratory theory” of law which wants the judiciary simply to identify pre-existing law rather than discovering the most persuasive result from any source available).

¹⁵⁸ *Id.* at 297.

¹⁵⁹ Kathryn A. Perales, *It Works Fine in Europe, So Why Not Here? Comparative Law and Constitutional Federalism*, 23 VT. L. REV. 885, 902 (1999) (quoting Pierre Lepaulle, *The Function of Comparative Law*, 35 HARV. L. REV. 838, 858 (1922)).

¹⁶⁰ *Id.* Taking a few too many steps back for better observation works both figuratively and in actuality. Bertrand Russell once observed that

if several people are looking at [an object] at the same moment, no two of them will see exactly the same distribution of colours, because no two can see it from exactly the same point of view, and any change in the point of view makes some change in the way the light is reflected.

BERTRAND RUSSELL, *THE PROBLEMS OF PHILOSOPHY* 12 (1912). However, as proximity to the object decreases, equality of perception by the two observers increases (even though it will never be exactly the same). By combining the observations of the two watchers, a better picture of the actual shape of the object will be produced. Similarly, by combining different national and foreign experiences on a particular legal issue, a better resolution of that issue will be achieved.

¹⁶¹ George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 AM. J. COMP. L. 683, 695 (1998) (using the term “subversive” to denote a progressive impulse in opposition to an “establishment” mode of preservation of the legal and structural status quo). *But see* Tushnet, *supra* note 15, at 1307 (viewing comparative law as an agent for preservation or change).

as a mirror so that by “seeking to learn from comparative . . . law, U.S. lawyers, academics, and judges run the risk of going abroad only to meet ourselves.”¹⁶² Specifically, comparative law “also operates like a rhetorical literary device, such as satire or simile, by forcing national values out in the open . . . [i]t offers judges a powerful tool to stimulate self-reflection and introspection” facilitating “a process of introspection and self-discovery” that “acts as a mirror that helps reflect the values already inherent, though not altogether obvious, in the domestic order.”¹⁶³

But the reflective power provided by comparative law not only produces a superficial picture, but actually pierces the surface and thus is more akin to a combination of mirror and x-ray machine.¹⁶⁴ Thus, “comparing oneself to others allows for greater self-knowledge,”¹⁶⁵ a fundamental intrinsic value described by Aristotle, among others.¹⁶⁶ Under this rationale, a Supreme Court (or lower court) espousing the comparative enterprise will function not only as an adjudicator, but also as an educator,¹⁶⁷ or analyst. In this way, comparative law rises to an internal ethos, or self-sustaining motivating force, in contrast to a purely determinate tool to be used as a means to an end.¹⁶⁸

¹⁶² Tushnet, *supra* note 15, at 1307 (applying this concept to comparative constitutional law); *see also* CLIFFORD GEERTZ, *LOCAL KNOWLEDGE* 57 (1983) (noting that foreign practices can provide a spotlight). Of course, mirrors not only provide a reflection, but allow the observer to self-identify blemishes and other markings on herself, a parallel equally applicable to the legal context and foreign law. *See* Knop, *supra* note 117, at 531 (citing Mayo Moran, *Talking About Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech*, 6 WIS. L. REV. 1425, 1513 (1994) (“What always seemed simple and natural becomes, through force of comparison, complex and problematic.”)).

¹⁶³ Bahdi, *supra* note 92, at 575, 584 (applying the above rationale to international law and noting that introspection plays into the persuasive nature of foreign sources as reference to these authorities occurs “because [such authorities] reflect domestic norms and not because they oblige the nation in any way” thus creating “spaces for judicial freedom”).

¹⁶⁴ The imaging powers of mirrors and x-ray machines also illustrate the concept that ready-made assumptions (about our health, for example) are much more complex than what is superficially apparent. As phrased by Bertrand Russell: “In daily life, we assume as certain many things which, on a closer scrutiny, are found to be so full of apparent contradictions that only a great amount of thought enables us to know what is that we really may believe.” Russell, *supra* note 160, at 10. Foreign authority, thus, can expose the apparent contradictions and complexities of our domestic law, which in turn leads to an internal reassessment through a greater amount of thought.

¹⁶⁵ Barak, *supra* note 80, at 110.

¹⁶⁶ *See* ARISTOTLE, *THE METAPHYSICS* 11 (John H. McMahon trans., Prometheus Books 1991) (“All men by nature are actuated with the desire of knowledge.”).

¹⁶⁷ *See, e.g.*, Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961, 965 (1992).

¹⁶⁸ *See, e.g.*, Mathias Reimann, *The End of Comparative Law as an Autonomous Subject*, 11 TUL. EUR. & CIV. L.F. 49, 60 (1996).

The impact of the increase in a nation's legal self-awareness is not felt just at home, but has consequences on the international arena. The interlocation of international law materials can act as a signal to the international community that the nation that is willing to be persuaded from abroad has earned itself a rightful place among the community of nations. As noted by one commentator:

Globalized self-awareness reflects a judicial desire to be accepted by an international community. This desire for acceptance betrays itself most clearly when judges invoke the notion of "civilization." Judgments across jurisdictions proclaim the desire to be part of a "civilized" world of judgment. The concept of civilization remains, of course, inherently value laden and relational—one is not "civilized" in isolation of others. Rather, the notion of being "civilized" requires one to live up to certain standards that are external to one's self; it signals a desire for participation in and acceptance by a community that has the power to define the standards of acceptance.¹⁶⁹

Of course, acceptance into the community of nations (or at least within the community referenced in the quotation above that calls itself "civilized" from a Western viewpoint) can come at any time in the life a particular nation. Thus, in the case of post-apartheid South Africa, the Supreme Court of that country has made it clear that the use of foreign law in domestic decisionmaking serves the purpose of announcing the arrival of the new South Africa to the world.¹⁷⁰ Put another way, the judge of this emerging democracy signals, through the use of foreign law, that his legal "culture is already open to learning from experience elsewhere."¹⁷¹ Citing to foreign law therefore becomes a way of enhancing the product to a specific audience.¹⁷²

This self-defining form of self-awareness used to announce oneself to the world is not confined to nations but is equally applicable to institutional bodies. Hence the European Court of Justice and the European Court of Human Rights have enhanced each other's standing by persistently referencing each other's decisions.¹⁷³ The increasing reliance by these bodies on

¹⁶⁹ Bahdi, *supra* note 92, at 591.

¹⁷⁰ See *S v. Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.).

¹⁷¹ Tushnet, *supra* note 15, at 1304.

¹⁷² See, e.g., Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499, 502 (2000) (discussing how judges have made efforts to use human rights law as a "distancing device" to settle disputes without appearing to rely on personal taste or political judgment).

¹⁷³ See Helfer & Slaughter, *supra* note 105, at 326 (explaining that the constant cross-referencing of decisions enables comparative law to function as a tool to enhance self-legitimacy); see also Thijmen

international sources as a self-legitimizing force indicates that self-definition might not necessarily commence at the beginning of a new era (such as the birth of the post-apartheid South African state), but can occur in the middle of an ongoing process.¹⁷⁴ In such instances, comparative analysis has a “redemptive” character,¹⁷⁵ and encompasses a search for a collective identity that encompasses a historical perspective that attempts to assess the question of “where we come from” in contemporary and forward-looking terms.

G. *Impact on the Rest of World*

One of the staples of the United States’s success in the world in terms of its influence on other countries has been its ability to reshape other nations in its image.¹⁷⁶ This reshaping ability of the United States is active in numerous international spheres such as international relations and international trade.¹⁷⁷ Furthermore, the legal arena has similarly been a theater in which the United States has “stepped up [its] role abroad in spreading the gospel about the virtues of the American legal system.”¹⁷⁸ Continuing with the biblical parallel, it becomes apparent that the most effective way for “spreading the gospel” is to practice what one preaches. Thus, foreign nations are to be most impressed and influenced by an American legal system that is engaged within a judicial dialogue with other nations (through the use of comparative law)¹⁷⁹ in the same way that engagement in international relations promotes both stability and

Koopmans, *The Birth of European Law at the Crossroads of Legal Traditions*, 39 AM. J. COMP. L. 493, 505 (1991) (arguing that it is comparative reasoning which has increased the European Court of Justice’s standing by force of the intellectual prowess that such reasoning involves).

¹⁷⁴ For example, the Treaty of Rome, which established the framework of the European Economic Community (the precursor to the European Union), was negotiated and approved by sovereign states without moving toward European “political-decisional-procedural” integration. J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2410 (1991). However, in time, the Treaty of Rome was judicially converted (to a certain extent, through comparative reasoning) into a more “constitution-like” document. *See id.* at 2403–31 (detailing the “constitutionalization” of the community legal structure).

¹⁷⁵ *See* Ackerman, *supra* note 139, at 794–95.

¹⁷⁶ Michael H. Hunt, *Ideology of National Greatness and Liberty*, in MAJOR PROBLEMS IN AMERICAN FOREIGN POLICY 7, 10 (Thomas G. Patterson ed., 3d ed. 1989).

¹⁷⁷ *See, e.g.,* AKIRA IRIYE, *ACROSS THE PACIFIC: AN INNER-HISTORY OF AMERICAN-EAST ASIAN RELATIONS* 335–37 (2d ed. 1991) (describing how the United States’s use of Cold War defense treaties in East Asia allowed South Korea, Taiwan, and Japan to focus on developing capitalists economies and how internal political stability resulted in domination by leaders committed to a U.S. alliance); Hunt, *supra* note 176.

¹⁷⁸ Abramson & Fischer, *supra* note 103, at 278 (commenting about the disconnect between this “spreading the gospel” attitude and American lawyers’ and judges’ reluctance to venture outside their borders to look for answers to domestic legal issues).

¹⁷⁹ If there be any doubt of the potential reach and impact of U.S. court decisions in the world, one might only need to read the words of Justice L’Heureux-Dube of the Supreme Court of Canada. *See* L’Heureux-Dube, *supra* note 88, at 19 (showing how U.S. Supreme court decisions have influenced the Canadian courts).

security for the United States.¹⁸⁰ From this perspective, the reasons for participating in a global enterprise of comparative analysis track those for partaking in the creation of customary international law. In particular, the United States, by being the center of creating customary international law will impact and shape such law, and not abdicate its responsibility to less-than-trustworthy regimes.¹⁸¹

The other side of the coin is represented by the consequences for the United States if it decides to forego the increasing judicial conversation that is taking place between courts of different countries. The failure of U.S. courts to engage in this enterprise “weakens America’s voice as a principled defender of human rights around the world and diminishes America’s moral influence and stature.”¹⁸² In fact, because of the raised profile of the United States in the world, its actions are routinely more heavily scrutinized than those of other nations, and any notion of the United States disengaging from international dialogue, or behaving in a manner that is considered inappropriate by the international community, results in a greater diminution of influence than if those same actions were to be performed by another nation.¹⁸³ This diminution of influence is already beginning to take its course, in large part due to the current Supreme Court’s predominantly regressive jurisprudence that has shown hostility to ideas and authority that originate from abroad.¹⁸⁴ Thus, even though historically the United States has provided, through its Constitution, inspiration to many fledgling democracies,¹⁸⁵ “the recent direction of United States constitutional jurisprudence has led most constitution-makers to seek alternative models.”¹⁸⁶ Unfortunately, the United States is increasingly used by

¹⁸⁰ See Michael Byers, *International Law and the American National Interest*, 1 CHI. J. INT’L L. 257, 257 (2000).

¹⁸¹ See *The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation*, 114 HARV. L. REV. 2049, 2061–62 (2001).

¹⁸² Roth, *supra* note 151, at 347.

¹⁸³ For example, segregation had a significant negative impact on the United States’s relationships with other countries. See MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS* 100 (2000). Therefore, because “[a]n international pariah becomes far less influential in the international sphere . . . the United States certainly wants to retain a leading role in the creation of international law.” Steven R. Swanson, *The Vexatiousness of a Vexation Rule: International Comity and Antisuit Injunctions*, 30 GEO. WASH. J. INT’L L. & ECON. 1, 11 (1996).

¹⁸⁴ See Ginsburg, *supra* note 140; see also Adam Liptak, *American Exception: U.S. Court is Now Guiding Fewer Nations*, N.Y. TIMES, Sept. 18, 2008, <http://www.nytimes.com/2008/09/18/us/18legal.html>.

¹⁸⁵ See generally Albert Blaustein, *The Influence of the United States Constitution Abroad*, 12 OKLA. CITY U. L. REV. 435 (1987) (providing a historical overview of the U.S. Constitution’s influence on a number of legal systems around the world, including upon the democracies of France, Japan, and India).

¹⁸⁶ Heinz Klug, *Model and Anti-Model: The United States Constitution and the “Rise of World Constitutionalism,”* 2000 WIS. L. REV. 597, 598.

courts of other nations as a “counter-example” because “as a global constitutionalism begins to flourish, this failure to engage [by the United States Supreme Court (in particular)] threatens increasingly to marginalize the experience of the constantly evolving United States Constitution that was once the inspiration of all constitutionalists.”¹⁸⁷

Concerns about the reputation of the United States’s legal system similarly motivate an integration of comparative law within American jurisprudence. Reputation is an important component of a nation’s ability to function on the international stage, and historically, the United States, through its international leadership and its “commitment to the rule of law and to the betterment of the human situation,” obtained a reputation that drew other nations towards adopting its values and outlook.¹⁸⁸ But reputation is a characteristic that needs constant feeding, and resting on its past laurels, or worse, showing disinterest or contempt for the international stage,¹⁸⁹ will result in long-term damage to the United States’s reputation (which takes a long time to rebuild), with the consequent diminution of its ability to impact other nations.¹⁹⁰ By showing willingness to consult legal ideas derived from international law principles, courts in the United States can go some way towards increasing their clout on the international stage, with the consequent improvement of the United States’s international reputation on the whole. Ultimately, it is in the interest of the United States to do so.

Nevertheless, the “pursuit of self-interest is tempered by recognition of the legitimate interests of other players and a desire to encourage reciprocal behavior.”¹⁹¹ That is, because of the assured interaction between the United States (either through its institutions or its citizens) and foreign countries in the future, the United States would want to guarantee itself a modicum of treatment equal to the level of treatment such foreign countries (or their

¹⁸⁷ *Id.* at 607, 616.

¹⁸⁸ See Byers, *supra* note 180, at 259.

¹⁸⁹ Such contempt was exhibited by the U.S. Supreme Court when it refused to follow (as a matter of persuasive authority) the suggestion of the ICJ, which ruled that Virginia violated the Vienna Convention on Consular Relations when it failed to inform a foreign death-penalty defendant of his consular rights. See *Breard v. Greene*, 523 U.S. 371, 375 (1998).

¹⁹⁰ For instance, “a decision to violate international law will increase today’s payoff but reduce tomorrow’s” with respect to the effect of such decision on the reputation of the country undertaking such decision. Guzman, *supra* note 111, at 1849.

¹⁹¹ Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907, 1920 (1992).

citizens) would receive in the United States.¹⁹² Thus, reciprocity, assisted by “transjudicial communication,”¹⁹³ gives a regime a “longer shelf life”¹⁹⁴ as it is helped along by international cooperation (or non-interference) of foreign nations.

Many scholars have noted that the current lack of reciprocity (personified by the reticence of U.S. courts to participate in the comparative enterprise) is not going unnoticed in international bodies and foreign countries.¹⁹⁵ International judges too have noticed this retrenchment by the U.S. Supreme Court and its failure to cite international sources, particularly from those international tribunals that referred, or used to refer, to the U.S. Supreme Court’s own decisions, thereby noting that (through reciprocity) those same international tribunals are going to rely on the U.S. Supreme Court’s decision with less and less frequency.¹⁹⁶ This attitude is exemplified by a Canadian Supreme Court decision preventing the extradition from Canada to the United States of two defendants who faced the death penalty.¹⁹⁷ It cited, among other international authorities, Justice Breyer’s dissent in *Knight v. Florida* in concluding that the death penalty was being phased out.¹⁹⁸

The need to provide reciprocal treatment to other nations of the world has been exacerbated by the fact that the world has become more interconnected, and consequently, domestic law and activity increasingly have international

¹⁹² This might be referred to as the “golden rule” rationale that is similar to the classic formulations of comity even though it has been argued that “comity must mean something more than a ‘golden rule’ for private international law if it is to retain the character of a legal doctrine.” Joel R. Paul, *Comity in International Law*, 32 HARV. J. INT’L L. 1, 11 (1991). Justice Ginsburg specifically identifies comity and a “spirit of humility” as reasons for engaging in comparative constitutionalism. Ginsburg, *supra* note 140, at 10.

¹⁹³ See David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 571 (2001). See generally Slaughter, *supra* note 113.

¹⁹⁴ See G. JOHN IKENBERRY, *AFTER VICTORY: INSTITUTIONS, STRATEGIC RESTRAINT, AND THE REBUILDING OF ORDER AFTER MAJOR WARS* 69 (2000).

¹⁹⁵ See, e.g., John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545, 550 (1995) (commenting that U.S. courts treat the abortion issue as though it were a unique problem to the United States); Gerald L. Neuman, *Casey in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany*, 43 AM. J. COMP. L. 273, 274 n.4 (1995) (noting that unlike U.S. courts, German courts pay attention to other countries’ constitutional decisions).

¹⁹⁶ See, e.g., Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 561 (1988) (making the same argument vis-à-vis foreign courts and pointing out that, although the United States has tried to export its interpretation of human rights overseas, its failure to import foreign interpretation of these rights has reduced its influence overseas).

¹⁹⁷ *United States v. Burns*, [2001] 1 S.C.R. 283 (Can.).

¹⁹⁸ *Id.* para. 122. Contrary to the *Knight* majority opinion that rejected the very notion of comparative analysis, *Burns* invoked foreign authority to question the constitutionality of the death penalty as applied in that particular instance.

consequences, and vice versa.¹⁹⁹ As a result of this interconnection, the United States has demonstrated that it holds no reservations to imposing laws and regulations over activities occurring abroad that supposedly have effect within its territory.²⁰⁰ It seems inconsistent to advocate a one-way ratchet approach to the effects of globalization that allows for exports but is resistant to imports, particularly when imports serve the same interests as do the exports. In fact, this excessive nation-centric view of the world, with the premise that any legal thought of any importance can only originate from the United States, seems largely obsolete in the new world order, and has already been rejected by the United States in areas such as international trade.²⁰¹ Like recent developments in the area of international trade, the use of international law as persuasive authority for domestic cases merely acknowledges today's global reality and serves the United States by offering reciprocity to other nations, thus enhancing its stature on the international legal stage.

H. Conclusion

Comparative analysis, like other legal disciplines, draws its strength from its normative justifications and their validity. This Part has described what various commentators have identified as the major goals (both intrinsic and instrumental) that the comparative practice serves for the United States. On the whole, advocates of the comparative enterprise tend not to fall into the same trap as do the formalist detractors of the practice, and concede that there are no "one-size-fits-all" uses for this discipline. Indeed, there is a general agreement, that one of the fundamental precepts of comparativism is its fluidity, meaning its functioning in a persuasive role, rather than a binding one.²⁰² Hence, the normative justifications identified above will not always all be present in cases in which comparative analysis might be appropriate, and, in many instances, will not be present at all, thus obviating any need for such analysis.

¹⁹⁹ See Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1672 (1997) (quoting Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 130) (stating that "[a]s integration increases, the 'effect' that local action will have beyond its own local border increases").

²⁰⁰ See, e.g., BEDERMAN, *supra* note 22, at 176–77 (2001) (discussing the "effects doctrine" and the extraterritorial application of U.S. antitrust laws).

²⁰¹ For example, the United States has seen it to be in its interest to abide by, and push for enforcement of, international trade laws through its membership in the World Trade Organization. *The World Trade Organization*, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/wto-multilateral-affairs/-world-trade-organization> (last visited Mar. 12, 2011).

²⁰² See, e.g., Daniel H. Foote, *The Roles of Comparative Law: Inaugural Lecture for the Dan Fenno Henderson Professorship for East Asian Legal Studies*, 73 WASH. L. REV. 25, 36 (1998).

However, the overall fact remains that the United States, through its now hundred-year old policy of international engagement, has assisted in creating a world-wide community premised on increasing global cooperation and integration. Through its conduct, the United States has, in large part, reaped the benefits of this participation, while other countries might not feel the same way. But “participat[ion] in a community over many years . . . creat[es] . . . a sense of entitlement to some benefits of community membership and a moral obligation based on . . . reasonable expectations.”²⁰³ In other words, an international system (including its legal component) largely shaped by the United States imposes a major responsibility on its creator to be receptive to the ideas originating from other countries that could help the operation of that system.

If all other reasons fail to convince, “[a]t the very least . . . American judges should write . . . decisions with a conscious awareness that decisions from abroad, if considered, might complicate and challenge our analyses.”²⁰⁴ As observed by Justice L’Heureux-Dube of the Supreme Court of Canada, “[i]f we continue to learn from each other, we as judges, lawyers, and scholars will contribute in the best possible way to the advancement not only of human rights but to the pursuit of justice itself, wherever we are.”²⁰⁵

III. PAST REFERENCES TO INTERNATIONAL LAW

Having identified the possible sources of international law that can be used as an aid to interpret the U.S. Constitution, and having posited several normative theories on which the comparative enterprise relies, it becomes incumbent in proposing a methodology for the appropriate selection of international law within the context of constitutional interpretation, to take a brief look as to what the U.S. Supreme Court has done lately in the matter. Because this Article proposes a methodology to be employed prospectively, only the most recent examples of the Court’s use of international law are

²⁰³ Gerald P. Lopez, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615, 696 (1981) (referring to Mexican immigrants’ participation in the community life of the United States (with the tacit approval of the official domestic authorities)).

²⁰⁴ Abramson & Fischer, *supra* note 103, at 284–85, 287 (stating that consultation of foreign law leads to a deeper understanding; comparing such law to “superstar amicus briefs” in that foreign decisions offer otherwise unavailable viewpoints from the world’s best legal minds).

²⁰⁵ L’Heureux-Dube, *supra* note 88, at 40.

relevant to the discussion. Moreover, other articles have already given detailed historical accounts of the use of foreign and international law in this context.²⁰⁶

Some recent members of the U.S. Supreme Court have not demonstrated much reticence in their willingness to consult international law as an aid to constitutional interpretation. Because of the high-profile cases where these references have occurred, these forays have been keenly noticed.²⁰⁷ Some Justices have also spoken about this practice off the bench. Justice Ginsburg, for example, in two recent articles, decried the “island” or “lone ranger” mentality that sometimes infects domestic jurists and noted that “[w]e are the losers if we do not both share our experience with, and learn from others.”²⁰⁸ Similarly, Justice O’Connor indicated that she was in favor of the U.S. Supreme Court citing decisions of the European Court of Justice.²⁰⁹

The recent attention paid to this particular use of international law, while important qualitatively, has not borne fruit in any quantitative manner. In other words, while the comparative use of international law has occurred in extremely contentious and highly visible cases, the total sample of recent cases where the Court has called upon international law as persuasive authority is quite small.²¹⁰ Moreover, in those select instances when the Court has opined on a constitutional provision by seeking insight from materials originating outside the United States, those materials have overwhelmingly been from foreign individual states, rather than international law.²¹¹ In fact, most often, international law is given an undifferentiated and uncontextualized treatment

²⁰⁶ See, e.g., Calabresi & Zimdahl, *supra* note 2; see also Glensy, *Which Countries Count?*, *supra* note 13, at 361–87.

²⁰⁷ See, e.g., Martin S. Flaherty, *Judicial Globalization in the Service of Self-Government*, 20 ETHICS & INT’L AFF. 477, 478 (2006).

²⁰⁸ Ginsburg, *supra* note 140, at 1, 8; see also Ruth Bader Ginsburg, *Looking Beyond our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL’Y REV. 329, 329 (2004).

²⁰⁹ See Elizabeth Greathouse, *Justices See Joint Issues with the EU*, WASH. POST, July 9, 1998, at A24.

²¹⁰ See generally Mark V. Tushnet, *Referring to Foreign Law in Constitutional Interpretation: An Episode in the Culture Wars*, 35 U. BALT. L. REV. 299 (2006) (outlining the limited use of international and foreign law in Supreme Court opinions).

²¹¹ E.g., *Roper v. Simmons*, 543 U.S. 551, 554 (2005) (pointing out that the United States is the only country that gives official sanction to the juvenile death penalty, making several comparisons to foreign and international law); *Thompson v. Oklahoma*, 487 U.S. 815, 815, 830 n.34 (1988) (referring to Anglo-American and Western European legal traditions, in deciding a death-penalty appeal while only referencing international law in a footnote).

by being thrown in with foreign domestic law.²¹² Thus, from within the small sample of cases that do persuasively rely on foreign and international law, the international law component represents a minority within a minority. Bradley has remarked that “[t]he Court has treated . . . international materials as evidence that may be relevant to the interpretation of vague or uncertain constitutional provisions.”²¹³ This observation, while necessarily accurate, does not go very far in explaining either the normative foundation of such use, or a methodological grounding in this context. As is discussed below, the inability to make more profound generalizations about the Court’s current use of international law as a constitutional interpretative aid is more a result of the Court’s rather ad hoc approach, than a failure of the commentators to spot a substantial theoretical trend.

A. *Eighth Amendment Cases*

Probably the most frequent use of international law as persuasive authority comes within the ambit of Eighth Amendment jurisprudence. This is because, from the dawn of modern cruel-and-unusual-punishment doctrine, “[t]he climate of international opinion concerning the acceptability of a particular punishment” has been a “not irrelevant” part of the analysis.²¹⁴ Indeed, the Court has repeatedly noted that that it has “recognized the relevance of the views of the international community” to determine whether a particular form of punishment comports with the contemporary understanding of the Eighth Amendment.²¹⁵ This foray into the realm of non-U.S. authority stems from the framing of the analysis of Eighth Amendment claims which are evaluated with an eye to “evolving standards of decency” that are the hallmarks of “a maturing society.”²¹⁶ As such, the Court has continuously opined that such standards take into account international opinion and therefore, by “society,” it is intended “all humanity” rather than a more insular American outlook.

From that vantage point, several modern cases interpreting the confines of the Eighth Amendment reference international materials—albeit most do so

²¹² See BEDERMAN, *supra* note 22, at 6–7 (2001) (arguing that international law should be seen as a separate and distinct legal system, and that the myth that international law can be grouped with domestic law in a given state should be dispelled).

²¹³ Curtis A. Bradley, *The Federal Judicial Power and the International Legal Order*, 2006 SUP. CT. REV. 59, 93.

²¹⁴ See *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (quoting *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977)).

²¹⁵ See *Thompson*, 487 U.S. at 830 (citing *Trop v. Dulles*, 356 U.S. 86, 102 (1958)).

²¹⁶ See *Trop*, 356 U.S. at 101.

without much contextualizing and so scantily that but for scathing dissents that draw attention to them, they would hardly be noticed. Thus, in *Thompson v. Oklahoma*, where the Court ruled that the death penalty was an unconstitutional violation of the Eighth Amendment as applied to persons who were under the age of sixteen when they perpetrated their crime, the Court, in a footnote, noted that “three major human rights treaties explicitly prohibit juvenile death penalties.”²¹⁷ The three treaties that the Court then referred to were the International Covenant on Civil and Political Rights (“ICCPR”),²¹⁸ the American Convention on Human Rights,²¹⁹ and the Geneva Convention Relative to the Protection of Civil Persons in Time of War.²²⁰

The only analysis by the Court, if it can be characterized as such, in citing these treaties was to note whether they were signed or ratified by the United States, and to characterize them as “major.” Both of these considerations are the tips of the iceberg of very important methodological approaches to the persuasive use of international law within the context of constitutional interpretation and offer tiny snippets into the Court’s thinking on the matter. However, only a psychic can truly know what the Court was attempting to convey with the notations of signing or ratification of the treaties and their description as “major.” Nevertheless, the notion of some form of imprimatur by the United States of an international treaty relates to the expressed opinion of some part of the U.S. government of which the Court should take account.²²¹ The identification of the three treaties as “major” is presumptively an attempt to encapsulate in one word the notion that these treaties represent a wide consensus within the international community and therefore portray a positive established norm.²²²

In the next case to tackle the juvenile death penalty, this time as applied to those who had committed their crime under the age of eighteen, the Court reached the opposite conclusion—such sentences were constitutional. In *Stanford v. Kentucky*,²²³ it was primarily the dissent that drew on international

²¹⁷ See *Thompson*, 487 U.S. at 831 n.34.

²¹⁸ International Covenant on Civil and Political Rights art. 6(5), *opened for signature* Dec. 16, 1966, 1966 U.S.T. 521, 999 U.N.T.S. 171 (adopted by the General Assembly of the United Nations on December 16, 1966) [hereinafter ICCPR].

²¹⁹ American Convention on Human Rights art. 4(5), Nov. 22, 1969, O.A.S.T.S. 36, 1144 U.N.T.S. 123.

²²⁰ Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 68, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

²²¹ This aspect will be discussed in further detail in Part IV.B.3, *infra*.

²²² This aspect will be discussed in further detail in Part IV.B.2, *infra*.

²²³ *Stanford v. Kentucky*, 492 U.S. 361 (1989).

materials in its attempt to buttress the majority's argument. In fact, the dissent reiterated almost verbatim the illustrative footnote of *Thompson* by stating that "In addition to national laws, three leading human rights treaties ratified or signed by the United States explicitly prohibit juvenile death penalties."²²⁴ In addition to the three treaties identified by *Thompson*, the *Stanford* dissent also added a resolution to the same effect that had been passed by the UN Economic and Social Council, endorsed by the General Assembly of the UN, and adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders.²²⁵ Although the Court, as it usually does in these circumstances, offered no contextual reasoning for why it was calling upon that particular source of international law, the addition of the resolution is particularly interesting. This is because the resolution is not a treaty, nor does it arguably rise to the level of customary law, and therefore represents an example of international law of the soft law variety. Its interpolation in the dissent's opinion might indicate that the prohibition on sentencing juveniles to death, while not necessarily an established norm of international law, is an emerging global norm to which the United States should subscribe.²²⁶

The most recent expostulations on the applicability of the Eighth Amendment to two different types of punishments also contain the most developed uses of international law as applied to juveniles.²²⁷ In *Roper v. Simmons*, the Court overruled *Stanford* and declared that the execution of individuals who had committed their crimes under the age of eighteen was an unconstitutional violation of the Eighth Amendment.²²⁸ In a section devoted entirely to the persuasive use of foreign and international law, the majority opinion cited favorably the same treaties identified in the *Thompson* majority

²²⁴ *Id.* at 389–90 (Brennan, J., dissenting).

²²⁵ *See id.* at 390 n.10 (noting that the resolution included the safeguard that "[p]ersons below 18 years of age at the time of the commission of the crime shall not be sentenced to death").

²²⁶ This aspect will be discussed in further detail in Part IV.B.2, *infra*.

²²⁷ Between *Stanford* and the two next cases about to be discussed, there were other examples of the use of international law similar in quantity and quality to those illustrated in *Thompson* and *Stanford*. In *Atkins v. Virginia*, 536 U.S. 304 (2002), relying in part on international authority, the Court ruled that it was unconstitutional to execute a person who was mentally challenged. *Id.* at 321. And in *Knight v. Florida*, 528 U.S. 990 (1999) (denying petition for certiorari), Justice Breyer dissented from the denial of certiorari in a case which presented the issue of whether a long delay between sentencing a person to death, and the execution of that sentence, constituted cruel and unusual punishment under the Eighth Amendment. *See id.* at 993 (Breyer, J., dissenting). In arguing that the Court should review the case on its merits, Justice Breyer referenced the United Nations Committee on Human Rights, the European Convention on Human Rights, and the Universal Declaration of Human Rights. *See id.* at 994.

²²⁸ *Roper v. Simmons*, 543 U.S. 551, 574, 579 (2005).

and *Stanford* dissent and added to them the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.²²⁹ The separate dissent authored by Justice O'Connor is noteworthy because, notwithstanding the fact that she disagreed with the outcome reached by the majority, she wrote separately from the other dissenters to confirm that foreign and international law have a role in Eighth Amendment analysis, because the inquiry required in this context "reflects the special character of the Eighth Amendment, which, as the Court has long held, draws its meaning directly from the maturing values of civilized society."²³⁰ Justice Scalia's dissent reiterates his usual creed against using international law to interpret any part of the U.S. Constitution, but is very interesting for its prescience.²³¹ In referring to the majority's use of the UN Convention on the Rights of the Child, Justice Scalia noted that the treaty "prohibits punishing [children] with life in prison without the possibility of release," and added that "get[ting] in line with the international community" would surely mean adopting that section of the treaty as well—a proposition that Justice Scalia characterized as giving "little comfort."²³²

Justice Scalia's prediction was of an accuracy that would have made Nostradamus proud. Merely five years after the decision in *Roper*, the Court decided *Graham v. Florida*, and held that the punishment of life imprisonment without the possibility of parole for juveniles who had not committed murder was an unconstitutional violation of the Eighth Amendment.²³³ The majority cited exactly the same article of the same treaty that Justice Scalia had identified five years earlier, stating that this treaty prohibited the imposition of "life imprisonment without possibility of release . . . for offences committed by persons below eighteen years of age."²³⁴ Even though the majority noted that there was "no international legal agreement that is binding on the United States," that prohibited "life without parole for juvenile offenders," it went on to assert that such a fact missed the mark because the inquiry is not about the binding (or not binding) nature of international law, but rather whether the

²²⁹ See *id.* at 575–77; see also Organization of African Unity, African Charter on the Rights and Welfare of the Child, entered into force Nov. 29, 1999, OAU Doc. CAB/LEG/24.9/49; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

²³⁰ *Roper*, 543 U.S. at 604–05 (O'Connor, J., dissenting).

²³¹ See *id.* at 607 (Scalia, J., dissenting).

²³² *Id.* at 623. Justice Scalia also consulted international law in the negative by pointing out several examples of laws that were not consonant with the U.S. legal system, and thus decrying the supposed selective nature of the Court's consultations with such law. See *id.* at 624–27.

²³³ *Graham v. Florida*, 130 S. Ct. 2011 (2010).

²³⁴ *Id.* at 2034.

punishment being examined by the Court comports with its contemporary understanding of the Eighth Amendment.²³⁵ In the *Graham* case, such punishment did not.

Taken together, *Roper* and *Graham* represent the high point of the use of international law as persuasive authority within the context of Eighth Amendment cruel-and-unusual punishment analysis. Both cases devote more length to the use of foreign and international authority than any of their predecessors (albeit the “foreign” part is significantly longer than the “international” part). And qualitatively, the analyses also reflect a deeper analytical focus than do many of the cases that also deploy this comparative methodology. Thus, both *Roper* and *Graham* offer a comprehensive introduction into the reasoning of the Court for embarking on its international voyage: that the United States is part of a community of nations in which it should share, from a normative standpoint, a certain commonality when it comes to how it treats its convicted criminals. Similarly, both cases do not select obscure notions of international doctrine, but well-known treaties that form the backbone of contemporary international law. Moreover, both cases reiterate the normative comparative ethos that international law is there to serve as a method of persuasion, and not one of forced compliance.

B. Other Cases

Before turning to the proposed framework for the selection of international law, it is worth examining two recent forays by the Supreme Court into the persuasive use of international law in cases that did not involve the Eighth Amendment. While, as noted above, the framing of modern Eighth Amendment jurisprudence is a natural fit for the use of international law, other U.S. constitutional doctrines might not be so amenable to this interpretative methodology. Nevertheless, the Court throughout history has used international law to interpret other constitutional provisions, with a particular focus on the Equal Protection and Substantive Due Process clauses.²³⁶ This is because, like the standards announced for the Eighth Amendment, the Equal Protection and Substantive Due Process clauses embody norms such as

²³⁵ *Id.* Justice Thomas, in dissent, confined his rejection of the use of international law in this context to a footnote noting correctly that his objection to this practice had been adequately explained in previous cases delineating the contours of the Eighth Amendment. *See id.* at 2053 n.12 (Thomas, J., dissenting).

²³⁶ *See, e.g.,* *Palko v. Connecticut*, 302 U.S. 319, 326 n.3 (1937) (looking to status of compulsory self-incrimination in continental Europe); *Muller v. Oregon*, 208 U.S. 412, 419 n.1 (1908) (looking to European labor laws in post-*Lochner* Due Process case).

fairness and liberty “that transcend[] borders,” and therefore lend themselves to a certain universality of approach.²³⁷ Indeed, Substantive Due Process analysis tracks somewhat that of the Eighth Amendment by seeking to protect those practices that are “implicit in the concept of ordered liberty.”²³⁸ Justice Scalia, albeit mockingly and disapprovingly, made a similar point when attempting to counter Justice O’Connor’s approval of the use of international law within the context of Eighth Amendment jurisprudence that she characterized as having a “distinctive character” that made it especially adept to the use of such non-U.S. authority, by noting that “[n]othing in the text [of the Eighth Amendment] reflects such a distinctive character—and [the Court has] certainly applied the ‘maturing values’ rationale to give brave new meaning to other provisions of the Constitution, such as the Due Process Clause and the Equal Protection Clause.”²³⁹ Notwithstanding Justice Scalia’s yearning for the jettison of “maturing values” jurisprudence that links the Eighth Amendment to the Fifth and Fourteenth Amendments, it does not appear that the Court is intent on abandoning this form of analysis at least within these specific constitutional contexts.

The most recent persuasive reliance on international law in the context of an equal protection case came in *Grutter v. Bollinger*,²⁴⁰ where the Court upheld The University of Michigan Law School’s affirmative action program.²⁴¹ In her concurrence, Justice Ginsburg noted that the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women both supported the proposition that affirmative action programs are remedial in nature and must be reviewed periodically so that they can be phased out once the goals of equality have been fulfilled.²⁴² No real reason for the consultation with these two international treaties was given, nor was any qualification other than the notation that the first of these two treaties was ratified by the United States.

A fuller use of international law occurred in *Lawrence v. Texas*.²⁴³ In *Lawrence*, the Court invalidated a Texas statute that criminalized the sexual

²³⁷ See Glensy, *Which Countries Count?*, *supra* note 13, at 382.

²³⁸ *Palko*, 302 U.S. at 325.

²³⁹ *Roper v. Simmons*, 543 U.S. 551, 627 n.9 (2005) (Scalia, J., dissenting) (citation omitted).

²⁴⁰ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

²⁴¹ *Id.* at 343.

²⁴² See *id.* at 344 (Ginsburg, J., concurring).

²⁴³ *Lawrence v. Texas*, 539 U.S. 558 (2003).

conduct of two consenting adults of the same sex as being an unconstitutional violation of the Due Process Clause of the Fourteenth Amendment.²⁴⁴ The international law references came in rebuttal to the arguments made in the case *Lawrence* was overruling, *Bowers v. Hardwick*,²⁴⁵ where Chief Justice Burger, in a concurrence, noted that sodomy was universally condemned and criminalized in all Judeo-Christian Western civilizations.²⁴⁶ Justice Kennedy, in *Lawrence*, drew on international law to debunk Chief Justice Burger's claim, in *Bowers*, specifically by noting that a case decided by the European Court of Human Rights five full years before *Bowers*, which presented the identical legal question as *Bowers*, had reached the exact opposite result of that which Chief Justice Burger declaimed, to universal approval.²⁴⁷

While Justice Ginsburg in *Grutter* provides only a scintilla of context to her citation of international authority, Justice Kennedy gives us substantial insight into the motivation behind his citations to non-U.S. opinions. In *Lawrence*, international law (of the regional law variety) provided a communing function of linking the U.S. Constitution to the European Convention of Human Rights as well as a counter to the obviously erroneous arguments uttered by Chief Justice Burger in *Bowers*.²⁴⁸ For the *Lawrence* majority, it was not enough to merely rule in favor of the petitioners, but they had to clarify that *Bowers* was being unceremoniously dumped as a colossal error from its inception.²⁴⁹ This could not be clearer in the words of Justice Kennedy: "*Bowers* was not correct when it was decided, and it is not correct today."²⁵⁰ International law was thus used as a universal battering ram to demonstrate the magnitude of *Bowers*'s error.

Notwithstanding the clear motivation of the use of international law in some of the cases illustrated above, there are key aspects of the use of international law exhibited in the Eighth Amendment, the Equal Protection, and Substantive Due Process contexts that raise more questions than answers. First, what is the point in noting frequently whether the United States has

²⁴⁴ *Id.* at 578–79.

²⁴⁵ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

²⁴⁶ *Id.* at 196 (Burger, C.J., concurring).

²⁴⁷ *See Lawrence*, 539 U.S. at 573 (“[T]he decision [of the European Court of Human Rights] is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.”).

²⁴⁸ *Id.* at 576–77 (citing European Court of Human Rights decisions rejecting *Bowers* and stating that the right of homosexuals to engage “in intimate, consensual conduct” is an “integral part of human freedom”).

²⁴⁹ *Id.* at 576 (“In the United States criticism of *Bowers* has been substantial and continuing, disapproving of its reasoning in all respects . . .”).

²⁵⁰ *Id.* at 578.

signed or ratified a particular treaty to which the Court is referring? Does failure of the United States to ratify a treaty signal a dereliction of the duty of the United States that the Court should rectify or does it convey the exact opposite—that the United States purposely seeks to oppose the substance of that treaty? Second, why is it important for the Court to predominantly refer to international law that is encapsulated in large well-known multilateral treaties? Is it to convince itself of the sound policy grounding of such law (thus implying that international law of a murkier provenance might not be perceived as persuasive enough) or is the Court more concerned with highlighting the perceived universality of the same? And last, is the Court's use of international law to be implied as occurring within a framework of repeated interactions—in other words, as part of an ongoing worldwide process of customary international law formation? These are the questions (and some others) that a methodological theory for the use of international law must answer.

IV. A FRAMEWORK FOR THE USE OF INTERNATIONAL LAW

One thing that can be glimpsed from the Court's use of international law as persuasive authority is that such use is usually called upon in what most commentators would characterize as “big” cases. This observation might not be as flip as it sounds because one theory could be that the more important and far-reaching from a constitutional, theoretical, and practical perspective the outcome might be, the more vital it becomes to consult as much relevant persuasive authority as is necessary to be assured of a correct result. Justice Kennedy hinted at such reasoning in *Lawrence* when he justified consultation to international materials by noting that the issue in that case involved “values [that are] share[d] with a wider civilization.”²⁵¹

But a methodological theory based on the relative importance of a particular case seems at best haphazard, and at worst self-serving. Chief Justice Rehnquist emphasized both of these notions observing that in a whole slew of cases where the Court cited international law to interpret the U.S. Constitution, it had “offered no explanation for its own citation[s]” and therefore this lacuna cast a serious doubt about the whole enterprise that he suggested ought to be abandoned outright.²⁵² Clearly, something else is required to give a sounder

²⁵¹ *Id.* at 576.

²⁵² *Atkins v. Virginia*, 536 U.S. 304, 325 (2002) (Rehnquist, C.J., dissenting). The majority opinion held that the imposition of the death penalty on those who were mentally challenged was an unconstitutional violation of the Eighth Amendment. *Id.* at 321 (majority opinion).

normative and methodological strength to this endeavor that can be of service to the members of the high court. After all, when all is said and done about the use of international law, “the task of interpreting [constitutional provisions] remains [the Court’s] responsibility.”²⁵³

A. *A Note on Foreign Law*

It bears repeating that international law is clearly not the only repository of non-U.S. law that can function as an aid to U.S. constitutional interpretation. Foreign law, being the domestic law of other countries, can and does function in a similar role as international law. Indeed, as noted above, the Court cites to both sources seemingly interchangeably and citations to foreign law are substantially more frequent and detailed than those to international law—the latter, in most circumstances, ostensibly appearing as afterthoughts. In other words, foreign and international law are not usually selected nor treated independently of one another within the context of constitutional interpretation.²⁵⁴ But foreign domestic law is inherently different from international law and its structural differences should, from both a normative and practical perspective, be treated differently than international law. These differences ought to be reflected not only in the motivations that go into whether such law should be selected,²⁵⁵ but also how that particular law is selected.

In a previous article, this Author approached the question of methodology of selection as applied to foreign law only. In it, this Author identified three criteria that courts should take into consideration when seeking to consult foreign law in the context of domestic constitutional adjudication: (1) the democratic credentials of the nation from which the law is being sought with a marked preference for those nations whose law is processed from a system of

²⁵³ *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

²⁵⁴ That is not to say that other parties have not already urged the Court to find a purposeful link between the foreign law and the international law it cites. For example, in its amicus brief filed in support of the petitioners in *Lawrence*, Amnesty International noted that both foreign law and international law were perfectly integrated on the matter of the criminalization of consensual adult same-sex activities. See Brief for Mary Robinson of Amnesty International et al. as Amici Curiae Supporting Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02–102), 2003 WL 164151, at *12–13 (specifying that the South African Constitutional Court, the European Court of Human Rights, and the UN Human Rights Committee all had reached a common understanding of privacy rights that encompassed the idea of non-interference into the sexual practices of same-sex consulting adults).

²⁵⁵ See, e.g., Glensy, *Constitutional Interpretation*, *supra* note 13, at 1178 (discussing the considerations that should cause foreign law and international law to be treated differently within the context of constitutional adjudication).

checks and balances that owes its ultimate source of legitimacy to the people; (2) the societal character and culture of the nation from where the proposed law is coming with an eye towards spotting those embedded socio-cultural features that create a commonality between that nation and the United States; and (3) the specific context of the case where the inquiry is into the nature of the doctrine being examined by the Court and whether it shares characteristics that transcend national borders.²⁵⁶

While the above criteria prove workable and very effective in identifying countries from where law can be consulted as persuasive authority as an aid to U.S. constitutional interpretation,²⁵⁷ they prove less useful within the context of international law. The reasons for this are multiple. First, it is difficult to evaluate the process of production of international law from a democratic perspective. There are certain characteristics of international law that appear democratic, but others are decisively not. On the more democratic side are notions that international bodies that promulgate international law only enact such rules when a majority or supermajority of nations agree. Similarly, the process of production of the basic forms of international law are superficially democratic in that bilateral or multilateral treaties are only entered into by consent of the participant nations without coercion, and customary international law is democratic in the sense that it requires a quasi-unanimous organic adherence before a rule ripens into binding status.

However, on the other side of the equation is the fact that not all of the process of international lawmaking is democratic. Even though international law is premised on a notion of juridical equality of all nations,²⁵⁸ in practice, this is a fallacy. For example, the UN Security Council (the chief executive lawmaking body of the UN) functions on an extremely undemocratic model where five nations (who are permanent members of the fifteen nation body) each possess a veto right on any action that the Council could take.²⁵⁹ The UN General Assembly, putatively more democratic, passes resolutions that are

²⁵⁶ See Glensy, *Which Countries Count?*, *supra* note 13, at 361.

²⁵⁷ The criteria do not ignore countries that have a particular outlying jurisprudence in particular areas of the law for specific historical or cultural reasons. Thus, the German restrictions on Nazi symbols and abortion must be viewed in light of the wild abuses of human rights carried out by the Third Reich; the tradition of French secularism must be appreciated in light of the causes of its revolution; the goal of total egalitarianism in democratic South Africa is a response to the vile apartheid regime that preceded the current constitutional structure; and the treatment of indigenous people in the United States, Canada, Australia, and New Zealand all reflect the specific historical relationships between the native populations and the respective governments.

²⁵⁸ BEDERMAN, *supra* note 22, at 52.

²⁵⁹ U.N. Charter arts. 23, 27.

non-binding at their inception but that could ripen into customary international law, but it is not truly democratic in the sense that China and India (with well more than one billion people each) have the same number of votes as countries such as Vanuatu or Tuvalu (Pacific atolls with only tens of thousands of people).²⁶⁰ Moreover, many international bodies with law making capabilities are comprised of countries that have no democratic credentials themselves.²⁶¹ Indeed, it is rare to have international bodies whose total membership are committed to democratic governance such as the European Court of Human Rights—“a body that derives its authority and jurisdiction via the consent of nations, all of which exhibit democratic characteristics.”²⁶² Nevertheless, regardless of the composition of international bodies and their members’ lack of adherence to democratic principles, the promulgation of international law from these sources is valid as is the substance of those rules. Therefore, unlike foreign law, an examination of democratic credentials does not yield anything useful to a court seeking to use international law as a source of persuasive authority.

Socio-cultural commonalities are equally not useful when searching for appropriate international law to use as an aid to constitutional interpretation. While international law might be said to reflect a certain legal culture (although legal culture is only part of the composite of elements that constitutes the totality of a nation’s “culture”),²⁶³ it is difficult to conceive what kind of society international law represents, if any.²⁶⁴ Therefore, aside from the specific context of the case (which is a factor equally applicable to foreign law and international law)²⁶⁵ the other two criteria offered for selection of foreign law do not apply to international law. Hence, different parameters should provide the adequate policy considerations that will form the basis of sound methodological selection factors.

²⁶⁰ See *id.* art. 18.

²⁶¹ For example, the Economist Intelligence Unit has created an index of democracy, assigning states values which reflect “the state of democracy worldwide.” Economist Intelligence Unit, *Democracy Index 2010*, THE ECONOMIST, 1 (Dec. 15, 2010), http://graphics.eiu.com/PDF/Democracy_Index_2010_web.pdf. The values range from zero to ten with a higher score reflecting a more democratic state. Three notable world players scored quite low: North Korea (1.08), Saudi Arabia (1.84), and Iran (1.94). *Id.* at 7–8. All of these countries are members of the World Health Organization. *Countries*, WHO, <http://www.who.int/countries/en> (last visited May 2, 2011).

²⁶² Glensy, *Which Countries Count?*, *supra* note 13, at 444.

²⁶³ See *id.* at 422–24 (analyzing the many component parts of different cultures).

²⁶⁴ Here the concept of “society” is descriptive of present reality rather than normative.

²⁶⁵ See, e.g., Glensy, *Which Countries Count?*, *supra* note 13, at 433–36 (justifying the use of case-specific context in a determination of applicable foreign and international law sources).

B. *The Three-Pronged Analysis*

Consultation with international law has been, in one form or another, part of the fabric of constitutional interpretation in the United States almost since its naissance. As noted by Justice Breyer, the United States is “a Nation that from its birth has given a ‘decent respect to the opinions of mankind.’”²⁶⁶ Chief Justice John Jay saw these references to the law of nations (as international law was known at the time) as a way for the United States to give itself legitimacy as a newly formed nation. He noted “the United States . . . by taking a place among the nations of the earth, bec[a]me amenable to the laws of nations.”²⁶⁷ The role that international law took in the early years of the Court’s jurisprudence was to function as an advisory backdrop against which U.S. decisions had to be squared and reconciled, whenever possible. Thus, “the laws of the United States ought not, if it be avoidable . . . be construed as to infract the common principles and usages of nations.”²⁶⁸ As concisely and famously expressed by Chief Justice John Marshall, “an act of [C]ongress ought never to be construed to violate the law of nations if any other possible construction” exists.²⁶⁹

While these iterations of the use of international law served a very valid purpose for the time in which they occurred, they cannot form the basis for a theory-based methodology for the selection of international law as persuasive authority. The main reason for this is that the early Court’s proposed role for international law was completely undifferentiated—that is it was not context specific, but merely a blanket judicial norm of which the Court, over time, became barely conscious.²⁷⁰ But a reasoned methodology cannot exist in the nether recesses of the judicial mind; rather, it must live in the foreground so there is a cognizance about how it should operate and the possibility of purposely adapting it to changing situations and circumstances. When coupling these considerations with a plausible germinating theory a coherent methodology can emerge.

²⁶⁶ Knight v. Florida, 528 U.S. 990, 995 (1999) (Breyer, J., dissenting) (denying petition for certiorari).

²⁶⁷ Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793).

²⁶⁸ Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 43 (1801).

²⁶⁹ Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

²⁷⁰ After all, rhetorically speaking, how many cases that the Court has decided since *Schooner Charming Betsy* explicitly test the notion whether a particular statutory or constitutional construction comports with, or deviates from, prevalent international law?

1. International Dimension of the Problem

It is an axiom that international law deals with cross-border affairs. Thus it comes as no surprise that there are vast bodies of international law in all forms dealing with topics such as foreign relations, the law of the seas, the conventions of war and the treatment of prisoners, and trade and tariff rules. But, as noted above, international law in the last sixty years has addressed more than extra-national matters but has increasingly concerned the relationships that a state has with its own citizens within its own borders. Moreover, even within traditional areas of international law, such as the substance of the various rights that foreign citizens enjoy when located in a country of which they are not nationals, norms of casual compliance by the host state are giving way to more stringent methods of enforcement so that the impact of international law is felt even in situations where only one sovereign nation is involved. In summary, the subject matter of international law has become more pervasive and has infiltrated legal issues which, until recently, have not had much to do with international law.

Notwithstanding the fact that international law has increased in scope, there are clearly areas of the law it has not reached yet. As a general matter, there are many administrative, structural, and procedural legal aspects about which international law has very little, if anything, to say. So, for example, international law might be silent as to what type of a challenge a welfare recipient should be entitled before having her subsidies curtailed by the state, or there might be nothing in international law that dictates what nutritional information should be printed on food products, or the jurisdictional overlaps inherent in a federal system of government might not appear in the annals of any repository of international law. The fact that international law might speak loudly to certain subjects but whisper or be mute about others leads to part of the first consideration that a court seeking to use international law as persuasive authority to aid in constitutional interpretation should contemplate: that the problem being presented in the case at hand have some sort of international dimension to it. In other words, the issue presented to the court must be of a subject matter that international law covers in some way. This might seem an obvious exhortation, but in certain past cases where the Supreme Court consulted international law, there seemed to be no apparent international connection to the issue being litigated.

However, this is not the end of the equation vis-à-vis the international dimension of the problem. There is a second part that might not seem as self-

evident as consulting international law only in those instances where the subject matter of the controversy is covered by the substantive rules of international law. The second part of this consideration must account for the potential international impact of the decision to be taken by the court. This should be consonant not only with the issue under review, but also with the normative goals of the comparative enterprise illustrated in Part III above. As such, any court that tasks itself with consulting international law as persuasive authority to interpret the U.S. Constitution should only do so after an inquiry into the international ramifications of its decision.

It should be noted that consultation with international materials in these instances does not have to lead to a result that conforms with prevalent international law norms if these norms conflict in an obvious way with the U.S. Constitution. As noted by Justice Scalia, “[T]he basic premise . . . that American law should conform to the laws of the rest of the world—ought to be rejected out of hand.”²⁷¹ As a general rule, Justice Scalia is correct, but of course the suggestion made by proponents of the persuasive use of international law is not that international law should be consulted so that American law can be “conformed” to it, but rather so that any conclusions reached by the court can be “confirmed” by this body of law. As noted very recently by Justice Kennedy, the idea that there is an “international consensus” regarding a particular rule of law to which the United States should be bound “miss[es] the mark” because the inquiry into the substance of international law is to provide for “respected and significant confirmation” of the Court’s conclusions.²⁷²

The notion that a court should examine the international impact of its decisions when referring to international law in the context of constitutional interpretation is not a novelty within Supreme Court jurisprudence. Several doctrines currently employed by the Supreme Court embody this ethos of awareness of international ramifications. Most important of these is comity.²⁷³ Comity is a concept mostly pertinent to private international law cases. Comity is defined as:

[N]either a matter of absolute obligation . . . nor of mere courtesy and good will [b]ut it is the recognition which one nation allows

²⁷¹ *Roper v. Simmons*, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting). Justice Scalia did not distinguish between international law and foreign law in his exhortation.

²⁷² *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010) (quoting *Roper*, 543 U.S. at 572).

²⁷³ Other doctrines that exhibit the same characteristics are the act of state doctrine and the dormant foreign relations preemption doctrine. See Glensy, *Which Countries Count?*, *supra* note 13, at 394.

within its territory to the . . . acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.²⁷⁴

Therefore, comity owes its grounding in a reciprocal norm that forms the root of many policies underlying the comparative enterprise. Indeed, comity is often invoked in cases “in the correct adjudication of which foreign nations are deeply interested . . . [and] in which the principles of the law . . . of nations often form[s] an essential inquiry.”²⁷⁵ Thus, comity represents “the basis of international law, a rule of international law, a synonym for private international law . . . goodwill between sovereigns . . . reciprocity, or ‘considerations of high international politics concerned with maintaining amicable and workable relationships between nations.’”²⁷⁶

In keeping precepts of comity in mind when deciding cases, the Court adopts the pragmatist notion on which comity is based. Possibly of even more importance, the force of comity, like that of international law within the context of constitutional adjudication, is not one of obligation, but rather one of counsel.²⁷⁷ Thus, the motivations that lead courts to justify reliance on notions of comity are similar to those used to justify reliance on international law within the context of constitutional interpretation. That is not to say that courts are uniform in their interpretation of the scope of comity. Some courts have used comity as a nominal starting point of their analysis, only to be discarded if counteracting policy considerations counsel against its application in that particular instance.²⁷⁸ Other courts have given the policy more teeth by noting that it will be employed to avoid retaliatory action in kind by a foreign state.²⁷⁹ Regardless of the particular treatment that comity is given in a specific

²⁷⁴ *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895); *see also* *Burley*, *supra* note 191, at 1948 (defining comity as “a principle grounded not on courtesy but on a conception of the transnational rule of law”).

²⁷⁵ *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 335 (1816).

²⁷⁶ *Paul*, *supra* note 192, at 3–4 (footnotes omitted).

²⁷⁷ *Hilton*, 159 U.S. at 163–64 (stating that comity is neither absolute obligation, nor mere courtesy); *see also* *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 797–98 (1993) (holding that comity would not counsel against exercising jurisdiction in an action affecting foreign insurers for violations of the Sherman Act).

²⁷⁸ *See, e.g., Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 428–30 (7th Cir. 1993) (upholding the injunction of foreign proceedings on the ground of putative incompetence of the foreign body notwithstanding contrary policy considerations supported by comity); *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 627 (5th Cir. 1996) (refusing to require district courts “to genuflect before a vague and omnipotent notion of comity” when issuing anti-suit injunctions against foreign proceedings).

²⁷⁹ *See, e.g., Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 927 (D.C. Cir. 1984).

case, the point is that courts are adept in exploring the international ramifications of a legal decision.

The possible international implications of the Court's decisions have played a major role in significant constitutional law cases where international law served as a persuasive source of law (whether the Court majority decided to adhere to it or not).²⁸⁰ Of utmost import is *United States v. Alvarez-Machain*,²⁸¹ where the Court decided that federal courts had jurisdiction to try a Mexican national who had been kidnapped and tendered to the United States by American law enforcement officers.²⁸² The dissent, although rooting its argument in the proper interpretation of the Mexican-American extradition treaty, expressed grave concern regarding the effect that the Court's majority opinion would have across the border.²⁸³ In very strong words, Justice Stevens concluded that he suspected that "most courts throughout the civilized world . . . [would] be deeply disturbed by the 'monstrous' decision the Court announce[d]. . . . For every nation that has an interest in preserving the Rule of Law is affected . . . by a decision of this character."²⁸⁴

The dissent in *Alvarez-Machain* is noteworthy. The most important reason for this is the fact that Justice Stevens derives the normative strength of his argument not from the U.S. government's breach of the Mexican-American extradition treaty (which was irrefutable) but instead from the potential parade of international horrors that he envisages should the Court ratify the act of banditry at issue in the case.²⁸⁵ After all, how happy would U.S. officials be if foreign undercover government agents were to kidnap an American national in the United States, shuttle him abroad, and then try him in a foreign land? Thus, by examining the impact on other countries of the Court's decision, Justice Stevens squarely reconciled the legal argument with its practical implications

²⁸⁰ A series of cases in which international ramifications played an important role in the arguments and decisions of the various courts that opined on the matter were related to U.S. states' continual violation of the Vienna Convention on Consular Relations, which mandates that signatory nations notify a person undergoing arrest procedures as quickly as is feasible of her right to assistance from her consulate. MICHAEL J. GARCIA, CONG. RESEARCH SERV., RL 32390, VIENNA CONVENTION ON CONSULAR RELATIONS: OVERVIEW OF U.S. IMPLEMENTATION AND INTERNATIONAL COURT OF JUSTICE INTERPRETATION OF CONSULAR NOTIFICATION REQUIREMENTS 3-10 (2004). Because these cases address, at least in part, matters that are properly of binding international law and its impact on the U.S. constitutional system, they are only tangentially relevant to the discussion at hand. *Id.* at 6.

²⁸¹ *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

²⁸² *Id.* at 657.

²⁸³ *Id.* at 687-88 (Stevens, J., dissenting).

²⁸⁴ *Id.*

²⁸⁵ *Id.*

and exhorted the Court to factor this latter variable into its decision. The international ramifications adduced in *Alvarez-Machain* were a natural outgrowth of the particular type of claim that was litigated in that case. In other words, some types of cases inherently lend themselves quite organically to the consultation of international law. But not all cases that present international ramifications can emerge even in cases that are, strictly speaking, purely domestic and therefore extrinsic to the specific issue being disputed. For example, a case presenting a constitutional issue stemming from a criminal conviction might have international reach if the criminal defendant is a foreign national, or if the possible sentence to be meted out in that case violates certain international norms that might form the basis of a retaliatory action by countries supporting such norms.²⁸⁶ Similarly, international ramifications might result from a case presenting purely a domestic issue of law but where the most noteworthy and influential precedent is international and courts all around the world are following that international precedent.²⁸⁷ These illustrations represent only the tip of the iceberg of situations that might arise that could trigger a constitutional law issue, the resolution of which may well ripple beyond the U.S. border.

In summary, the first step that a court should undertake when deciding whether to consult with international law as an aid to constitutional interpretation is to determine whether the problem has an international dimension. This is a two-step analysis: first, and rather obviously, the court should ascertain whether the subject matter of the dispute is of the nature to which international law speaks. In a second and more complex step, the court should determine whether the consequences of the decision reached have any international ramifications. As illustrated above, the Court is familiar with the latter inquiry that forms the part of various doctrines that often come up in its jurisprudence—comity being the most important example. Once this threshold

²⁸⁶ An example of this is the European Union rule that refuses extradition of any person to a country where that person could be subjected to the death penalty. Agreement on Extradition Between the European Union and the United States of America, U.S.–E.U., art. 13, July 19, 2003, S. TREATY DOC. No. 109-14 (2006). Of course, this does not mean that a U.S. court should declare the death penalty unconstitutional because of the European Union rule, but merely that it should be cognizant that the resolution of a specific case might impact these international norms.

²⁸⁷ This was the case in *Lawrence*, where the *Dudgeon* decision rendered by the European Court of Human Rights, characterized as “the world’s most influential human rights court,” was contrary to U.S. law, and it was that U.S. law that was being rejected world over, creating not negligible reputational problems for the United States in international settings. See Brief for Mary Robinson, Amnesty International et al. as Amici Curiae Supporting Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02–102), 2003 WL 164151, at *10–11.

inquiry is made, the Court should consider two other elements to determine the appropriateness of relying on a particular rule of international law.

2. *Status of Law*

Like domestic law, international law is constantly undergoing births, deaths, rebirths, transformations, and mutations of all shapes and sizes. There has been, and continues to be, a very vigorous debate amongst international tribunals, organizations, institutions, scholars, governments, lawyers, and activists about the substantive content of international law and its scope, reach, and enforcement both on a transnational and domestic level.²⁸⁸ As with many similar debates, there are major areas of agreement around which a large majority of the various players in the international system have coalesced, but there are major areas of disagreement around which, at least for the present, there is a lack of unity. The areas of agreement and disagreement can be of various sorts; so, for example, the international community might concur that certain rules that began as mere custom have now ripened into binding customary international law, or there might be considerable unresolved debate about the enforcement mechanisms to be deployed against a state that has signed and ratified, but then violated, an important multilateral treaty. To synthesize, international law is in a constant state of flux and contest, and a court that seeks to use it as an aid to domestic constitutional interpretation must be aware of this fact.

The fact that the substantive and procedural rules of international law are being constantly rewritten is an important consideration for courts to bear in mind when seeking to use international law persuasively. However, and more importantly, that knowledge must be supplemented by proper rules of recognition that are able to determine the status and force of a particular rule of international law. In other words, not all rules of international law have the same status, and an appreciation of which rules hold most (or least) sway should be a factor the court considers in determining how persuasive a rule of international law should be. From this perspective, it is possible to divide international law rules into three distinct categories, using as the dividing criteria the level of concordance about the existence and strength of these rules amongst the international community. Thus, the court seeking to use international law as persuasive authority should first ascertain whether that law

²⁸⁸ See BEDERMAN, *supra* note 22, at 6–12.

reflects a settled norm of international law, a contested norm of international law, or an emerging norm of international law.

Settled norms of international law represent those substantive rules that enjoy the highest level of support and adherence among players in the international system. Virtual unanimity (or, at the very least, an extremely high consensus) must exist between nations around the globe for an international norm to be considered “settled.”²⁸⁹ As a result of their almost unimpeachable status within the framework of international law, the use of settled norms within the ambit of constitutional interpretation would carry substantial weight and significant persuasive value. Here, the comparative policy being served is not conformity for conformity’s sake but it is instead a normative evaluation of the fact that there must be important motivations behind a position of international law that nations of diverse cultures and backgrounds have concluded deserve respect and universal compliance. Therefore, within the context of constitutional interpretation, settled norms of international law should be given an elevated level of persuasive effect.

So how does a court identify that these international norms are settled (rather than contested or emerging) and thus universal? There are several possible avenues that one can take to conclude that an international norm is settled, and much will depend on how broadly one wants to define “settled.” Under the narrowest possible definition, settled norms of international law will correlate very closely to peremptory norms (*jus cogens*). As noted in Part II above, a peremptory norm is a fundamental tenet of international law that is approved by the international community of nations as a rule from which no waiver can ever be permitted. It bears reiterating that, while there is not much agreement as to which norms have reached that status or how they have done so, there is considerable agreement that norms such as the prohibition of slavery, genocide, piracy, and torture are all *jus cogens*.²⁹⁰ Taking the last as an example, a ban on torture can be validated as *jus cogens* by examining the numerous international treaties that ban it (among others, the Geneva Conventions²⁹¹), the universal nature of such treaties (having been signed and ratified by almost every nation around the globe), the expressed opprobrium

²⁸⁹ *Id.* at 25.

²⁹⁰ See, e.g., M. Cherif Bassiouni, *International Crimes: ‘Jus Cogens’ and ‘Obligatio Erga Omnes,’* LAW & CONTEMP. PROBS., Autumn 1996, at 63.

²⁹¹ See Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

against the practice by government officials of most countries, the absence of any accepted legal argument in opposition to its status as a peremptory norm, and the legal arguments made in cases where such a practice is imputed.²⁹² Moreover, judicial decisions have declared that torture “violates established norms of the international law of human rights”—a clear assertion of the existence of a settled international norm on the subject.²⁹³

Under a broader definition of “settled norm,” other international rules could be classified as “settled” beyond the narrow categorization of *jus cogens*. Here, the examination is the same as that described in the paragraph above, but a finding of a peremptory norm would not be necessary to define a settled international norm. The normative reason for the broadened definition of “settled norm” is that the purpose for categorizing international rules as “settled” is different than the purpose of finding a particular international norm to be peremptory: in the first case, evidence of a norm being settled is used as a strong *persuasive* indicator of what the proper interpretation of a specific U.S. constitutional provision should be, while in the second case, the reason to find an international rule to be *jus cogens* is to *bind* nations to it without exception.²⁹⁴ Clearly, the threshold inquiry in the latter case should be far higher than in the former, because any findings within the context of constitutional interpretation are never binding onto U.S. courts. The type of issue before the court might function as an indicator as to the level of consensus international law should have before the court deems it valid enough for consultation. As stated by the Court, in cases pertaining to “the express affirmation of certain fundamental rights,” a settled norm of international law would “simply underscore[] the centrality of those same rights within our own heritage of freedom.”²⁹⁵ In these instances, international rules such as the prohibition on executing persons who committed crimes while juveniles should acquire the status of settled international norm for the same reasons given

²⁹² For example, the International Criminal Tribunal for the Former Yugoslavia stated that torture is a peremptory international norm and all countries are mandated “to investigate, prosecute and punish” individuals accused of torture because “the torturer has become, like the pirate and the slave trader before him, *hostis humani generis*, an enemy of all mankind.” *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T at 55–56 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

²⁹³ See *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980).

²⁹⁴ In his majority opinion in *Graham*, Justice Kennedy made this exact point by noting that whether a settled norm of international law is *jus cogens* or not is “of no import” because the strength of international law in the context of constitutional interpretation is not contingent on “those norms [being] binding” but on its ability to establish a denominator for “basic principles of decency.” *Graham v. Florida*, 130 S. Ct. 2011, 2027 (2010).

²⁹⁵ *Roper v. Simmons*, 543 U.S. 551, 577 (2005).

above for torture. In addition, even though the prohibition of the practice might not rise to the level of peremptory norm, its sheer unusualness in the international community contributes to the notion that it is something that the vast majority of the international community finds repugnant.²⁹⁶

There does not seem to be much normative force to the argument that the U.S. Constitution should be interpreted in a way that is contrary to settled norms of international law, so long as the constitutional provision being examined can be rationally and reasonably interpreted to be consonant with such norms. Aside from the tired refrain of preservation of sovereignty uttered by critics of this sort of use of international law (which applies to the comparative enterprise across the board and not just to international law in particular), it is hard to imagine anyone seriously advocating that genocide or torture are somehow permitted by the U.S. Constitution.²⁹⁷ Settled international norms therefore represent the strongest iteration of international law and are most normatively persuasive within the context of constitutional interpretation.²⁹⁸

On the other hand, contested norms represent the intermediate echelon of rules as they pertain to their level of observance and enforcement by the international community. Contested norms of international law are recognized and practiced by a significant majority or plurality of international actors but are nonetheless opposed by a non-negligible number within the various

²⁹⁶ This means that the determination that a practice violates a peremptory norm of international law, while instructive, is not critical to the determination of whether such practice is contrary to settled norms of international law. Thus, for example, in *Domingues v. United States*, Case 12.285, Inter-Am. Comm'n H.R., Report No. 62/02, OEA/Ser.L/V/II.117, doc. 1 (2002), the petitioner argued before the Inter-American Commission of Human Rights that his death sentence in Nevada for a crime that he committed when a juvenile should be overturned on the grounds that such a punishment contravened a peremptory norm of international law. *Id.* ¶ 113. Over the objections of the United States, the Commission agreed. *See id.* ¶ 115. Nevertheless, in *Roper*, when the U.S. Supreme Court declared those punishments as applied to juveniles unconstitutional under the Eighth Amendment, they did not do so on the ground that such punishments violated *jus cogens* (a fact that is still debatable notwithstanding the holding in *Domingues*) with which the United States would have to comply, but rather because of the persuasive weight of international law based on the reasoning that prohibiting the execution of juvenile offenders had, by the time *Roper* was decided, become settled international law. *Roper*, 543 U.S. at 575–79.

²⁹⁷ Disturbingly, Justice Scalia states that an international consensus on such matters can be shown to be unreasonable by contrary U.S. law. *See id.* at 627 n.9 (Scalia, J., dissenting).

²⁹⁸ In her dissent in *Roper*, Justice O'Connor implied that settled norms of international law found in treaties were the only rules that she was prepared to use as an aid for constitutional interpretation. *See id.* at 605 (O'Connor, J., dissenting). In rejecting that international law advised against the execution of minors, Justice O'Connor noted that the congruence of domestic and international law that she was seeking ought to be only found in "clear agreement-expressed" forms. *See id.*

international regimes.²⁹⁹ Their status as “contested” stems from the fact that these norms are often the subject matter of heated debate in the international community—such debate being ongoing at the time that a court interpreting the U.S. Constitution calls upon them as a source of persuasive authority.³⁰⁰ Therefore, in general terms, they should not carry as much persuasive weight as settled norms of international law.

Clearly, there are superficially stronger arguments against the persuasive use of contested norms of international law than there are for a similar use of settled norms. Contested norms, by their nature, are not universally accepted by the international community; therefore, why should the United States utilize international norms of ambiguous provenance to interpret its own Constitution? The policies served by using contested norms of international law as persuasive authority are somewhat different than those applicable to a similar use of settled norms, but these policies are nonetheless important and carry a dual purpose. First, the United States, by domestically adopting a contested norm as a constitutional requirement, may signal to the rest of the world that it is taking a particular side in the contest. Because the opinion of the United States carries a lot of weight, by so acting, the United States could be seen as a norm entrepreneur and provide guidance to other nations (which might have been reticent up to that point to state their position), to adopt a similar rule. In this context, the United States is attempting to push a contested norm into the category of settled norm. Secondly, the signal sent by the United States in adopting the contested norm might also be expressive and associative in value. Under this reading, it would be valuable for the Court to engage in an inquiry into which nations had already expressed their favor for the contested norm. If these were nations with which there were commonalities of purpose, entering the fray on that particular side would express the desire of the United States to be counted as part of that side of the argument with all the reputational enhancements that might entail.

The method of recognizing contested norms in many ways resembles that illustrated above for settled norms (whether peremptory or not). However, there are added circumstances that need to be examined for contested norms. In particular, the international law of regional organizations can be an area where contested norms of international law lie. Because the contest regarding the status of international law often pits one region of the world against another for

²⁹⁹ See BEDERMAN, *supra* note 22, at 20.

³⁰⁰ See generally *Roper*, 543 U.S. 551.

social, cultural, and historical reasons, a simple analysis of the output of world bodies might overlook the important activity being conducted by regional institutions on this front. Similarly, contested norms of international law (unlike peremptory norms) might actually be part of international law that has not ripened yet into customary international law but is possibly quite close to doing so. Therefore, UN General Assembly resolutions and declarations, and international tribunal advisory opinions are useful places to detect the existence of a contested norm because the force of these documents is not binding at inception but can become so over time.³⁰¹

Examples of contested norms of international law can thus be found in the Universal Declaration of Human Rights. The Universal Declaration of Human Rights is a UN General Assembly Resolution adopted in 1948.³⁰² The UN General Assembly does not have authority to promulgate binding international norms; nevertheless, it is beyond dispute that several of the Universal Declaration's substantive rules have taken on the status of peremptory norms.³⁰³ Indeed, the Universal Declaration created "an expectation of adherence, and insofar as the expectation is gradually justified by State practice . . . may by custom become recognized as laying down rules binding upon the States."³⁰⁴ However, other of its substantive provisions have clearly not reached that plateau and are more aptly described as contested norms. For example, Article 12 protects the right to privacy, but this right is not accepted as universally binding, as many nations do not subscribe to its substantive essence.³⁰⁵ Similarly, Article 18 allows the freedom of religion that includes the right to change one's religion, but this latter clause is clearly violated in many countries of the world through provisions for the crime of apostasy.³⁰⁶ In referring to either Article 12 or Article 18 as persuasive authority within the context of constitutional analysis, a court could not make the assertion that these norms are peremptory or even settled. However, the status of these norms as contested does not detract from their utility as persuasive authority because

³⁰¹ See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 390 n.10 (1989) (Brennan, J., dissenting) (quoting a UN Economic and Social Council resolution endorsed by the UN General Assembly).

³⁰² Universal Declaration of Human Rights, *supra* note 33.

³⁰³ See *id.* art. 4 (prohibiting slavery); *id.* art. 5 (prohibiting torture).

³⁰⁴ *Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980).

³⁰⁵ Universal Declaration of Human Rights, *supra* note 33, art. 12.

³⁰⁶ *Id.* art. 18.

a further analysis of which countries subscribe to them and how they are interpreted could be of immense value for the reasons adduced above.³⁰⁷

Lastly, emerging norms are the weakest international law rules when it comes to their recognition and acceptance.³⁰⁸ Only a plurality of nations could be said to agree with their status as international law, with a greater number of international players acting in opposition to them.³⁰⁹ Their status as emerging is an indication that these types of norms are in their Neolithic period of development on the international scene and are thus fighting an evolutionary battle to emerge from a proto-form of substantive rule into a more defined shape. The fact that these norms are in their infancy on the international scene does not mean that they are necessarily new on the domestic scene as well. Indeed, emerging norms of international law might have long and old roots in traditional domestic law. Thus, the fact that they are defined as “emerging” is a connotation solely applicable to their status as international law.

Emerging norms of international law pose very interesting and vibrant normative questions when assessing their suitability to function as persuasive authority within the context of U.S. constitutional interpretation. Because their foundation as international law is the weakest, it would be easy to ignore them entirely. But engaging in judicial dialogue on emerging norms of international law might be a very effective way for the United States to exert its influence on the international scene and encourage other legal regimes to shape themselves in the United States’s image. Therefore, rather than attesting a congruence between emerging norms of international law and U.S. law, the process would be redirected outwards where a domestic statement of presence of an international law norm in its emerging state would provide the impetus to create or develop that particular norm. The process, of course, could also work in reverse where a U.S. judicial determination in the context of a constitutional

³⁰⁷ Interestingly, the recent UN General Assembly resolution calling for a moratorium on the death penalty likely falls in the bundle of contested norms of international law. *See* G.A. Res. 62/149, U.N. Doc. A/RES/62/149 (Feb. 26, 2008). The resolution, which passed easily (105 votes in favor, 54 against, and 29 abstentions), was the product of a coalition of European, Latin American, Oceanian, and some Sub-Saharan African countries and was opposed by North African, Middle-Eastern (except Israel), Asian, and Caribbean nations. Press Release, U.N. General Assembly, General Assembly Adopts Landmark Text Calling for Moratorium on Death Penalty, U.N. Press Release GA/10678 (Dec. 18, 2007). The United States sided with the latter group, and it will be very interesting to track the development of this contested norm to see if it will influence any upcoming challenges in the realm of the Eighth Amendment in the future. *Id.*

³⁰⁸ *See, e.g.*, *North Sea Continental Shelf*, (Ger. v. Den./Neth.), 1969 I.C.J. 3, ¶¶ 46–56 (Feb. 20) (delineating a nation’s continental shelf by the principle of equidistance was not customary international law, because the majority of nations had not agreed to the principle).

³⁰⁹ *See id.*

argument that an emerging norm of international law does not in fact exist might significantly contribute to that norm's extinction. In either circumstance, the word of the U.S. Supreme Court would likely carry a lot of weight.

Two examples serve to illustrate the two scenarios outlined above. In 2003, the Court in *Lawrence* ruled that the criminalization of adult consensual same-sex acts was an unconstitutional violation of the Due Process clause in part by opining that international law carried that same view.³¹⁰ Within five years, a coalition of European, Latin American, and Oceanian countries proposed a UN General Assembly resolution calling for the end to the criminalization of homosexual acts.³¹¹ Paradoxically, and rather astonishingly, at the time of its introduction in the UN General Assembly, the United States (then under the George W. Bush Administration) refused for rather muddled reasons to sign onto the resolution, an omission quickly rectified by the Obama Administration.³¹² It can be of little doubt that the emphatic statements in *Lawrence* played a large part in the timing of the presentation of that UN resolution. From the opposite angle, in 2009, the UN Human Rights Council (the body tasked by the UN to monitor human rights around the world) passed a resolution condemning "defamation of religion" as a serious human rights violation.³¹³ This resolution was widely condemned by Western countries as being a not-so-veiled attempt by Islamic countries to clamp down on human rights groups within their territories and as a concerted attack on freedom of expression.³¹⁴ Legal pronouncements from important judicial bodies of the world (such as the U.S. Supreme Court) would go a long way towards preventing this concept of "defamation of religion" from seeping into the lexicon of international law and becoming an established norm.

The nature of the specific international law norm being consulted in the context of constitutional interpretation is a vital component of the analysis. Whether an international law norm is settled, contested, or emerging will play a large part in determining the weight a court in the United States should give

³¹⁰ See *Lawrence v. Texas*, 539 U.S. 558, 572–73, 578–79 (2003).

³¹¹ See *U.N. Gen. Assembly Statement Affirms Rights for All*, INT'L LESBIAN, GAY, BISEXUAL, TRANS & INTERSEX ASS'N (Dec. 19, 2008), <http://ilga.org/ilga/en/article/1211>.

³¹² See Neil MacFarquhar, *In a First, Gay Rights are Pressed at the U.N.*, N.Y. TIMES (Dec. 18, 2008), <http://www.nytimes.com/2008/12/19/world/19nations.html> (describing the United States's initial refusal to sign the declaration); Sue Fleming, *In Turnaround, U.S. Signs U.N. Gay Rights Document*, REUTERS, Mar. 18, 2009, available at <http://www.reuters.com/article/2009/03/18/us-rights-gay-usa-idUSTRE52H5CK20090318>.

³¹³ See Laura MacInnis, *U.N. Body Adopts Resolution on Religious Defamation*, REUTERS, Mar. 26, 2009, available at <http://www.reuters.com/article/2009/03/26/us-religion-defamation-idUSTRE52P60220090326>.

³¹⁴ *Id.*

that law. Moreover, the normative considerations involved will differ depending on whether the international law norm is settled, contested, or emerging, and will thus profoundly affect the nature of the examination. Because of the different treatment that should be given to international law depending on its status, this is a deliberation that courts using this law to interpret the U.S. Constitution should always verify in the course of their analyses.

3. *Position of the United States*

The third and final filter of analysis that a court seeking to use international law persuasively within the context of constitutional interpretation should be to inquire into the stated position of the United States apropos the particular international norm that the court proposes to use.³¹⁵ As for the other two factors described above, the result of this inquiry will not necessarily dictate whether that international law should be used in this context, but will inform the court as to how those specific norms should be utilized and what policies are to be served by such deployment.

The nature of the contemporary state is one of disaggregation.³¹⁶ This is especially true of liberal democracies but also, albeit to a lesser extent, of more authoritarian regimes. This means that in modern times the many different components that make up the state act with only a modest degree of concert and often pursue their own potentially conflicting interests and motivations.³¹⁷ While some cohesion by a state is preferable, because of the myriad of operations that a modern state engages in on a daily basis, the pursuit of complete coordination on all government business would necessarily grind the governmental wheels to a halt and prevent a proper functioning of institutional bodies. Therefore, the disaggregation of the state is not only a precise description of the state of things, but it is also somewhat normatively desirable

³¹⁵ It is important to note that this inquiry is not into what the stated position of the United States is vis-à-vis the case that is up before the court. The position of the United States on the case at hand will always be easy to assess, because either the United States will be an actual litigant in the case, or, in cases of national import, will most likely either intervene or file an amicus brief.

³¹⁶ See, e.g., Tom Ginsburg, *International Delegation and State Disaggregation*, 20 CONST. POL. ECON. 323 (2009); Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT'L L. 1041 (2003).

³¹⁷ Easy examples that come to mind are the conflicts that erupt between the military and the diplomatic corps of the same nation, who seemingly are often in tension with one another as to how goals ought to be pursued.

if only for the pragmatic reason that disaggregation forms part of those oils that smooth the workings of the whole system.

Because of the different governmental roles enshrined in the U.S. Constitution, the seeds of disaggregation have been a staple of the make-up of the U.S. government since its founding. For the purposes of using international law as persuasive authority as an aid in constitutional interpretation, this means that once a court determines what the stated U.S. position is on a particular doctrine of international law, it should take note of it but not behave as if that stated position is binding upon it. After all, the task of ultimate arbiter of constitutional meaning in the United States rests upon the Supreme Court.³¹⁸ Nevertheless, being cognizant of what the United States has stated about particular rules of international law is important not only because of the repercussions that could be felt as a result of the Court's opinion, but also because these official statements of position are worthy of informed respect when squared with a constitutional mandate.

A very topical example can be hypothesized pertaining to the recent controversy regarding the U.S. government's use of waterboarding—which is considered a form of torture³¹⁹—on terrorism suspects.³²⁰ It is not far-fetched to think that a case challenging the use of waterboarding could reach the Supreme Court in which the United States would argue in the case that it reserves the right to use waterboarding in limited circumstances. It is also not a stretch of imagination to expect the Court to square the United States's argument with its past actions, which might include a look at pertinent international law and the United States's signing and ratification of binding treaties banning all uses of torture (such as the various Geneva Conventions, the Convention Against Torture,³²¹ or the ICCPR) or else the United States's vote in favor of the nonbinding Universal Declaration of Human Rights, whose various substantive provisions have matured into customary international law.³²² Here the stated position of the United States on the international norm against torture serves as a normative behavioral beacon that would appear to be

³¹⁸ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (establishing judicial review).

³¹⁹ Michael Isikoff, *The Truth Will Out*, NEWSWEEK (Feb. 6, 2008), <http://www.newsweek.com/2008/02/05/the-truth-will-out.html>.

³²⁰ *Id.*

³²¹ G.A. Res. 39/46, U.N. Doc A/RES/39/46 (Dec. 10, 1984).

³²² See Antônio Augusto Cançado Trindade, *Universal Declaration of Human Rights*, UNITED NATIONS 2 (2008), http://untreaty.un.org/cod/avl/pdf/ha/udhr/udhr_e.pdf; *supra* notes 289–91.

consonant with an evolving notion of the Eighth Amendment that the use of torture is constitutionally banned under all instances.

Although the Court has not delved into deep discussions regarding the stated position of the United States on international law it uses to interpret the Constitution, it has developed some narratives on the matter. The most typical of these is to note, without much elaboration, whether an international treaty to which it refers has been signed by the United States, and if so, whether the United States has ratified that same authority.³²³ Unfortunately, in these instances, the Court has not explained the import of its notations. In other words, is signature without ratification a signal to the Court that it should side with the executive against the legislative, or vice versa? Or does this mean that because the full treaty implementation has not occurred according to constitutional mandate, the Court should treat this as a negative view of the substantive rules contained in the treaty? And what about a signed and ratified treaty that the United States is not abiding by? Is that something that the Court should rectify through interpretation of constitutional law? In some cases, the Court has begun to give some answers to these questions.

Thus, in *Roper*, Justice Kennedy, in referring to Article 37 of the UN Convention on the Rights of the Child, noted disapprovingly: “[E]very country in the world [had] ratified [that treaty] save for the United States and Somalia.”³²⁴ He further surmised that none of the countries that had ratified the treaty had “entered a reservation to the provision” that was the subject matter of the case before the Court.³²⁵ Justice Kennedy also noted that the ICCPR contained similar prohibitions to the UN Convention on the Rights of the Child; further, he noted that even though the United States had ratified the ICCPR, it had specifically reserved the provision (pertaining to the execution

³²³ See, e.g., *Roper v. Simmons*, 543 U.S. 551, 576 (2005) (noting that the United States had signed and ratified the ICCPR subject to a reservation); *Grutter v. Bollinger* 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (noting that the United States had ratified the International Convention on the Elimination of All Forms of Racial Discrimination); *Stanford v. Kentucky*, 492 U.S. 361, 390 n.10 (1989) (Brennan, J., dissenting) (noting that even though countries maintained laws allowing for capital punishment of juvenile offenders, they had ratified treaties prohibiting the practice, and the United States was similarly situated, having signed but not ratified the ICCPR and American Convention on Human Rights and signed and ratified the Geneva Convention Relative to the Protection of Civilian Persons in Time of War); *Thompson v. Oklahoma*, 487 U.S. 815, 831 n.34 (1988) (noting the United States’s position on the same treaties found in Justice Brennan’s dissent in *Stanford*).

³²⁴ *Roper*, 543 U.S. at 576.

³²⁵ *Id.*

of juveniles) that was the subject matter of *Roper*.³²⁶ In underlining the stated position of the United States on both treaties, Justice Kennedy's point was two-fold: first, that the failure to ratify was so out of sync with the rest of the world that only a disreputable regime such as Somalia shared the United States's position, and second, that the Court felt perfectly free to disregard the stated U.S. position on a particular norm of international law if it conflicted with its understanding of the U.S. Constitution.³²⁷

Justice Scalia's understanding of the U.S. failure to ratify one treaty and preserve a reservation to the other treaty is unsurprisingly quite different from Justice Kennedy's understanding. In commenting on the *Roper* majority's acknowledgment that the United States had either not ratified or had reserved the treaties that the majority had referenced, Justice Scalia wryly wrote that "[u]nless the Court has added to its arsenal the power to join and ratify treaties on behalf of the United States, I cannot see how this evidence favors, rather than refutes, its position" regarding the constitutionality of executing juveniles.³²⁸ He went on to note that there could not be a national consensus against the execution of juveniles because "the Senate and the President—those actors our Constitution empowers to enter into treaties . . . have declined to join and ratify treaties prohibiting execution of under-18 offenders."³²⁹ Justice Scalia's point is superficially palatable but conveniently ignores both the normative considerations underlying Justice Kennedy's point as well as the text of the reservation Justice Scalia relies upon. The reservation to the treaty prohibiting the execution of juveniles is "subject to . . . Constitutional constraints,"³³⁰ and unless Justice Scalia takes the view that the Senate is now the ultimate arbiter of constitutional meaning, then the reservation,³³¹ by its

³²⁶ See *id.* at 576. The specific reservation reads: "The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person . . . duly convicted under existing or future law permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age." ICCPR, *supra* note 218.

³²⁷ See *Roper*, 543 U.S. at 576–78.

³²⁸ *Id.* at 622–623 (Scalia, J., dissenting).

³²⁹ *Id.* (citing U.S. CONST. art. II, § 2).

³³⁰ ICCPR, *supra* note 218.

³³¹ Justice Breyer made this same point in his dissent from a denial of certiorari in *Knight v. Florida*, a case where the issue was whether there was a length of time between death sentence and execution that could be unconstitutional under the Eighth Amendment. *Knight v. Florida*, 528 U.S. 990, 993 (1999) (Breyer, J., dissenting) (denying petition for certiorari). Noting reservations to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment enacted by the ratifying U.S. Senate, Justice Breyer emphasized that "the treaty reservations say nothing about whether a particular [practice identified in the reservation] is 'constitutional.'" *Id.* at 993. Indeed, Justice Breyer noted that the reservation, similar to the one

text alone, subjects itself to a constitutional trump. Moreover, Justice Kennedy implied that his notation of the U.S. position on these treaties is illustrative of the “unusual” character of this form of punishment and not an attempt to *bind* the United States to these treaties through a process of ratification via judicial fiat.³³²

Whether the United States’s position regarding a specific tenet of international law is to be adhered to or disregarded will always ultimately hinge upon the Court’s assessment of its constitutionality. Even so, it can nonetheless inform the analysis and thus is an important part of this equation. Because of the inherent disaggregation of the U.S. government, sometimes the stated positions of the United States can be in conflict. This is exemplified when a signed treaty, signaling approval by the executive branch, is either reserved or never ratified, demonstrating a disapproval by the legislative branch. In all cases, the judiciary should take these expressions into account when deciding the level of respect and persuasion to afford the substantive rules of international law because the motivations that will be at play will differ according to the Court’s willingness to conform to (or depart from) that expression. In either circumstance, the Court, exhibiting its awareness of what other parts of the U.S. government have said on such matters, can only enhance the analysis. If that occurs, we can look forward to further judicial discussions such as those exhibited between the majority and dissent in *Roper* that will elucidate more of the Court’s thinking about the use of international law in this context.

CONCLUSION

Justice Kennedy stated in *Lawrence* that the Constitution is subject to the passage of time and therefore mutates in meaning as time goes by.³³³ Part of that changing meaning can be garnered by looking at external sources of law, such as the wealthy repository of rules that is contained within international law. Indeed, international law as persuasive authority already plays a part in U.S. constitutional adjudication. The main criticism is that this is done in a rather ad hoc manner with seemingly little thought expended towards finding a

identified in *Roper*, was self-limiting in that its import had to be “consistent with the . . . Constitution.” *Id.* (quoting 136 CONG. REC. 36,192–99 (1990)).

³³² Justice Kennedy reiterated this point by reference to the United States’s position on the same two treaties in *Graham*. See *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010).

³³³ See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

normatively plausible methodological theory to guide its use. Because this practice is destined to continue, it is vital to construct such a methodology.

In proposing a methodology for the use of international law within the framework of constitutional interpretation, it is axiomatic to state that context is everything. An analysis detached from the situation in which it exists is not only destined to be haphazard, but also to succumb to the accusation that it is self-serving and unpredictable. However, by delineating the circumstances under which this activity should take place and providing dependable factors that link naturally with the policies underlying the comparative enterprise, it is possible to avoid the pitfalls identified by the critics. As a consequence, this sort of use of international law will create a solid foundation to be built upon as this endeavor moves confidently into the future.