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## The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and The Juvenile Death Penalty Decision

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THE SUPREME COURT AND FOREIGN SOURCES OF LAW:  
TWO HUNDRED YEARS OF PRACTICE AND THE JUVENILE  
DEATH PENALTY DECISION

STEVEN G. CALABRESI\* & STEPHANIE DOTSON ZIMDAHL\*\*

*“The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”*

—Justice Kennedy, writing for the majority in *Roper v. Simmons*<sup>1</sup>

*“[T]his Nation’s evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement—expressed in international law or in the domestic laws of individual countries—that a particular form of punishment is inconsistent with fundamental human rights. At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus.”*

—Justice O’Connor, discussing the relevance of foreign sources of law in her dissenting opinion in *Roper v. Simmons*<sup>2</sup>

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The division of labor on this Article was as follows: the idea for this Article originated with Professor Calabresi. Ms. Zimdahl did substantial research and summarized and wrote up the cases and the draft became a collaborative effort between Ms. Zimdahl and Professor Calabresi. Both Professor Calabresi and Ms. Zimdahl then edited the piece substantially, producing many subsequent drafts. This Article is the end result of that collaborative process.

1. 125 S. Ct. 1183, 1200 (2005).

2. *Id.* at 1215-16 (O’Connor, J., dissenting).

*"[T]he basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand.... I do not believe that approval by 'other nations and peoples' should buttress our commitment to American principles any more than (what should logically follow) disapproval by 'other nations and peoples' should weaken that commitment."*

—Justice Scalia, dissenting in  
*Roper v. Simmons*<sup>3</sup>

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3. *Id.* at 1226, 1229 (Scalia, J., dissenting).

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## INTRODUCTION

Should courts cite foreign law in U.S. constitutional cases? The Supreme Court said “yes” last term in *Roper v. Simmons*,<sup>4</sup> the landmark case that recently struck down the juvenile death penalty. Justice Kennedy’s majority opinion and Justice O’Connor’s dissent both cited foreign law,<sup>5</sup> even though they disagreed as to the constitutionality of the juvenile death penalty.<sup>6</sup> Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, forcefully dissented, saying that foreign law is not relevant to the Court’s constitutional decision making.<sup>7</sup>

This issue first drew public notice two years ago in *Lawrence v. Texas*.<sup>8</sup> That case struck down state laws against sodomy, in part, by relying on decisions of the European Court of Human Rights.<sup>9</sup> In

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4. 125 S. Ct. 1183 (2005).

5. We consider foreign law to include statutes and cases of other countries arrived at after American independence in 1776. We think the term includes the writings of foreign jurists and scholars. Obviously, pre-1776 English law is not foreign law because the United States was then part of England.

6. *Roper*, 125 S. Ct. at 1198-200; *id.* 1215-16 at (O’Connor, J., dissenting)

7. Justice Scalia further spoke of his view that “modern foreign legal materials can never be relevant to an interpretation of—the meaning of—the U.S. Constitution” in a keynote address to the American Society of International Law. Justice Antonin Scalia, Keynote Address Before the American Society of International Law: Foreign Legal Authority in the Federal Courts (Apr. 2, 2004), in 98 AM. SOC’Y INT’L L. PROC. 305, 307 (2004). In his address, Justice Scalia noted the few ways in which he found foreign law, other than historical English law, to be relevant to Supreme Court decisions and stated that he feared “that the Court’s use of foreign law in the interpretation of the Constitution will continue at an accelerating pace.” *Id.* at 306-08. Using foreign law in constitutional cases is what Justice Scalia most strongly opposes, but his opposition to the use of such sources is not absolute. Justice Scalia is very open to considering foreign law in the interpretation of treaties, for example, and has stated that the Court “can, and should, look to decisions of other signatories when we interpret treaty provisions.” See *Olympic Airways v. Husain*, 540 U.S. 644, 660 (2004) (Scalia, J., dissenting). He has explained that “[f]oreign constructions are evidence of the original shared understanding of the contracting parties. Moreover, it is reasonable to impute to the parties an intent that their respective courts strive to interpret the treaty consistently.” *Id.* Other commentators have not been as clear in distinguishing between constitutional cases and nonconstitutional cases, asserting instead that the Court should not consider foreign sources in interpreting any American laws and arguing that the Court’s use of such sources is unprecedented. See, e.g., *Hannity & Colmes: Interview with Constitution Party National Committee Chairman Jim Clymen* (Fox News television broadcast July 9, 2003).

8. 539 U.S. 558 (2003).

9. *Id.* at 573, 576.

the wake of *Lawrence* and *Roper*, the disagreement on the Court is no longer about whether to cite foreign sources of law but about when and how to cite them.<sup>10</sup>

The Justices have taken the debate beyond their chambers. In January of 2005, Justices Scalia and Breyer debated this issue publicly at American University,<sup>11</sup> with Justice Breyer expressing support for citing foreign law and Justice Scalia disagreeing.<sup>12</sup> Other Justices have also made public statements about this issue. In a

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10. The use of foreign law in *Roper* is especially interesting because the decision of the Court ostensibly turned, at least in part, on whether there was a national consensus within the United States against the execution of juvenile offenders. *Roper*, 125 S. Ct. at 1192-94. For insightful commentary on the use of foreign sources of law in *Roper*, see the *Harvard Law Review* survey of the 2004 Supreme Court Term. See Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005) (arguing for consideration of foreign sources of law and providing suggestions for using comparative law); Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129 (2005) (discussing the legitimacy of citing foreign law based on the law of nations); Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005) (clarifying how foreign sources are used in cases such as *Roper* and cautioning about expanding the denominator of foreign sources).

11. See Justices Antonin Scalia & Stephen Breyer, Discussion at the American University Washington College of Law: Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005) [hereinafter Scalia & Breyer Discussion] (transcript available at <http://domino.american.edu/AU/media/mediarel.nsf/0/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument>).

12. Justice Scalia has actually referred to noted foreign sources of law in two of his opinions. In his dissent in *McIntyre v. Ohio Elections Commission*, Justice Scalia noted that the foreign democracies of Australia, Canada, and England all have prohibitions against anonymous campaigning, which he thought was relevant to the question whether prohibiting anonymous campaigning "is effective in protecting and enhancing democratic elections." 514 U.S. 334, 381 (1995). In *Coy v. Iowa*, Justice Scalia wrote for the Court that the Constitution requires face-to-face cross examinations of child sexual assault victims. 487 U.S. 1012, 1020 (1988). In highlighting the history and importance of the Sixth Amendment right of confrontation, Justice Scalia referred to both Roman law and the Bible. *Id.* at 1015-16. It is debatable whether Roman law is a foreign law in our common law legal system. Justice Scalia explained the origins and importance of a criminal defendant's right "to be confronted with the witnesses against him." *Id.* at 1015-20 (quoting U.S. CONST. amend. VI).

This language "comes to us on faded parchment," with a lineage that traces back to the beginnings of Western legal culture. There are indications that a right of confrontation existed under Roman law. The Roman Governor Festus, discussing the proper treatment of his prisoner, Paul, stated: "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges."

*Id.* at 1015-16 (citations omitted). The earlier case of *Greene v. McElroy* noted this same biblical story of Festus and the Roman roots of the right of confrontation. 360 U.S. 474, 496 n.25 (1959).

2004 speech at Georgetown Law School, Justice O'Connor approved of the citing of foreign law in U.S. courts,<sup>13</sup> a view that she has also expressed elsewhere.<sup>14</sup> And, at a recent national convention of the American Constitution Society, Justice Ginsburg took the same position.<sup>15</sup>

The use of foreign law is often thought to be an issue that divides conservative and liberal Justices.<sup>16</sup> But, Chief Justice Rehnquist once endorsed the use of foreign law in constitutional cases even though he joined Justice Scalia's dissents in *Lawrence* and *Roper*.<sup>17</sup>

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13. Associated Press, *O'Connor Extols Role of International Law*, ABC NEWS, Oct. 27, 2004, available at <http://abcnews.go.com/Politics/print?id=202974>.

14. See, e.g., Justice Sandra Day O'Connor, Keynote Address Before the American Society of International Law (Mar. 16, 2002), in 96 AM. SOC'Y INT'L L. PROC. 348, 350 (2002). In her separate opinion in *United States v. Stanley*, a case that involved a master sergeant in the Army who had been secretly administered LSD, Justice O'Connor cited the Nuremberg Military Tribunals. 483 U.S. 669, 710 (1987) (O'Connor, J., concurring in part and dissenting in part). Justice Brennan also discussed the Nuremberg trials, explaining that the United States Military Tribunal developed the Nuremberg Code, which stated that the "voluntary consent of the human subject is absolutely essential," to judge German scientists who experimented on human subjects. *Id.* at 687 (Brennan, J., concurring in part and dissenting in part).

15. Justice Ruth Bader Ginsburg, Remarks Before the American Constitution Society, Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication (Aug. 2, 2003), available at <http://www.americanconstitutionsociety.org/pdf/Ginsburg%20transcript%20final.pdf>. Justice Ginsburg's support for looking to foreign sources of law was also apparent in her concurring opinion in *Grutter v. Bollinger*, where she noted that "[t]he Court's observation that race-conscious programs 'must have a logical end point' accords with the international understanding of the office of affirmative action" and cited the International Convention on the Elimination of All Forms of Racial Discrimination, a convention the United States ratified in 1994. 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (citation omitted); see also *Gratz v. Bollinger*, 539 U.S. 244, 302 (2003) (Ginsburg, J., dissenting).

16. Even the most conservative Justice on the Court, Clarence Thomas, has cited foreign law on one occasion for comparative purposes. In *Holder v. Hall*, Justice Thomas noted the voting systems of Belgium, Cyprus, Lebanon, New Zealand, West Germany, and Zimbabwe in his assessment of the extent of racial consciousness in the American voting system. 512 U.S. 874, 906 n.14 (1994) (Thomas, J., concurring). Justice Thomas has stated his general opposition to reliance on foreign law in *Foster v. Florida*, 537 U.S. 990, 990 n.\* (2002) (Thomas, J., concurring) (denying certiorari).

17. He said: "Now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process." Chief Justice William H. Rehnquist, Constitutional Courts—Comparative Remarks, Address Before the German-American Conference Sponsored by the Dräger Foundation and the American Institute for Contemporary Studies (Oct. 1989), in 14 GERMANY AND ITS BASIC LAW: PAST, PRESENT, AND FUTURE: A GERMAN-AMERICAN SYMPOSIUM 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993).

Moreover, Chief Justice Rehnquist was also the author of a major opinion in the assisted-suicide case, *Washington v. Glucksberg*, which cited and discussed how the practice of assisted suicide has led to abuses in the Netherlands.<sup>18</sup> Justices Scalia and Thomas joined *Glucksberg* without commenting on its citation of foreign legal practices on assisted suicide.<sup>19</sup>

In addition, although the Court has cited foreign law in support of liberal results banning the execution of juveniles and promoting gay rights, citation of foreign law in other areas could lead to results conservatives favor. Foreign law is more conservative than U.S. constitutional law with respect to separation of church and state, admission of illegally obtained evidence, and allowance of governmental restrictions on speech. And, on the political hot-button issue of abortion, many foreign nations have policies that are much more restrictive overall of abortion rights than those in the United States. Although most European nations do have legalized abortion, most restrict its availability to approximately the first twelve weeks of gestation, rather than allowing elective abortion into the second and even third trimesters, as is the practice in the United States.<sup>20</sup> In fact, the United States is one of only six countries worldwide that allows "abortion on demand until the point of viability."<sup>21</sup>

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18. 521 U.S. 702, 734 (1997); see *infra* Part IV.C.2. Additionally, in his opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Chief Justice Rehnquist cited abortion-related decisions of the West German constitutional court and the Supreme Court of Canada. 505 U.S. 833, 945 n.1 (1992) (Rehnquist, C.J., concurring in part and dissenting in part). Chief Justice Rehnquist also joined Justice Kennedy's dissent in *Zadvydas v. Davis*, which noted that international law supported the view that detention of inadmissible aliens incident to removal could not be "justified as punishment nor [could] the confinement or its conditions be designed in order to punish." 533 U.S. 678, 721 (2001) (Kennedy, J., dissenting).

19. See 521 U.S. 702, 704 (1997).

20. Center for Reproductive Rights, *The World's Abortion Laws*, [http://www.crlp.org/pub\\_fac\\_abortion\\_laws.html](http://www.crlp.org/pub_fac_abortion_laws.html) (last visited Nov. 26, 2005). Of the countries that allow abortion without restriction as to reason, most "impose a limit on the period during which women can readily access the procedure." *Id.* See generally MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 145-54 (1987) (noting the differences in abortion laws of various Western countries).

21. *Roper v. Simmons*, 125 S. Ct. 1183, 1227 (2005) (Scalia, J., dissenting) (citing Joan L. Larsen, *Importing Constitutional Norms from a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283, 1320 (2004)).

Legal scholars have played a big role in the debate so far over whether to cite foreign law in constitutional cases.<sup>22</sup> Yale Law Dean Harold Koh has been at the “vanguard of the movement to encourage U.S. courts to pay more attention to international trends.”<sup>23</sup> Others have argued strongly against the practice, including Roger P. Alford and Joan Larsen.<sup>24</sup> The debate has not been left solely to the Justices and to legal academics but has led to much public discussion and has even led to the creation of interactive websites.<sup>25</sup> One of us, Professor Calabresi, has written an article that calls on Congress to reinstitute circuit riding in July when the Justices currently go to Europe to soak up foreign constitutional law.<sup>26</sup> And, two Congressmen recently introduced a bill on the subject in the House of Representatives entitled the “Reaffirmation of American

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22. See, e.g., Daniel Bodansky, *The Use of International Sources in Constitutional Opinion*, 32 GA. J. INT'L & COMP. L. 421, 421-23 (2004); Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. (forthcoming Winter 2006) (manuscript on file with authors); Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82, 86-88 (2004); Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT'L L. 69, 72-82 (2004).

23. Lori Fisler Damrosch & Bernard H. Oxman, *Agora: The United States Constitution and International Law: Editors' Introduction*, 98 AM. J. INT'L L. 42, 42 (2004); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 43-56 (2004).

24. See generally Roger P. Alford, *Misusing International Sources To Interpret the Constitution*, 98 AM. J. INT'L L. 57 (2004) (outlining potential misuses of international and foreign materials); Larsen, *supra* note 21, at 1309, 1315, 1318, 1326 (identifying weakness in scholarly justifications for the use of foreign law).

25. At a recent conference entitled “Confronting the Judicial War on Faith,” a few conservative leaders even argued for the impeachment of Justice Kennedy due to his philosophy, as shown by his opinion in *Lawrence*, which they claim “upholds Marxist, Leninist, satanic principles drawn from foreign law.” Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, WASH. POST, Apr. 9, 2005, at A3. Similar criticisms appear on the Internet. See, e.g., At the U.S. Supreme Court the “Euro Street” Counts, and American Voters Don't Count, <http://harkonnendog.blogspot.com/2005/03/at-us-supreme-court-euro-street-counts.html> (Mar. 1, 2005, 10:09 EST); Posting of McQ to <http://www.qando.net/details.aspx?Entry=861> (Jan. 15, 2005). In his book *Coercing Virtue*, Robert Bork criticizes the citation of foreign law and characterizes the appeal of internationalism as “insidious.” ROBERT H. BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* 15-25, 135-39 (Am. Enter. Inst. Press 2003) (2002); see also Will Baude, *Low Opinion*, THE NEW REPUBLIC, Mar. 3, 2005; Cheryl K. Chumley, American Policy Center, *The Supreme Court Has Abandoned the Constitution*, Mar. 18, 2004, <http://www.americanpolicy.org/un/abandoned.htm>; Phyllis Schlafly, *Whom Is The Supreme Court Listening To?* (Eagle Forum, Wash., D.C.) Nov. 10, 2004, <http://www.eagleforum.org/column/2004/nov04/04-11-10.html>.

26. Steven G. Calabresi & David C. Presser, *Reinstituting Circuit Riding*, 90 MINN. L. REV. (forthcoming May 2006).

Independence Resolution.”<sup>27</sup> This bill would specifically provide that “judicial determinations regarding the meaning of the laws of the United States should not be based on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the laws of the United States.”<sup>28</sup>

Advocates and opponents of reliance on foreign law disagree on the question of whether the current Court’s practice of citing such law is unprecedented.<sup>29</sup> Strikingly, however, the participants in this debate have not yet stopped to examine closely just what exactly the actual practice of the Supreme Court has been over the past two hundred years of its history in citing foreign law. This Article fills that gap by describing what the Supreme Court’s practice has actually been from 1789 to 2005 with respect to citing foreign law. We will show that the Court’s citation of foreign law in recent years is not “unprecedented” as some critics have claimed,<sup>30</sup> although citation to such sources is increasing. We also show that there have been some dramatic instances of the Court citing foreign law historically. For example, foreign law is cited in concurring and

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27. H.R. Res. 568, 108th Cong. (2004); Congressman Tom Feeney, *Should Americans Be Governed by the Laws of Jamaica, India, Zimbabwe, or the European Union?*, <http://www.house.gov/feeney/reaffirmation.htm> (last visited Nov. 26, 2005).

28. H.R. Res. 568. It should be noted that this resolution disapproved of federal courts considering foreign law in all cases involving the laws of the United States, not just direct constitutional issues. *Id.* A similar Senate Resolution recently introduced by Senator John Cornyn does focus directly on cases involving the meaning of the United States Constitution. See S. Res. 92, 109th Cong. (2005). The resolution expresses the “sense of the Senate that judicial determinations regarding the meaning of the Constitution of the United States should not be based on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution ....” *Id.*

29. Julie E. Payne, Comment, *Abundant Dulcibus Vitiis, Justice Kennedy: In Lawrence v. Texas, an Eloquent and Overdue Vindication of Civil Rights Inadvertently Reveals What Is Wrong with the Way the Rehnquist Court Discusses Stare Decisis*, 78 TUL. L. REV. 969, 1004 (2004) (stating that “[c]ritics of *Lawrence* have decried the majority’s reliance on foreign jurisprudence as unprecedented”). Sean Hannity has said that what concerns him most is “Justice Kennedy in particular, he’s citing in his particular case foreign law, which is almost unprecedented.” *Hannity & Colmes*, *supra* note 7 (statement of Sean Hannity). Constitution Party National Committee Chairman Jim Clymer responded to Hannity’s statement, saying “it is unprecedented. It’s unprecedented in terms of citing a law, or using a law for basis of overturning a state law as it’s done here. I think the only other example was the case where it was noted in a footnote. But in [*Lawrence*], they actually relied on foreign law.” *Id.*

30. See *supra* note 29.



dissenting opinions joined by six of the nine Justices in *Dred Scott v. Sandford*<sup>31</sup> and in the Court's opinion in the anti-polygamy case, *Reynolds v. United States*.<sup>32</sup> Foreign law is also cited in the *Legal Tender Cases*<sup>33</sup> and the *Selective Draft Law Cases*,<sup>34</sup> both of which had big federalism implications. Moreover, we will show that the debate over whether to cite foreign law in American court opinions is not at all new. Indeed, the Justices debated the practice as early as 1820 when Justice Livingston responded to Justice Story's use of foreign law to provide a definition for the crime of piracy by stating that "it is not perceived why a reference to the laws of China, or to any other foreign code, would not have answered the purpose quite as well as the one which has been resorted to."<sup>35</sup> Thus, Justice Scalia's modern lament finds its echo from as long ago as 1820 in the U.S. Reports.

This Article does not seek definitively to answer the question of whether the Supreme Court ought to cite foreign law, a question Professor Calabresi has addressed in another context.<sup>36</sup> Rather, we seek here to address the issue at a much more fundamental and basic level, which is: what has been the Supreme Court's actual historical practice in citing foreign law?<sup>37</sup> The Article proceeds in the following manner: Parts I through IV compile and examine some of the most striking cases in which the Supreme Court has cited foreign law throughout its history. Each Part covers a time frame of approximately fifty years, starting with the first half century under the Constitution and ending with the modern period. These four fifty-year Parts are then further subdivided according to the types of cases that cite foreign law in each historical period. Thus, Part I

31. 60 U.S. (19 How.) 393 *passim* (1857). Six of the nine justices in *Dred Scott*—four in the majority and the two in dissent—joined opinions citing foreign law. *Id.*

32. 98 U.S. 145, 164, 167 (1878).

33. 79 U.S. (12 Wall.) 457 (1871).

34. 245 U.S. 366 (1918).

35. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 181 (1820) (Livingston, J., dissenting).

36. Steven G. Calabresi, Lawrence, *the Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L.J. 1097 (2004).

37. We researched this Article by several means, including running searches in legal databases for terms related to foreign sources of law, including Anglo-American, civil law, civilized world, civilized nations, Code Napoleon, Roman law, and Western nations; and conducting searches for the names of prominent foreign scholars such as Bynkershoek and Vattel.

discusses several important cases in which the Supreme Court cited foreign law prior to 1840. Part II compiles and discusses many noteworthy cases that cited foreign law decided during the years between 1840 and 1890, including *Dred Scott* and *Reynolds*. Part III addresses Supreme Court opinions citing foreign sources of law decided between 1890 and 1940. Part IV then concludes by discussing many of the opinions of the Court from 1940 to the present that cited foreign law. Our survey of the Court's practice shows a steady escalation in the citation of foreign law with the modern references to foreign sources of law being the most striking. Part V of this Article then concludes by analyzing the cases discussed in Parts I through IV and addressing some of the unifying themes.

Our analysis of the Court's practice leads us to several conclusions. First, we believe that those political and journalistic commentators who say that the Court has never before cited or relied upon foreign law are clearly and demonstrably wrong. In fact, the Court has relied on such sources to some extent throughout its history. Second, the Court has cited foreign law with much more frequency in far more important constitutional cases as the Court has grown older and has increased significantly its use of such sources in *striking down* legislation only since *Trop v. Dulles* in 1958.<sup>38</sup> The phenomenon that Justice Scalia complains about is thus a relatively new development. Third, the Court has tended to cite foreign law in some of its most problematic opinions, such as several of the concurring opinions in *Dred Scott*, and its opinions in *Reynolds* and in *Roe v. Wade*.<sup>39</sup> This suggests that Justice Scalia is right to be wary of the Court's movement in this direction. Fourth, the historical evidence suggests to us that citation of foreign law is most (if at all) justifiable when the U.S. Constitution asks the Justices to weigh whether a certain practice is reasonable, as it does in the Fourth Amendment, or whether it is unusual, as it does in the Eighth Amendment. In contrast, citing foreign law is least justifiable when the Court is asked to determine whether an unenumerated right is deeply rooted in American history and tradition, as was the case in *Lawrence*,<sup>40</sup> or whether a federal statute

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38. 356 U.S. 86, 102-03 (1958).

39. 410 U.S. 113, 136-38 (1973).

40. 539 U.S. 558, 559 (2003).

violates historically unique American federalism rules, as it was asked to do in *Printz v. United States*.<sup>41</sup> We suggest that in the overwhelming majority of non-Fourth and non-Eighth Amendment cases, it is inappropriate for the Court to cite foreign law. Citation of such law can, in fact, be a sign that the Court is falling into policymaking, as it did in *Dred Scott*, *Reynolds*, and *Roe*, and this, in turn, suggests that the Justices are behaving illegitimately. We thus substantially agree with the spirit, if not entirely all of the substance, of Justice Scalia's warning against citing foreign law in most U.S. constitutional cases.<sup>42</sup>

### I. THE EARLY COURT

The Declaration of Independence speaks of giving a "decent Respect to the Opinions of Mankind,"<sup>43</sup> and at least one scholar has claimed that this means the Supreme Court ought to take account of foreign law.<sup>44</sup> Federalist Number 63 says that an "attention to the judgment of other nations is important to every government .... [I]n doubtful cases, particularly where the national councils may be warped by some strong passion or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can be followed."<sup>45</sup> It is thus not surprising that from its earliest years the Supreme Court considered and cited foreign sources of law.

We begin with two preliminary, large issues in the early Supreme Court's treatment of foreign law: the law of nations and civil, especially Roman, law. We will then proceed to examine seven Supreme

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41. 521 U.S. 898, 905 (1997). In these cases, we agree with Justice Scalia that the Court's task is to interpret the original meaning of our Constitution and not to determine the current-day reasonableness or unusualness of a legislative practice. See also Calabresi, *supra* note 36.

42. See, e.g., *Roper v. Simmons*, 125 S. Ct. 1183, 1217 (2005).

43. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

44. See, e.g., Koh, *supra* note 23, at 43-44.

45. THE FEDERALIST NO. 63, at 382 (Alexander Hamilton or James Madison) (Clinton Rossiter ed., 1961). The author, presumed to be Alexander Hamilton or James Madison, wrote:

What has not America lost by her want of character with foreign nations; and how many errors and follies would she not have avoided, if the justice and propriety of her measures had, in every instance, been previously tried by the light in which they would probably appear to the unbiased part of mankind?

*Id.*

Court cases between the Founding and 1840 that rely on foreign law.

### A. *The Law of Nations*

There were frequent references to the term the “law of nations” during the early days of American history. John Jay, the nation’s first Chief Justice and one of the three authors of the *Federalist Papers*, said in *Chisholm v. Georgia* in 1793 that the newly formed country “had, by taking a place among the nations of the earth, become amenable to the laws of nations.”<sup>46</sup> One of the nation’s earliest attorneys general, Edmund Randolph, argued that the “law of nations, although not specially adopted by the [C]onstitution or any municipal act, is essentially a part of the law of the land.”<sup>47</sup> In addition, the Constitution itself speaks directly of the law of nations when, in the Offenses Clause, it gives Congress the power to “define and punish ... Offenses against the Law of Nations.”<sup>48</sup>

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46. 2 U.S. (2 Dall.) 419, 474 (1793). Chief Justice Jay wrote in *Henfield’s Case* that the “laws of the United States admit of being classed under three heads of descriptions.” 11 F. Cas. 1099, 1100-01 (C.C.D. Pa. 1793) (No. 6360). He first listed treaties; second, the law of nations; and third, the Constitution and statutes of the United States. *Id.* at 1101. Jay wrote that the laws of nations are the “laws by which nations are bound to regulate their conduct towards each other, both in peace and war.” *Id.* at 1102. In *Ware v. Hylton*, Justice Wilson stated that “[w]hen the *United States* declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.” 3 U.S. (3 Dall.) 199, 281 (1796).

47. 1 Op. Att’y Gen. 26, 27 (1792). Chief Justice Marshall wrote in *The Nereide* that, absent an act directing otherwise, “the Court is bound by the law of nations which is part of the law of the land.” 13 U.S. (9 Cranch) 388, 423 (1815).

48. U.S. CONST. art. I, § 8, cl. 10. Consider, as examples, and in addition to the cases discussed further in this Article, the following cases addressing the law of nations: *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 734 (1835) (stating, for example, that

by the law of nations, the inhabitants, citizens, or subjects of a conquered or ceded country, territory, or province, retain all the rights of property which have not been taken from them by the orders of the conqueror, or the laws of the sovereign who acquires it by cession, and remain under their former laws until they shall be changed);

*United States v. Ortega*, 24 U.S. (11 Wheat.) 467, 469 (1826) (addressing the law of nations in the context of ambassadors and holding that the criminal prosecution at issue in the case was not one “affecting a public minister” for the purposes of the original jurisdiction of the Supreme Court); *The Nereide*, 13 U.S. (9 Cranch) at 388 (discussing the law of nations regarding the condemnation of ships and cargo); *Talbot v. Janson*, 3 U.S. (3 Dall.) 133 (1795) (discussing the law of nations and capture of vessels on the high seas).

The question then arises, especially in the context of the issue addressed in this Article, what precisely were these principles that composed the "law of nations" that the early United States adopted as its own laws?<sup>49</sup> How far did the Offenses Clause go as a matter of its original meaning in allowing Congress to legislate with respect to foreign law? Although some have attempted to equate the term "law of nations" with international law,<sup>50</sup> we think it is highly unlikely that the Founders considered the phrase to be synonymous with what we think of today as international law. Instead, the law of nations more probably referred to a rather discrete and limited "species of universal law"<sup>51</sup> that allowed, for example, the punishment of piracy and other extraordinary and heinous crimes. Unfortunately, it is impossible to define precisely what the law of nations meant to early American jurists, in part because subsequent scholars and judges did not always use the phrase consistently to describe the same thing.<sup>52</sup>

One of the few recent Supreme Court opinions to discuss the law of nations is *Sosa v. Alvarez-Machain*,<sup>53</sup> which summarized the subject matters thought to be covered by the phrase.<sup>54</sup> First, the law of nations included "the general norms governing the behavior of national states with each other"; that is, it covered "the science which teaches the rights subsisting between nations or states, and the obligations correspondent to those rights."<sup>55</sup> Second, the law of nations involved a "body of judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor."<sup>56</sup> The law of nations in this area encompassed commercial questions, admiralty issues, prize law, and disputes regarding matters such as shipwrecks and

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49. One scholar's answer to this question can be found in Edward Dumbauld's article *John Marshall and the Law of Nations*, 104 U. PA. L. REV. 38, 38 (1955).

50. See Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish ... Offenses Against the Law of Nations,"* 42 WM. & MARY L. REV. 447, 449 (2000).

51. See Dumbauld, *supra* note 49, at 38.

52. See Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 821 (1989).

53. 124 S. Ct. 2739 (2004).

54. *Id.* at 2755-56.

55. *Id.* at 2756 (emphasis omitted) (quoting EMER DE VATTEL, *THE LAW OF NATIONS Preliminaries* § 3 (Joseph Chitty trans. & ed., Edward O. Ingraham ed., 1883)).

56. *Id.*

hostages.<sup>57</sup> Finally, the law of nations encompassed a “sphere in which these rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships.”<sup>58</sup> The law of nations in this realm was often criminal in nature, and can be seen in early prohibitions of piracy as defined in foreign law and the protection of the rights of ambassadors.<sup>59</sup>

A more thorough analysis of the original meaning of the phrase “the law of nations” is beyond the scope of this Article, and the topic is one that has been addressed in other scholarly works.<sup>60</sup> For the purposes of this Article, it is sufficient that we note that a reference to the law of nations, itself, is not assumed to be merely a reference to international law. The early Supreme Court, in discovering the rules and original meaning of the law of nations, often considered the following: first, the laws and practices of other nations, especially those on the European continent; second, the views of foreign scholars, including writers on the civil law; and third, the decisions of English judges in cases arising after American independence in 1776. A follower of Justice Kennedy’s approach to citing foreign law might argue that these references are significant citations to foreign laws and provide evidence that the early Court was fully amenable to considering foreign law in reaching its decisions and developing its opinions.

A follower of Justice Scalia’s argument, on the other hand, could claim that the law of nations is not foreign law in the sense that modern debates use the term “foreign.” Because the law of nations is expressly recognized by the Constitution and arguably applied to the United States following independence by virtue of its acceptance into the community of nations, the law of nations might be viewed as truly a form of domestic law. The content of this species of domestic law, the argument might run, depends to some extent on the practices of foreign nations and the reasoning of foreign writers, but

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57. *Id.*

58. *Id.*

59. *Id.*

60. See, e.g., Dumbauld, *supra* note 49, at 38; Jay, *supra* note 52, at 821; see also Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 49 (1994) (asserting that the Supreme Court has in recent years failed to respect and adhere to international laws); Douglas J. Sylvester, *International Law as a Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 N.Y.U. J. INT’L L. & POL. 1, 7 (1999).

the Constitution itself literally "domesticates" this body of law. Uses by the Court of the law of nations, one could conclude, are completely different from the use of post-1788 developments in foreign countries to inform the meaning of constitutional language that does not expressly tie domestic law to foreign sources.

The question of just how pertinent these early references to the law of nations are to the current debate is one best left, at least at this time, to the reader. However, at minimum, in examining early Supreme Court cases that include such references, it becomes clear that the early Court, as well as other important entities in the early American government,<sup>61</sup> were unquestionably willing to at least reflect on the views of the world outside the borders of our own nation.

### *B. Civil and Roman Law and the Early Supreme Court*

Due to the importance of the law of nations and natural law theories to the newly formed American legal system, many references were made by the early U.S. Supreme Court to the civil law in general and to Roman law in particular. As with the law of nations, it is unclear to what extent these references really constitute reliance on foreign sources of law in a manner relevant to modern debates. On the one hand, Roman law seems like a foreign source to the common law tradition of the early Court; common law systems in England and the United States are not at all founded upon Roman law as civil law systems are.<sup>62</sup> On the other hand, to the extent that federal courts in the early years of the United States sought to uncover (or fashion) federal common law, it is not surprising that they would draw upon Roman and civil law sources—no more than it would be surprising for a common law court in England or Massachusetts to consider, for example, the Roman law of property or agency.

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61. This group includes political actors, commentators, and scholars, among others. See Jay, *supra* note 52, at 825 (stating that, in addition to judges, "leading political figures, and commentators commonly stated that the law of nations was part of the law of the United States").

62. See Douglas G. Smith, *Citizenship and the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 681, 740 (1997) (describing the influence of Roman law on common law systems).

Yet, Roman law certainly exerted an influence over the Supreme Court during its early, as well as later, years. Caleb Cushing, a well-remembered Attorney General of the United States, described the influence of the civil law on American jurisprudence in 1820 as follows:

The common, civil, and customary law of Europe have each precisely the same force with us in this branch; that is, our courts study them all, and adopt from them whatever is most applicable to our situation, and whatever is on the whole just and expedient, without considering either of course obligatory. If Mansfield, Scott, or Ellenborough, is cited with deference or praise, so likewise are Bynkershoek, Valen, Cleirac, Pothier, and Emerigon. The authority of a decision or opinion, emanating from either of these sources, is rested on exactly the same foundation, viz. its intrinsic excellence.<sup>63</sup>

The civil and Roman law did have a significant influence on legal education and legal writers from “the colonial period to the time of the *Dred Scott* decision.”<sup>64</sup> Addressing the importance of the Roman law as a guidepost during this time period, Justice Story said:

Where shall we find such ample general principles to guide us in new and difficult cases, as in that venerable deposit of the learning and labors of the jurists of the ancient world, the Institutes and Pandects of Justinian. The whole continental jurisprudence rests upon this broad foundation of Roman wisdom; and the English common law, churlish and harsh as was its feudal education, has condescended slightly to borrow many of its best principles from this enlightened code ....<sup>65</sup>

Lawyers and jurists in cases of maritime disputes and commercial law referenced civilian sources for principles and doctrines in American cases most frequently; for example, they looked to cases dealing

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63. PETER STEIN, *THE CHARACTER AND INFLUENCE OF THE ROMAN CIVIL LAW: HISTORICAL ESSAYS* 429 (1988) (quoting Caleb Cushing, *On the Study of the Civil Law*, 11 N. AM. REV. 407, 412 (1820)); see also Smith, *supra* note 62, at 738-43 (discussing the impact of the Roman law on the United States' legal system).

64. Smith, *supra* note 62, at 738.

65. *Id.* at 740 (quoting Joseph Story, *Address Before the Suffolk Bar* (Sept. 4, 1821), in 1 AM. JURIST 1, 13-14 (1829)).



with negotiable instruments, rules of trade, and agency law.<sup>66</sup> The reliance on such sources in admiralty law arose because this area of the law originally evolved from the civil and international mercantile law.<sup>67</sup>

It appears that early American lawyers did regard civil and Roman law as “aids to understanding the overall structure of the law.”<sup>68</sup> In addition, they viewed references to civil law as a means of demonstrating that our own law was logical in its composition.<sup>69</sup> It was this vision of the important role that Roman and civil law could play in the early years of our system of justice that likely led Justice Story to state that the fact that a rule of American law was “approved by the cautious learning of Valin, the moral perspicacity

66. R.H. Helmholz, *Use of the Civil Law in Post-Revolutionary American Jurisprudence*, 66 TUL. L. REV. 1649, 1657 (1992).

67. *Id.* “[T]he general maritime law of the United States has strong roots in international custom. In extending judicial power ‘to all cases of admiralty and maritime jurisdiction,’ the framers of the Constitution apparently had English admiralty practice in mind, itself based on the civil law of continental Europe.” James A.R. Nafziger, *The Evolving Role of Admiralty Courts in Litigation Related to Historic Wreck*, 44 HARV. INT’L L.J. 251, 266 (2003) (citations omitted).

68. Helmholz, *supra* note 66, at 1651. Helmholz also notes that civil law, including Roman law, appeared in various cases

involving the law of evidence, in disputes over real and personal property, in cases involving procedural rules, in questions relating to the law of agency and partnership, in pleas raising the statute of limitations, in criminal prosecutions, in disputes about principles of statutory construction, on questions relating to the law of damages, and in many probate matters.

*Id.* at 1662-63 (citations omitted). Justice Joseph Story said along the same lines that [t]he law with regard to personal or movable property, and contracts, (often called in the language of common law, *choses in action*) is in substance that of England .... except that the American law on these subjects is more expansive and comprehensive, and liberal, borrowing freely from the law of Continental Europe, and more disposed to avail itself of the best principles of commerce, which can be gathered from all foreign sources not excluding even the civil law.

Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 443 (2000). Perillo obtained this quotation from an article by Justice Story entitled *American Law* that was published in Germany in a German translation. *Id.* at 443 n.104. According to Perillo, the original English-language text appears in Kurt H. Nadelmann, *Joseph Story’s Sketch of American Law*, 3 AM. J. COMP. L. 3 (1954). Perillo, *supra*, at 443 n.104.

69. See Michael Lobban, *Blackstone and the Science of Law*, 30 HIST. J. 311, 321 (1987) (arguing that Blackstone employed Roman law to demonstrate that English law had a logical structure).

of Pothier, and the practical and sagacious judgment of Emerigon” was a significant recommendation of that rule.<sup>70</sup>

We turn now to seven specific Supreme Court opinions between 1789 and 1840 that actually cited foreign law, so the reader can get a better sense of the form and substance of these citations. We begin, of course, with opinions written by the legendary Chief Justice John Marshall who served from 1801 to 1835.

### *C. Opinions of Chief Justice Marshall*

In his lengthy tenure on the United States Supreme Court, Chief Justice John Marshall wrote several important opinions that referred to foreign law.<sup>71</sup> When employing foreign law, Chief Justice Marshall often looked to contemporaneous (i.e., post-1776) decisions of the English courts for guidance, and on more than one occasion he specifically referred to the decisions and opinions of Sir William Scott of the English High Court of Admiralty.<sup>72</sup> Although admiralty cases (and law of nations cases) are not traditionally seen as raising direct constitutional issues, there is a constitutional component to them, as each area is, at least in some way, based upon and derived from the Constitution. Admiralty law, for example, is grounded upon constitutional law in that the foundation for its development is its specific inclusion within the judicial power of the federal courts in Article III, Section 2 of the Constitution, which states that “[t]he judicial Power shall extend ... to all Cases of admiralty and maritime jurisdiction.”<sup>73</sup> Similarly, law of nations cases also have a constitutional root. The Constitution, in the Offenses Clause, gives Congress power to “define and punish ... Offenses against the Law of Nations.”<sup>74</sup>

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70. Helmholtz, *supra* note 66, at 1681-82 (citing *Peele v. Merchants' Ins. Co.*, 19 F. Cas. 98, 102 (C.C.D. Mass. 1822) (No. 10905)).

71. Chief Justice Marshall considered foreign law in the 1812 case of *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136-37 (1812). Because the Court found the case to explore “an unbeaten path” it “found it necessary to rely much on general principles,” and turned to the concurrence of the civilized world, as well as the writings of Vattel and Bynkershoek, for guidance. *Id.* at 136, 137, 143-46.

72. See *infra* notes 92-101 and accompanying text.

73. U.S. CONST. art. III, § 2, cl. 1.

74. U.S. CONST. art. I, § 8, cl. 10.

Neither admiralty law nor the law of nations, however, is an area of constitutional law in the same sense as more traditional areas of constitutional law that are discussed in this Article, such as Eighth Amendment and substantive due process cases. A big difference is that in both admiralty and law of nations cases it could be argued that the Constitution invites the Court to involve itself in some consideration of foreign law. Thus, Article III of the Constitution arguably delegates to the Court the power to formulate a common law of admiralty, which would build upon English and even civil law traditions and would allow the Court to consider foreign sources of law in choosing the appropriate standards to govern U.S. admiralty law. Both admiralty law and the law of nations may have been thought of in the early years as areas where a brooding omnipresence of general law made reliance on foreign legal writings peculiarly appropriate. But, if the text of the Offenses Clause or the Admiralty Jurisdiction Clause invites reference to foreign law, why does the use of the word "unreasonable" in the Fourth Amendment, or of "unusual" in the Eighth Amendment, not do the same thing? This question, too, we leave to the reader. In any event, the first Marshall opinion referring to foreign law was *Murray v. Schooner Charming Betsy*.<sup>75</sup>

### 1. *Murray v. Schooner Charming Betsy/Talbot v. Seeman*

In 1804, a mere fifteen years after the Constitution was ratified and in effect, Chief Justice Marshall wrote the opinion in *Murray v. Schooner Charming Betsy*.<sup>76</sup> This case gave rise to the so-called "*Charming Betsy*" canon of statutory construction, which has been reaffirmed and utilized throughout the history of the Court, and has been the subject of limited, although increasing, scholarly debate.<sup>77</sup>

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75. 6 U.S. (2 Cranch) 64, 118 (1804) (holding that congressional statutes should not be construed so as to violate the law of nations). Today, references to this canon of statutory construction often equate Marshall's reference to the law of nations with international law. See, e.g., Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185, 211-14 (1993).

76. 6 U.S. (2 Cranch) at 115.

77. For an example of a more recent Supreme Court case reaffirming the *Charming Betsy* canon, see, for example, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814-15 (1993). For more on the relevant scholarly commentary and debate on the issue, see, for example, Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*,

This canon provides that an act of Congress ought never to be construed to violate the law of nations if any other construction is possible.<sup>78</sup> The canon has gained such preeminence that it is embodied in the prominent Third Restatement of the Foreign Relations Law of the United States.<sup>79</sup> Its existence constitutes a clear acceptance by the Marshall Court of the background importance of foreign sources of law. It suggests that the Supreme Court should exercise its constitutional grant of power to interpret federal statutes by taking account of foreign law.

One important question before the Court in *Murray v. Schooner Charming Betsy* was whether the *Charming Betsy*, a ship, was “subject to seizure and condemnation for having violated a law of the United States?”<sup>80</sup> In answer to this question, Chief Justice Marshall first stated, as a principle “believed to be correct” and one that “ought to be kept in view in construing the act now under consideration,” the canon of statutory construction often referred to as the *Charming Betsy* canon.<sup>81</sup> Chief Justice Marshall said that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”<sup>82</sup> Marshall added that this consequently meant that an act “can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.”<sup>83</sup>

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43 VAND. L. REV. 1103, 1112-15 (1990); Turley, *supra* note 75, at 211-17; see also Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 482 (1998). It should also be noted that, although the canon is most often referred to as the *Charming Betsy* canon, it was actually first established by the Court three years earlier in the case of *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801). Chief Justice Marshall also wrote the *Talbot* opinion, *id.* at 1, although he made no reference to the *Talbot* holding in the *Charming Betsy* opinion, see *Charming Betsy* 6 U.S. (2 Cranch) at 64. The Court stated that “the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law.” *Talbot*, 5 U.S. (1 Cranch) at 43. For more on the *Talbot* opinion as the basis for the *Charming Betsy* canon, see Bradley, *supra*, at 485-86.

78. See *supra* note 77.

79. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987) (stating that “[w]here fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States”).

80. *Charming Betsy*, 6 U.S. (2 Cranch) at 118 (emphasis omitted).

81. *Id.*

82. *Id.*

83. *Id.*

The Court eventually concluded that the *Charming Betsy*, by virtue of being “the bona fide property of a Danish burgher,” was not forfeitable under the congressional statute prohibiting all commercial intercourse between the United States and France.<sup>84</sup> The Marshall Court, in now famous dicta, thus endorsed the notion that American statutes should be construed to comport with the law of nations.<sup>85</sup> What this means, in practice, is that when American courts exercise their constitutional power to interpret statutes, they must exercise that constitutional power by giving legal weight to foreign sources of law.

## 2. *Rose v. Himely*

A second Marshall opinion that endorsed reference to foreign law is *Rose v. Himely*,<sup>86</sup> decided in 1808, a mere nineteen years into the history of the Republic. This case involved a question of jurisdiction and a seized vessel, here a ship carrying a cargo of coffee that had been condemned by a French tribunal sitting in Santo Domingo.<sup>87</sup> The question posed by *Rose v. Himely* which led to the invocation of foreign sources of law was, as Chief Justice Marshall wrote, whether the United States Supreme Court could “examine the jurisdiction of a foreign tribunal.”<sup>88</sup> In this case, it was the French tribunal sitting in Santo Domingo. Chief Justice Marshall first considered the underlying assumption, saying:

Upon principle, it would seem that the operation of every judgment must depend upon the power of the court to render that

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84. *Id.* at 121 (emphasis omitted).

85. Exactly how the Court used the law of nations, or international law, in reaching its conclusion in this case is not clear from Chief Justice Marshall’s opinion, if the law of nations even truly influenced the Court’s decision. See Bradley, *supra* note 77, at 487. Some scholars have argued, however, and it seems rather apparent, that the decision and the maxim of statutory construction “became the bedrock for a series of later decisions involving international law and judicial construction.” See Turley, *supra* note 75, at 213. Others have found that, despite its initially apparent simplicity as a principle of statutory interpretation, the *Charming Betsy* canon “hides a deep and characteristic complexity that goes to the heart of how international law should be applied in the courts of the United States.” Steinhardt, *supra* note 77, at 1113.

86. 8 U.S. (4 Cranch) 241 (1808).

87. *Id.* at 268.

88. *Id.*

judgment; or in other words, on its jurisdiction over the subject-matter which it has determined.... Upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemned, arising from its being within, or without their jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence.<sup>89</sup>

Moving from principle to authority, Chief Justice Marshall then considered several foreign law decisions of the courts of England rendered after 1776, on the grounds that the United States Supreme Court was "best acquainted with them" and because he found these decisions to "give to foreign sentences as full effect as are given to them in any part of the civilized world."<sup>90</sup> *Rose v. Himley* is thus a second clear example of the Marshall Court giving legal weight to foreign—in this case, English—law.

The status given to foreign law by the courts of England, according to Chief Justice Marshall, was that the "sentence of a foreign court is conclusive with respect to what it professes to decide," qualified, however, by the limitation that the foreign court "has, in the given case, jurisdiction of the subject-matter."<sup>91</sup> In support of this statement, Chief Justice Marshall discussed four cases from the English High Court of Admiralty, all decided between the years 1799 and 1804.<sup>92</sup> It is important to point out that, because these English cases were decided after 1776, they are foreign sources of law rather than common law precedent adopted from English case law predating the Declaration of Independence.

The first foreign law case, *Flad Oyen*,<sup>93</sup> was decided in 1799, twenty-four years after American independence, by Judge Sir William Scott. It involved a vessel that was condemned by a "belligerent court sitting in a neutral territory" and the whole objection to the enforcement of the sentence was based "entirely on the defect in the constitution of the court."<sup>94</sup> The next foreign (English) case Chief

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89. *Id.* at 269.

90. *Id.* at 270.

91. *Id.*

92. *Id.* at 270-71.

93. (1799) 165 Eng. Rep. 124, 1C. Rob. 134 (High Ct. Admlty).

94. *Rose*, 8 U.S. (4 Cranch) at 270.

Justice Marshall cited, *The Christopher*,<sup>95</sup> was also decided by Sir William Scott in 1799. In *The Christopher*, the Court affirmed the jurisdiction of the foreign court passing sentence; however, “no doubt seems to have been entertained, at the bar, or by the judge himself, of his right to decide the question, whether a court of admiralty sitting in the country of the captor could take jurisdiction of a prize lying in the port of an ally.”<sup>96</sup> Chief Justice Marshall next referred to the 1799 English case of *The Henrick and Maria*<sup>97</sup> in which the right to “inquire whether the situation of the thing, the *locus in quo*, did not take it out of the jurisdiction of the court, was considered as unquestionable.”<sup>98</sup> Finally, Chief Justice Marshall discussed the 1801 foreign (English) law case of *The Helena*<sup>99</sup> in which a British vessel was captured and transferred by a foreign court.<sup>100</sup> In *The Helena*, Sir William Scott, affirming the title of the purchaser of the vessel, “expressed no doubt of the right of the court to investigate the subject.”<sup>101</sup>

Following this rather lengthy discussion of post-1776 English case law, Chief Justice Marshall adopted the position that American courts should follow the English law and should examine the jurisdiction of foreign courts. He summarized his findings by stating that

[t]he manner in which this subject is understood in the courts of England, may then be considered as established on uncontrovertible authority. Although no case has been found in which the validity of a foreign sentence has been denied, because the thing was not within the ports of the captor, yet it is appar-

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95. (1799) 165 Eng. Rep. 291, 2C. Rob. 209 (High Ct. Admly).

96. *Rose*, 8 U.S. (4 Cranch) at 270. Chief Justice Marshall also cited to the English case of *The Kierlighett*, (1800) 165 Eng. Rep. 399, 3C. Rob. 96 (High Ct. Admly), decided by Sir William Scott, as well, on May 22, 1800, as establishing the same principle as *The Christopher*. *Rose*, 8 U.S. (4 Cranch) at 270.

97. (1799) 165 Eng. Rep. 129, 1C. Rob. 146 (High Ct. Admly). Sir William Scott also decided this case, determining that “a condemnation, by the court of the captor, of a vessel lying in a *neutral* port, was conformable to the practice of nations, and therefore valid.” *Rose*, 8 U.S. (4 Cranch) at 270.

98. *Rose*, 8 U.S. (4 Cranch) at 270. *The Comet*, (1804) 165 Eng. Rep. 778 5C. Rob. 285 (High Ct. Admly), an English case decided October 10, 1804, was also cited as standing on the same principles as *The Henrick and Maria*. *Rose*, 8 U.S. (4 Cranch) at 271.

99. (1801) 165 Eng. Rep. 515, 4C. Rob. 3 (High Ct. Admly).

100. *Rose*, 8 U.S. (4 Cranch) at 271.

101. *Id.*

ent that the courts of that country hold themselves warranted in examining the jurisdiction of a foreign court, by which a sentence of condemnation has passed, not only in relation to the constitutional powers of the court, but also in relation to the situation of the thing on which those powers are exercised; at least so far as the right of the foreign court to take jurisdiction of the thing is regulated by the law of nations and by treaties. There is no reason to suppose that the tribunals of any other country whatever deny themselves the same power. *It is, therefore, at present, considered as the uniform practice of civilized nations, and is adopted by this court as the true principle which ought to govern in this case.*<sup>102</sup>

*Rose v. Himely* thus clearly relies on foreign—post-1776 British—case law in deciding an American admiralty case involving a question of jurisdiction. In it, the foreign law is adopted by Chief Justice Marshall as the new American rule of law. Admittedly, this case is an example of the Supreme Court borrowing a rule in an admiralty case from a country closely related to the United States and not one of the Court being influenced by the mores of France or Germany. Nonetheless, we think the existence of *Rose v. Himely* and *Charming Betsy* is at least a little disturbing for the thesis that the Supreme Court ought never to look to foreign sources of law. John Marshall at least seemed to think he could look to foreign law to determine whether to inquire into a foreign tribunal's jurisdiction or to construe a congressional statute.

### 3. *Brown v. United States*

Foreign sources of law surfaced again in the Marshall Court's 1814 decision in *Brown v. United States*.<sup>103</sup> Chief Justice Marshall wrote for a majority of the Court in *Brown*, addressing the War Clause of the Constitution and invalidating an executive branch seizure of British property, a cargo of pine timber, which had been bought by U.S. citizens prior to the War of 1812.<sup>104</sup> The question before the Court was whether "enemy's property, found on land at

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102. *Id.* (emphasis added).

103. 12 U.S. (8 Cranch) 110 (1814).

104. *Id.* at 121-22, 129.



the commencement of hostilities, [may] be seized and condemned as a necessary consequence of the declaration of war.”<sup>105</sup> The Court looked at the War Clause, which gave Congress the power to “make Rules concerning Captures on Land and Water,”<sup>106</sup> and found that the clause would not allow the president to seize enemy property without congressional authorization, even property that was within the United States during a time of war.<sup>107</sup> The Court thus stated that the executive seizure was not proper, as it appeared to the Court that under the Constitution “the power of confiscating enemy property is in the legislature, and that the legislature has not yet declared its will to confiscate property which was within our territory at the declaration of war.”<sup>108</sup>

Strikingly, in reaching this conclusion, Chief Justice Marshall cited and wrote about the views of many famous foreign jurists and writers, including Bynkershoek, Vattel, and Chitty.<sup>109</sup> After taking into account the analyses of these foreign scholars, Chief Justice Marshall wrote that the “modern rule then would seem to be, that tangible property belonging to an enemy and found in the country at the commencement of war, ought not to be immediately confiscated.”<sup>110</sup> Although he found that the rule at first seemed to be totally incompatible with the idea that war itself vested property in the enemy government, he wrote that it “may be considered as the opinion of all who have written on the *jus belli*, that war gives the right to confiscate, but does not itself confiscate the property of the

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105. *Id.* at 123.

106. U.S. CONST., art. I, § 8, cl. 11.

107. *Brown*, 12 U.S. (8 Cranch) at 126.

108. *Id.* at 129.

109. *Id.* at 124-25. Bynkershoek was a Dutch writer on international law in the early 1700s; Vattel, a Swiss philosopher and jurist of the same era; and Chitty, a leading English scholar of the early nineteenth century. See Jianming Shen, *The Basis of International Law: Why Nations Observe* 17 DICK. J. INT'L L. 287, 295, 310 (1999) (discussing Bynkershoek and Vattel); Stephen N. Limbaugh, Jr., *The Case of Ex Parte Lange (or How the Double Jeopardy Clause Lost Its "Life or Limb")*, 36 AM. CRIM. L. REV. 73 (1999) (describing Chitty as a prominent criminal law commentator of the nineteenth century).

110. *Brown*, 12 U.S. (8 Cranch) at 125. *Jus belli* is Latin for the “law of war” and is defined by Black’s Law Dictionary as “[t]he law of nations as applied during wartime, defining in particular the rights and duties of the belligerent powers and of neutral nations.” BLACK’S LAW DICTIONARY 876 (8th ed. 2004).

enemy.”<sup>111</sup> In respect to the Constitution, Chief Justice Marshall then declared:

The constitution of the United States was framed at a time when this rule, introduced by commerce in favor of moderation and humanity, was received throughout the civilized world. *In expounding that constitution, a construction ought not lightly to be admitted which would give to a declaration of war an effect in this country it does not possess elsewhere, and which would fetter that exercise of entire discretion respecting enemy property, which may enable the government to apply to the enemy the rule that he applies to us.*<sup>112</sup>

Chief Justice Marshall thus construed the U.S. Constitution so that it would accord with the law of nations, just as he said statutes should be so construed in *Charming Betsy*. Both opinions provide solid evidence that even very early on in our history, the Court recognized and gave weight to foreign law.

Justice Story’s dissent rebutted Chief Justice Marshall with a lengthy discussion of the views of foreign jurists, including Puffendorf, Vattel, Grotius, and Bynkershoek, to indicate that the principles of the British courts, which would have upheld the seizure, did not depart from the law of nations.<sup>113</sup> According to Justice Story, Grotius, Puffendorf, and Bynkershoek were good authority, while Bynkershoek was “the highest authority.”<sup>114</sup> While claiming to withhold an opinion “of the character of Vattel as a jurist,” Justice Story wrote that if Vattel “was singly to be opposed to the weight of Grotius and Puffendorf, and, above all, Bynkershoek, it [would] be difficult for him to sustain so unequal a contest.”<sup>115</sup> In defense of his citation of foreign jurists, Justice Story stated:

I have been led into this discussion of the doctrine of foreign jurists, farther than I originally intended; because the practice of this Court in prize proceedings must, as I have already inti-

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111. *Brown*, 12 U.S. (8 Cranch) at 125.

112. *Id.* (emphasis added).

113. *Id.* at 132-35 (Story, J., dissenting).

114. *Id.* at 140.

115. *Id.* at 140-41.

mated, be governed by the rules of admiralty law disclosed in English reports, in preference to the mere *dicta* of elementary writers. I thought it my duty, however, to notice these authorities, because they seem generally relied on by the Claimant's counsel.<sup>116</sup>

In addressing the jurisdiction of the Court over matters of prize, Justice Story considered foreign law as well as the opinions of foreign jurists. In finding that the Court did have "prize jurisdiction of the admiralty," Justice Story took into account the fact that "in other countries, and especially in France, upon whose ancient prize ordinances the administration of prize law seems, in great measure, to have been modelled, the jurisdiction has uniformly belonged to the admiralty."<sup>117</sup> Justice Story also stated that this "exercise of jurisdiction is settled by the most solemn adjudications" and cited numerous post-1776 English cases as support for this proposition,<sup>118</sup> including *The Rebeckah*,<sup>119</sup> *The Cape of Good Hope*,<sup>120</sup> *The Gertruyda*,<sup>121</sup> *The Island of Trinidad*,<sup>122</sup> *The Stella del Norte*,<sup>123</sup> and *The Maria Franchoise*.<sup>124</sup>

*Brown v. United States* was again an admiralty case, and it is theoretically possible that the Framers meant for admiralty cases to be decided according to foreign law while reserving the meaning of "unusual" in the Eighth Amendment solely to domestic law sources. We think this argument should be made, if it can be, by reference to originalist sources. *Brown v. United States* seems to us to provide some support for looking at foreign law in the Eighth Amendment context.<sup>125</sup>

116. *Id.* at 135.

117. *Id.* at 138 (citations omitted).

118. *Id.* at 139.

119. (1799) 165 Eng. Rep. 158, 1C. Rob. 227 (High Ct. Admlty).

120. (1799) 165 Eng. Rep. 314, 2C. Rob. 274 (High Ct. Admlty). The case is also referred to as *The Cape of Good Hope and Its Dependencies*. 2 CHRISTOPHER ROBINSON, REPORTS OF CASES ARGUED AND DETERMINED IN THE HIGH COURT OF ADMIRALTY; COMMENCING WITH THE JUDGMENTS OF THE RIGHT HON. SIR WILLIAM SCOTT, MICHAELMAS TERM 1798, at 274 (1801).

121. (1799) 165 Eng. Rep. 292, 2C. Rob. 211 (High Ct. Admlty).

122. (1804) 165 Eng. Rep. 799, 5C. Rob. 92 (High Ct. Admlty).

123. (1805) 165 Eng. Rep. 801, 5C. Rob. 349 (High Ct. Admlty).

124. (1806) 165 Eng. Rep. 932, 6C. Rob. 282 (High Ct. Admlty).

125. Another Marshall opinion that looks to foreign sources of law as being relevant is *McCoul v. Lekamp's Administratrix*. 15 U.S. (2 Wheat.) 111 (1817). In a footnote at the end of this 1817 case, Chief Justice Marshall described foreign law regarding the evidentiary

admission of account books of merchants and traders. *Id.* at 117 n.a. An important issue arose when Albert Lekamp, who had filed suit against Neil M'Coul to recover money owed to him, died before the suit was resolved. *Id.* at 112. When Lekamp died the suit was revived in the name of his administratrix. *Id.* The question for the Marshall Court was whether it was an error to permit an entry from one of Lekamp's account books regarding merchandise sold and delivered to M'Coul to be entered into evidence and submitted to the jury when testimony as to the originality of the account book came from Lekamp's clerk, rather than the deceased plaintiff himself. *Id.* at 115-17. The Court found that the account was "taken from the original entries made at the time of delivery" and therefore admissible. *Id.* at 117. At the end of the opinion, in a striking footnote, Chief Justice Marshall wrote of the laws of other nations regarding the use of merchants' books of account as evidence:

Whatever might have been the doctrine of the civil, or Roman law, on this subject, it is certain that *by the codes of the nations of the European continent*, which are founded on that law, the books of merchants and traders are, under certain regulations, evidence against those with whom they deal. Thus, *by the law of France*, the books of traders, regularly kept, may be admitted as evidence, in commercial matters, between persons engaged in trade. So, also, the books of tradesmen make a *semi-proof* against all persons dealing with them, the oath of the party being added to this imperfect evidence afforded by the books.

*Id.* at 117 n.a (first two emphases added) (citation omitted). In regard to the law of France concerning such books, Chief Justice Marshall cited directly to a French law from the *Code de Commerce*. See *M'Coul*, 15 U.S. (2 Wheat.) at 117 n.a. (citing, specifically, CODE DE COMMERCE, liv. 1, tit. 2, art. 12 (Fr.)). He then took note of the writings of French jurist Robert Pothier on the subject, stating:

To which *Pothier* adds, that the tradesman must enjoy the reputation of probity; that the books must be regularly kept; that the action must be commenced within a year from the time the article are delivered; that the amount be not too great; and that there is nothing improbable in the demand arising from the circumstances and wants of the debtor.

*Id.* (citing DES OBLIGATIONS §§ 719, 721). After discussing the notions of the civil law on the issue of books of account, Chief Justice Marshall turned to the English law, stating that under the common law of England:

[B]ooks of account, or shop books, are not allowed, of themselves, to be given in evidence for the owner; but a clerk, or servant, who made the original entries, may have recourse to them to refresh his memory, as to other written memoranda, made at the time of the transaction. So if the clerk or servant who made the entries be dead, the books may be admitted in evidence, to show the delivery of the articles, on producing proof of his hand-writing. But if the clerk be living, though absent without the jurisdiction of the court, the entries are inadmissible.

*Id.* at 118 (citations omitted). Chief Justice Marshall cited several English cases, including *Cooper v. Marsden*, (1793) 170 Eng. Rep. 261, 1 Esp. (K.B.) 1. *M'Coul*, 15 U.S. (2 Wheat.) at 118.

Finally, Chief Justice Marshall wrote that most of the United States, at that time, adhered to the English rule of general inadmissibility of books of account, but pointed specifically to those other states, including New York and Pennsylvania, where the rule had been changed "by usage ... of the courts founded thereon, or by positive statutes" to allow for greater usage of such books. *Id.* By pointing to the rules of these states, as well as the rules of other foreign nations, Chief Justice Marshall provided additional confirmation that the decision of the

#### 4. *The Antelope*

The fourth and final Marshall opinion we would like to discuss is *The Antelope*,<sup>126</sup> a well-known 1825 case regarding the slave trade. Chief Justice Marshall's opinion in this case demonstrated not only the early Court's devotion to positive law over sentiment,<sup>127</sup> but also its willingness to look at the views of the world beyond America's borders. At issue in the case was whether a ship that had been captured illegally importing slaves into the United States, the *Antelope*, should be returned to its Spanish and Portuguese owners along with the slaves it was carrying.<sup>128</sup> Chief Justice Marshall delivered the opinion of the Court,<sup>129</sup> finding that, although slavery is "contrary to the law of nature,"<sup>130</sup> the slaves should be returned to their "owners" based upon the belief that "positive law overruled the natural law principle."<sup>131</sup>

In regard to the slave trade, Chief Justice Marshall noted that the "Christian and civilized nations of the world, with whom we have the most intercourse, have all been engaged in it."<sup>132</sup> He noted that it was "sanctioned in modern times by the laws of all nations who possess distant colonies, each of whom has engaged in it as a common commercial business which no other could rightfully interrupt."<sup>133</sup> Chief Justice Marshall claimed that due to "long usage" and

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Court to admit the account entry into evidence was not an erroneous or illogical conclusion. Here again, we seem to have a plain reliance by Chief Justice Marshall on foreign sources of law, albeit not a reliance with respect to a hotly contested moral or constitutional issue like gay rights or the juvenile death penalty.

126. 23 U.S. (10 Wheat.) 66 (1825).

127. Justice Marshall stated early in the opinion that "this Court must not yield to feelings which might seduce it from the path of duty, and must obey the mandate of the law." *Id.* at 114.

128. *Id.* at 114, 123-24.

129. *Id.* at 114. No dissent was written in *The Antelope*; Supreme Court historians believe, however, that Justices Story, Thompson, and Duvall dissented from the Court's holding. See, e.g., Michael Daly Hawkins, *John Quincy Adams and the Antebellum Maritime Slave Trade: The Politics of Slavery and the Slavery of Politics*, 25 OKLA. CITY U. L. REV. 1, 33 n.109 (2000).

130. *The Antelope*, 23 U.S. (10 Wheat.) at 120.

131. Kaimipono David Wenger, *Slavery as a Takings Clause Violation*, 53 AM. U. L. REV. 191, 202 n.34 (2003).

132. *The Antelope*, 23 U.S. (10 Wheat.) at 114-15.

133. *Id.* at 115.

“general acquiescence,” the trade “could not be considered as contrary to the law of nations.”<sup>134</sup>

However, Chief Justice Marshall also noted the fact that when the American states acquired the right of self-government most of them forbade the traffic of slaves.<sup>135</sup> He also spoke of British movement in the early nineteenth century to abolish slavery, stating:

In the beginning of this century, several humane and enlightened individuals of Great Britain devoted themselves to the cause of the Africans; and, by frequent appeals to the nation, in which the enormity of this commerce was unveiled, and exposed to the public eye, the general sentiment was at length roused against it, and the feelings of justice and humanity, regaining their long lost ascendancy, prevailed so far in the British parliament as to obtain an act for its abolition. The utmost efforts of the British government, as well as of that of the United States, have since been assiduously employed in its suppression. It has been denounced by both in terms of great severity, and those concerned in it are subjected to the heaviest penalties which law can inflict. In addition to these measures operating on their own people, they have used all their influence to bring other nations into the same system, and to interdict this trade by the consent of all.<sup>136</sup>

Chief Justice Marshall continued by noting that public sentiment in the United States and Britain had “kept pace with the measures of the government” and that the opinion that the slave trade ought to be suppressed was “extensively, if not universally entertained.”<sup>137</sup> Public opposition to the slave trade in Britain in 1825 was not unlike public opposition to the juvenile death penalty in Western Europe today. If the one is relevant, perhaps the other is as well.

Chief Justice Marshall also made considerable reference to several post-1776 decisions from the British High Court of Admiralty. First, he cited *The Amedie*<sup>138</sup>—decided on March 17, 1810, thirty-four years after American independence—in which Sir William

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134. *Id.*

135. *Id.*

136. *Id.* at 115-16.

137. *Id.* at 116.

138. (1810) 12 Eng. Rep. 92, 1 Acton 240 (P.C.).

Grant found that, because Great Britain had prohibited the slave trade, principles of universal law gave a claimant no right to claim restitution in a prize court for human beings carried as slaves.<sup>139</sup>

The Court next discussed *The Diana*,<sup>140</sup> decided by Sir William Scott on May 21, 1813,<sup>141</sup> thirty-seven years after American independence, in which a Swedish vessel carrying slaves was captured by a British cruiser but was ordered returned by the British court "on the principle that the [slave] trade was allowed by the laws of Sweden."<sup>142</sup> And, the Court concluded its exposition of post-1776 foreign, English law by examining an 1817 British High Court of Admiralty case, *Le Louis*,<sup>143</sup> in which a French vessel was captured on a slaving voyage prior to purchasing any slaves.<sup>144</sup> In the opinion, again written by Sir William Scott, the English court held that the act of trading in slaves was not piracy, nor could it be pronounced contrary to the law of nations.<sup>145</sup> Chief Justice Marshall quoted directly from the opinion as follows:

A Court, in the administration of law, cannot attribute criminality to an act where the law imputes none. It must look to the legal standard of morality; and, upon a question of this nature, that standard must be found in the law of nations, as fixed and evidenced by general, and ancient, and admitted practice, by treaties, and by the general tenor of the laws and ordinances, and the formal transactions of civilized states; and, looking to

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139. *The Antelope*, 23 U.S. (10 Wheat.) at 116-17. According to Sir William Grant, the only way that the claimant in *The Amedie* could receive restitution was if he could show that some right was violated by the capture of his slaves, and, as he was unable to show that his country allowed the property right that he claimed, he had no right of restitution. *Id.* at 117. Marshall also cited *The Fortuna*, (1811) 165 Eng. Rep. 1240, 1 Dods. 81 (High Ct. Admlty), decided on March 12, 1811 by Sir William Scott, as affirming the same principle as *The Amedie*. *The Antelope*, 23 U.S. (10 Wheat.) at 117.

140. (1813) 165 Eng. Rep. 1245, 1 Dods. 95 (High Ct. Admlty).

141. *Id.*

142. *The Antelope*, 23 U.S. (10 Wheat.) at 117. Chief Justice Marshall stated that a common principle of the British cases was that

the legality of the capture of a vessel engaged in the slave trade, depends on the law of the country to which the vessel belongs. If that law gives its sanction to the trade, restitution will be decreed; if that law prohibits it, the vessel and cargo will be condemned as good prize.

*Id.* at 118.

143. (1817) 165 Eng. Rep. 1464, 2 Dods. 210 (High Ct. Admlty).

144. *The Antelope*, 23 U.S. (10 Wheat.) at 118.

145. *Id.* at 118-19.

those authorities, [he found] a difficulty in maintaining that the transaction was legally criminal.<sup>146</sup>

Next, discussing the question of whether the slave trade was prohibited by the law of nations, Chief Justice Marshall stated that, although the trade is contrary to the law of nature,<sup>147</sup> slavery had existed “from the earliest times” as the result of a right of war that “the victor might enslave the vanquished.”<sup>148</sup> Thus, the slave trade could not be prohibited by the law of nations because “[t]hat which has received the assent of all, must be the law of all.”<sup>149</sup> Although, according to the Chief Justice’s statement that “[t]hroughout Christendom, this harsh rule has been exploded,” the transformation had not been universal.<sup>150</sup> Speaking of Africa, he stated that the “parties to the modern law of nations do not propagat[e] their principles by force; and Africa has not yet adopted them. Throughout the whole extent of that immense continent, so far as we know its history, it is still the law of nations that prisoners are slaves.”<sup>151</sup>

Chief Justice Marshall then questioned whether citizens of the United States could continue to participate in the slave trade. He asked, “[c]an those who have themselves renounced this law, be permitted to participate in its effects by purchasing the beings who are its victims?”<sup>152</sup> In answering the question, he recognized that a jurist must search for a legal solution, not a moral one, in “those principles of action which are sanctioned by the usages, the national acts, and the general assent, of that portion of the world of which he

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146. *Id.* at 119 (quoting from *Le Louis*, 165 Eng. Rep. at 1477, 2 Dods. at 249-50). Regarding the bracketed text: In the original case, Sir William Scott stated “I find,” *Le Louis*, 165 Eng. Rep. at 1477, 2 Dods. at 249, and Chief Justice Marshall quoted the language as “he found.” Chief Justice Marshall also noted that Sir William Scott stated in *Le Louis* that if a French ship laden with slaves was brought in, he would “without hesitation,” restore the possession which was unlawfully divested. *The Antelope*, 23 U.S. (10 Wheat.) at 119 (quoting from *Le Louis*, 165 Eng. Rep. at 1479). According to Sir William Scott, no evidence was shown that the French had, as of the time of *Le Louis*, forbidden the slave trade. *Id.* at 120.

147. *Id.* Chief Justice Marshall explained that “every man has a natural right to the fruits of his own labour.” *Id.*

148. *Id.*

149. *Id.* at 121.

150. *Id.*

151. *Id.*

152. *Id.*



considers himself as a part, and to whose law the appeal is made.”<sup>153</sup> Thus, considering international law, Marshall stated:

If we resort to this standard as the test of international law, the question, as has already been observed, is decided in favour of the legality of the trade. Both Europe and America embarked in it; and for nearly two centuries, it was carried on without opposition, and without censure. A jurist could not say, that a practice thus supported was illegal, and that those engaged in it might be punished, either personally, or by deprivation of property.<sup>154</sup>

Chief Justice Marshall found that traffic in slaves remained lawful to those whose governments had not forbidden it<sup>155</sup> and stated that it followed that “a foreign vessel engaged in the African slave trade, captured ... and brought in for adjudication, would be restored.”<sup>156</sup>

Unlike the three prior Marshall opinions we discussed, *The Antelope* does involve a hot-button moral issue—slavery—that is akin to gay rights and the juvenile death penalty, and here we find Chief Justice Marshall having waded into a thicket of references to foreign sources of law to support his holding in the case—a case that Justice Scalia might say was not one of Marshall’s finest moments. Maybe the lesson to be drawn from the citation of foreign sources of law in *The Antelope* is that if one finds oneself heavily citing foreign sources of law, as opposed to domestic ones, perhaps one ought to entertain the possibility that one is mistaken. In any event, Marshall’s extensive reliance on foreign sources of law in *The Antelope* may provide some support for Justice Kennedy’s and Justice O’Connor’s reliance on those sources in *Roper*.<sup>157</sup> If so,

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153. *Id.*

154. *Id.* at 121-22.

155. *Id.* at 122.

156. *Id.* at 123.

157. Another famous Marshall opinion that is based on foreign law is the 1823 case of *Johnson v. M'Intosh*. 21 U.S. (8 Wheat.) 543 (1823). This case was the first instance in which the Supreme Court addressed a federal Indian question, see Richard J. Anns, Jr., *The United States Supreme Court and American Indian Tribal Sovereignty*, 23 AM. INDIAN L. REV. 465, 465 (1999) (reviewing DAVID E. WILKINS, *AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE* (1998)), and is another example of Chief Justice Marshall using foreign sources of law to justify and support a decision of the Court.

*Johnson* involved foundational questions of American property law and is thus relevant to the meaning of the word “property” in the Fifth Amendment. It is thus arguably relevant to a question of constitutional meaning. At issue in *Johnson* was whether private purchases of

Indian lands from the chiefs of certain Indian tribes would be recognized in U.S. courts. *Johnson*, 21 U.S. (8 Wheat.) at 571-72. In ruling that the federal courts would not recognize the validity of land titles obtained through such purchases, Chief Justice Marshall emphasized the right of discovery, holding, essentially, that a European discovering sovereign had an exclusive right to extinguish the Indians' title, if not their right of occupancy, in their lands. *Id.* at 573-74. In support of the Court's holding, Chief Justice Marshall made considerable use of the practices and legal philosophies of the European nations that first discovered and settled on the American continent. *See id.* at 572-84. This use of foreign law was of foreign law prior to 1776 when the United States became independent. It is thus a use of foreign law to illuminate the original meaning of the Constitution and the rights the U.S. government succeeded to. It is *not* like a reference to post-1776 foreign law to illuminate constitutional meaning, as occurred in *Roper v. Simmons*, 125 S. Ct. 1183 (2005).

Chief Justice Marshall discussed the necessity of a development of a uniform principle of ownership among the numerous European nations seeking territory in America and implied that international law applied only within the realm of the European world, the so-called "civilized" nations. Jonathan Shafter, Note, *Original Intentions and International Reality: States, Sovereignty, and the Misinterpretation of Alienage Jurisdiction in Matimak v. Khalily*, 39 COLUM. J. TRANSNAT'L L. 729, 754 n.75 (2001). Marshall stated:

[I]t was necessary ... in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented. Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

*Johnson*, 21 U.S. (8 Wheat.) at 573.

The Chief Justice considered the conduct and reasoning of individual foreign nations in Europe in their conquest of the American continent to support the notion that the principle of a right of discovery had received "universal recognition." *Id.* at 574. First, Chief Justice Marshall addressed Spain, stating that the nation "did not rest her title solely on the grant of the Pope. Her discussions respecting boundary, with France, with Great Britain, and with the United States, all show that she placed it on the rights given by discovery." *Id.* The Court noted that Portugal also "sustained her claim to the Brazils by the same title." *Id.* The Court then discussed the actions of France. *Id.* at 574-75.

Chief Justice Marshall also considered the law and practice of yet another foreign nation that had made acquisitions in America, the States of Holland, who "sustained their right on the common principle adopted by all Europe," *id.* at 575, that is, alleging that they acquired title by virtue of its discovery by Henry Hudson, sailing under orders of the Dutch East India Company, *id.* at 575-76. Marshall noted that the English had contested the claim, "not because they questioned the title given by discovery, but because they insisted on being themselves the rightful claimants under that title." *Id.* at 576.

At this juncture, the Court addressed the adoption of the principle of the right of discovery by England, *id.*, which is the only European nation whose early legal practices were in any

foreign law has been used to protect both slavery and sixteen- and seventeen-year-old murderers—something many would say is hardly a cause for celebration.

#### *D. Opinions of Justice Story*

Justice Story also wrote noteworthy majority opinions that referred to foreign sources of law and wrote the previously discussed dissent in *Brown v. United States*.<sup>158</sup> As we have shown, Justice Story was quite fond of and knowledgeable about the civil law, as well as of the writings and opinions of foreign jurists and scholars.<sup>159</sup> It is thus not at all surprising that these sources quite naturally found their way in to some of his opinions. In addition to serving on the Supreme Court, Justice Story was also a highly esteemed academic, with a simultaneous appointment as a professor at Harvard Law School.<sup>160</sup> His lengthy discussions of foreign law in his opinions thus read much like a scholarly work or academic lecture, and even include citations to the foreign sources in their original language, without provision of an English translation.

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way originally adopted as American legal precedent after the formation of the new nation. Chief Justice Marshall stated that none “of the powers of Europe gave its full assent to [the principle of the right of discovery] more unequivocally than England.” *Id.* at 576. Only after a very lengthy discussion of the English recognition of this principle and of the struggles among the European nations, most prominently England, regarding claim to American lands, *id.* at 576-84, did the Court finally address whether the “American States [had] rejected or adopted this principle.” *Id.* at 584. Chief Justice Marshall found that our nation had acted in such a manner as to “recognise and elucidate the principle which has been received as the foundation of all European title in America.” *Id.* at 587. Marshall concluded:

The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, *as all others have maintained*, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest ....

*Id.* (emphasis added).

Once again, we find Chief Justice Marshall looking to foreign sources of law for guidance—this time on a foundational issue of American property law. Defining the scope of property rights pre-1776 in the U.S. is critical to understanding the scope of the Fifth Amendment’s Due Process and Takings Clauses. *Johnson v. M’Intosh* is thus ultimately of constitutional dimensions.

158. See discussion *supra* Part I.C.3 and accompanying text.

159. See *supra* notes 114-24.

160. See Sanford Levinson, *Compelling Collaboration with Evil? A Comment on Crosby v. National Foreign Trade Council*, 69 *FORDHAM L. REV.* 2189, 2190 (2001) (explaining that Story “moonlighted” as a Harvard law professor during his time on the Court).

### 1. *United States v. Smith*

The 1820 case of *United States v. Smith*,<sup>161</sup> which involved the Offenses Clause of the Constitution, provides the current Supreme Court with a precedent for citing foreign sources of law in criminal law cases with constitutional law underpinnings.<sup>162</sup> *Smith* also contains a disagreement between Justice Story, in his majority opinion, and Justice Livingston, in dissent, over the propriety of references to foreign sources of law.<sup>163</sup> This exchange shows that the debate between Justices Scalia and Kennedy in *Lawrence* and in *Roper* is far from new.

*Smith* concerned an 1819 federal statute that provided that

if any person or persons whatsoever, shall, upon the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders shall be brought into, or found in the United States, every such offender or offenders shall, upon conviction ... be punished with death.<sup>164</sup>

Specifically, the *Smith* case involved some American citizens who had captured and robbed a Spanish ship and, upon their own capture, were tried in U.S. courts for the crime of piracy.<sup>165</sup> The key question presented when the case reached the Supreme Court was whether the statutory outlawing of piracy, as defined by the law of nations, was a sufficiently precise definition of the crime of piracy,<sup>166</sup> which was punishable by death.<sup>167</sup> Lurking in the background of this case is therefore a constitutional question about the adequacy of the notice that defendants received that their conduct was unlawful. Thus the issue the Court was addressing was not simply how the law of nations defined piracy, but whether definition of a crime by reference rather than explicit provision was certain enough to pass constitutional muster.<sup>168</sup> Counsel for the alleged pirates argued that

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161. 18 U.S. (5 Wheat.) 153 (1820).

162. See *infra* notes 172-84 and accompanying text.

163. See *infra* notes 185-88 and accompanying text.

164. *Smith*, 18 U.S. (5 Wheat.) at 157.

165. *Id.* at 154.

166. *Id.* at 160.

167. *Id.* at 154 n.a.

168. The Court considered "whether the crime of piracy is defined by the law of nations

Congress was obliged to define piracy in more definite terms than simple reference to so vague a concept as the law of nations.<sup>169</sup> He claimed it was unconstitutional simply to leave the definition of piracy to be ascertained by judicial interpretation of the law of nations.<sup>170</sup> Counsel further argued that, as the "writers on public law do not define the crime of piracy with precision and certainty," it was necessary for Congress to define, "in terms," the crime before proceeding to punish it.<sup>171</sup>

In resolving the case, the majority and dissenting opinions in *Smith* made it clear that, by 1820, debate regarding judicial and congressional reference to foreign sources of law was not a new phenomenon. Writing for the majority, Justice Story found the law's reference to the law of nations for a definition of the crime of piracy to be sufficiently definite to be acceptable<sup>172</sup> and the argument that Congress was bound to define in terms the offense "too narrow a view of the language of the constitution."<sup>173</sup> The Court in *Smith* then turned to foreign sources of law to uphold the congressional statute that otherwise might have been found unconstitutional. Justice Story wrote that the law of nations on the subject of piracy "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognising and enforcing that law."<sup>174</sup> Justice Story claimed that "[t]here is scarcely a writer on the law of nations, who does not allude to piracy as a crime of a settled and determinate nature; and whatever may be the diversity of definitions, in

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with reasonable certainty." *Id.* at 160. As one author has pointed out:

Early 19th-century jurisprudence had accepted the principle that crimes had to be statutorily defined and their elements set forth with precision, yet Congress had felt free to define piracy by reference to "the law of nations," with no further particularization. Congress seemed to have assumed that even though a domestic crime would be unpunishable if the perpetrator's offense had not been precisely defined, a crime on the high seas could be "defined by the law of nations." Story endorsed this view in *Smith*.

G. Edward White, *The Marshall Court and International Law: The Piracy Cases*, 83 AM. J. INT'L L. 727, 733 (1989).

169. *Smith*, 18 U.S. (5 Wheat.) at 156-57 (describing counsel's arguments).

170. *Id.*

171. *Id.* at 157.

172. *Id.* at 162.

173. *Id.* at 158.

174. *Id.* at 160-61.

other respects, all writers concur, in holding, that robbery, or forcible depredations upon the sea ... is piracy."<sup>175</sup> Justice Story then included a lengthy footnote with citations to foreign jurists and scholars and international practice that he "believed to be sufficient" to show that "piracy is defined by the law of nations."<sup>176</sup> In this footnote, Justice Story spent several pages surveying the views of a variety of foreign legal scholars and jurists.<sup>177</sup> He quoted extensively from Grotius, entirely in Latin with no English translation provided. He found passages that showed Grotius's opinion was that "piracy by the law of nations is the same thing as piracy by the civil law" and that, while Grotius did not explicitly define the crime, there was "no doubt" that in his view pirates were "robbers or plunderers on the sea."<sup>178</sup> Justice Story also reflected on "the definitions of the civil law and maritime writers."<sup>179</sup> He addressed the views of Calvinus,<sup>180</sup> M. Bonnemant,<sup>181</sup> Valin, Straccha, Casaregis, Dr. Brown, Beawes, Molloy, Lord Coke, Sir Leoline Jenkins, and Targa,<sup>182</sup> among others, supporting the proposition that piracy involves, in essence, "robbery upon the sea."<sup>183</sup> In conclusion, Justice Story stated that the collec-

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175. *Id.* at 161.

176. *Id.* at 163 n.a.

177. *Id.* at 163-80.

178. *Id.* at 166.

179. *Id.* at 170.

180. *Id.* at 171 (citing Calvinus's work LEXICON JURIDICUM).

181. *Id.* at 172 (citing CHAVALIER D'ABREU, TRAITE' JURIDICE-POLITIQUE SUR LES PRIZES MARITIMES (Bonnemant trans., 1802)).

182. *Id.* at 173-75.

183. *Id.* at 173. Justice Story stated that "Comyn's (*Dig. Admiralty, E. 3.*) defines piracy thus: 'Piracy is when a man commits robbery upon the sea.'" *Id.* Justice Story then stated that "[c]itations from civilians and maritime writers to the same effect might be multiplied; but they would unnecessarily swell this note." *Id.* at 176. Justice Story wrote that all that remained was to "notice the doctrines which have been held by the tribunals of Great Britain, and asserted by her common law writers on the subject of piracy." *Id.* In doing so, Justice Story recognized that at common law piracy was not a felony but rather was "only punishable by the civil law" and noted the writings of Hawkins and Blackstone. *Id.* He also made note of the state trials for piracy in Britain during the reign of King William III when it was stated that "piracy is only a sea term for robbery." *Id.* at 177 (citing *Rex v. Dawson*, 8 William III. 1696, reprinted in 13 State Trials 451 (1742)). Finally, Justice Story referred to Erskine's Institutes of the Law of Scotland (Scotland being at least in part a civil law jurisdiction), in which the author stated that "piracy is that particular kind of robbery which is committed on the seas." *Id.* at 180 (quoting JOHN ERSKINE, AM. INSTITUTE OF THE LAW OF SCOTLAND, bk. 9, tit. 4965).

tion of doctrines confirmed the opinion of the Court and provided the reader with an aid to his future research.<sup>184</sup>

Justice Livingston, in dissent, disagreed with the proposition that the law of nations could provide a sufficiently precise definition of piracy to allow the statute to pass constitutional review in a capital case.<sup>185</sup> He argued that the Framers of the Constitution, in giving Congress the power to define and punish piracies in the Offenses Clause, must have intended for Congress to provide a more concrete definition of piracy and to remedy the uncertainty that existed in the law of nations.<sup>186</sup> Justice Livingston maintained that it was Congress's duty to incorporate definitions of important terms, such as piracy, into its statutes.<sup>187</sup> He also took issue with the majority's use of foreign law to establish the parameters of a criminal offense and its references to foreign authors to ascertain the meaning of the law of nations. Justice Livingston wrote:

Although it cannot be denied that some writers on the law of nations do declare what acts are deemed piratical, yet it is certain, that they do not all agree; and if they did, it would seem unreasonable to impose upon that class of men, who are the most liable to commit offences of this description, the task of looking beyond the written law of their own country for a definition of them. If in criminal cases every thing is sufficiently certain, which by reference may be rendered so, which was an argument used at bar, *it is not perceived why a reference to the laws of China, or to any other foreign code, would not have answered the purpose quite as well as the one which has been resorted to.* It is not certain, that on examination, the crime would not be found to be more accurately defined in the code thus referred to, than in any writer on the law of nations; but the objection to the reference in both cases is the same; that it is the duty of Con-

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184. Justice Story wrote that the "foregoing collection of doctrines, extracted from writers on the civil law, the law of nations, the maritime law, and the common law, in the most ample manner confirms the opinion of the Court in the case in the text." *Id.* at 180. The doctrines were also "submitted to the learned reader to aid his future researches in a path, which, fortunately for us, it has not been hitherto necessary to explore with minute accuracy." *Id.*

185. *Id.* at 164-83 (Livingston, J., dissenting). His dissent in *Smith* was one of the only eight dissents Justice Livingston recorded in his seventeen-year tenure on the Court. White, *supra* note 168, at 734.

186. *Smith*, 18 U.S. (5 Wheat.) at 166-82 (Livingston, J., dissenting).

187. *Id.* at 182.

gress to incorporate into their own statutes a definition in *terms*, and not to refer the citizens of the United States for rules of conduct to the statutes or laws of any foreign country, with which it is not to be presumed that they are acquainted.<sup>188</sup>

Justice Livingston's debate with Justice Story in *Smith* thus seems to foreshadow Justice Scalia's debate with Justice Kennedy in *Roper v. Simmons*. Both *Smith* and *Roper* involved the criminal law and capital punishment. In both cases, the majority extensively refers to foreign sources of law. And, in both cases, the dissent complains that those references to foreign sources of law are illegitimate. The biggest difference between the two cases may be that the first was decided by Justice Story in 1820 and the second by the Court in 2005. It is, of course, theoretically possible that the Offenses Clause authorizes the Supreme Court to rely on foreign law, while the Eighth Amendment does not. But, no one has ever shown that. Originalists who reject reliance on foreign law ought to show why such reliance is allowed in cases like *Charming Betsy* and *Smith* but not in Eighth Amendment cases.

## 2. *Columbian Insurance Co. of Alexandria v. Ashby*

Justice Story also spent considerable time reviewing and addressing foreign jurisprudence on the admiralty law question of the law of general average<sup>189</sup> in *Columbian Insurance Co. of Alexandria v. Ashby*.<sup>190</sup> Once again, it is theoretically possible that the original meaning of the grant of admiralty jurisdiction in Article III includes a power to rely on foreign law while the original meaning of the Eighth Amendment does not. But no one has shown this. Thus, this case is arguably precedent for *Roper*.

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188. *Id.* at 181-82 (first emphasis added).

189. General average is defined as an "[a]verage resulting from an intentional partial sacrifice of ship or cargo to avoid total loss." BLACK'S LAW DICTIONARY 145 (8th ed. 2004). Liability arising from the sacrifice "is shared by all parties who had an interest in the voyage." *Id.* at 145-46.

190. 38 U.S. (13 Pet.) 331 (1839). Justice Gray, in the 1895 case of *Ralli v. Troop*, cited this case as stating "the leading limitations and conditions, as recognized by all maritime nations, to justify a general contribution." 157 U.S. 386, 394 (1895). In *Ralli*, the Court stated that the law of general average came down from "remote antiquity" and "derived from the law of Rhodes, through the law of Rome." *Id.* at 393.



The question before the Court in *Ashby* was “whether the voluntary stranding of a ship in a case of imminent peril, for the preservation of the crew, the ship, and cargo, followed by a total loss of the ship, constitutes a general average, for which the property saved is bound to contribution.”<sup>191</sup> Justice Story found that the “maritime jurists of continental Europe” were not in agreement upon the answer, and that American admiralty case law reached “conflicting adjudications.”<sup>192</sup> Thus, Justice Story wrote, it was the *duty* of the Court to examine and weigh the opposing opinions on the issue, including those of foreign nations, to determine the “true principle which ought to govern us on the present occasion.”<sup>193</sup> Foreign law therefore provided Justice Story with guidance in ascertaining the appropriate manner in which to resolve the conflict in American jurisprudence and in settling on the appropriate rules for deciding the case.

Justice Story began his review of the commentary and opinions upon the issue by discussing the origin of the rule as to general average, stating that it was “derived to us from the Rhodian law, as promulgated and adopted in the Roman jurisprudence.”<sup>194</sup> Justice Story examined the Roman law on the issue and concluded that

the Roman law does not proceed upon any distinction as to the property sacrificed, whether it be ship or cargo, a part or the whole; but solely upon the ground that the sacrifice is voluntary, to avert an imminent peril; and that it is in the event successful by accomplishing that purpose.<sup>195</sup>

Regarding his discussion of Roman law, Justice Story wrote that such

remarks seem proper to be made in order to meet the suggestions thrown out at the argument, with reference to the actual bearings of the Roman law on the question before the Court; and

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191. *Ashby*, 38 U.S. (13 Pet.) at 337.

192. *Id.*

193. *Id.*

194. *Id.* at 337-38.

195. *Id.* at 339.

they may also serve in some measure to explain the true principles by which the question ought to be decided.<sup>196</sup>

Justice Story next addressed the opinions of foreign jurists, including those of the leading French authority on commercial law, Emerigon. Justice Story's analysis of the foreign jurists found "far less disagreement among them than ha[d] been generally supposed," and that all of them "admit that a voluntary stranding of a ship constitutes a case of general average, if there is not a total loss of the ship."<sup>197</sup> Justice Story reviewed Emerigon's statement of the doctrine, even remarking that Emerigon's passage on general average cited a French ordinance, and noting his disagreement with some of Emerigon's views.<sup>198</sup> Justice Story stated his disagreement with Emerigon's opinion that for a general average to apply the ship must "be again set afloat".<sup>199</sup>

Surely the question of contribution cannot depend upon the amount of the damage sustained by the sacrifice; for that would be to say, that if a man lost all his property for the common benefit, he should receive nothing; but if he lost a part only he should receive full compensation. No such principle is applied to the total loss of goods sacrificed for the common safety: why then should it be applied to the total loss of the ship for the like purpose?<sup>200</sup>

After voicing this disagreement with Emerigon, Justice Story then concluded that "Emerigon stands alone among the foreign jurists, in maintaining the qualification that it is necessary to a general average that the ship should be got afloat again after a voluntary stranding."<sup>201</sup> He found that Valin's writings would not support such a conclusion, nor would the *Consolato del Mare*, "one of the earliest and most venerable collections of maritime law."<sup>202</sup> Justice Story found further support against Emerigon's view in the Roman law,

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196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 339-40.

201. *Id.* at 340.

202. *Id.* at 340-41.

“where it is said, without referring to the manner and extent of the damage, that the whole damage voluntarily done to the ship for the common good, must be borne by a common contribution.”<sup>203</sup> After further analysis of leading foreign jurists on the issue, including an opinion by some Amsterdam maritime judges,<sup>204</sup> Justice Story concluded that, based on the Court’s review of “*some of the leading opinions in foreign jurisprudence*, brief and imperfect as it is, it seems to us that the weight of the authority is decidedly in favour of the present claim for general average.”<sup>205</sup>

Only after this detailed analysis of foreign law and scholarship did Justice Story turn to the “domestic authorities” that had already addressed the same issue, albeit reaching conflicting conclusions.<sup>206</sup> First, the Court noted that the Supreme Court of New York had held in a similar case that a general average does not exist where a ship is totally lost after being voluntarily run ashore.<sup>207</sup> Although the Supreme Court of New York grounded its opinion in its own exposition of Rhodian and Roman law and the authority of foreign jurists, Justice Story disagreed with its conclusion as to the “true interpretation of the Roman text, and of the continental jurists.”<sup>208</sup> Justice Story then discussed other American courts that had reached conclusions opposite to those of the Supreme Court of New York, including an opinion by Justice Washington in *Caze v. Reilly*,<sup>209</sup> which included the “most extensive research into foreign jurisprudence,” and an opinion by the Supreme Court of Pennsylvania.<sup>210</sup> Based on the foregoing analysis, the Court then reached its final conclusion on the issue of general average, stating:

We have examined the reasoning in these opinions, and are bound to say that it has our unqualified assent: and we follow

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203. *Id.* at 341.

204. The opinion of the Amsterdam judges arises from Bynkershoek’s treatment of the issue. *Id.*

205. *Id.* at 342 (emphasis added).

206. *Id.*

207. *Id.* (referring to *Bradhurst v. Columbian Ins. Co.*, 9 Johns. 9 (N.Y. Sup. Ct. 1812)).

208. *Id.* at 342-43. The Court stated that it was not “satisfied that the doctrine of the Supreme Court of New York can be maintained; for the general principle certainly is, that whatever is sacrificed voluntarily for the common good, is to be recompensed by the common contribution of the property benefited thereby.” *Id.* at 343.

209. 5 F. Cas. 332 (C.C.D. Pa. 1814) (No. 2538).

210. *Ashby*, 38 U.S. (13 Pet.) at 343.

without hesitation the doctrine, as well founded in authority and supported by principle, that a voluntary stranding of the ship, followed by a total loss of the ship, but with a saving of the cargo, constitute when designed for the common safety a clear case of general average.<sup>211</sup>

This case, then, along with the *Smith* case and Justice Story's dissent in *Brown*, clearly shows that Justice Story was willing in some cases to cite foreign sources of law at some length.<sup>212</sup> Admittedly, the *Ashby* case involved issues of admiralty law where the Supreme Court arguably has more of a free hand in devising rules than it does in Eighth Amendment U.S. constitutional cases; however, Justice Story's references still show the willingness of the early Court to look extensively at foreign sources of law. *Ashby* also suggests that, where the Court is concerned with adopting a rule of reasonableness—as in admiralty law—the early Court thought references to foreign law to be perfectly appropriate. This may be relevant to Fourth and Eighth Amendment cases where the Constitution speaks directly of reasonableness and of what is unusual.

### *E. Opinion of Justice Johnson*

Lest it be thought that Chief Justice Marshall and Justice Story were the only members of the early Court to rely on foreign law in their opinions, one should also consider the case of *The Rapid*, in which Justice Johnson referred to foreign law in reaching a decision on an issue of prize law.

#### *1. The Rapid*

*The Rapid*,<sup>213</sup> a case involving the law of prize, a category of the law of nations, is often noted for its focus on the distinction between reason and sentiment in legal analysis.<sup>214</sup> However, the case is also

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211. *Id.*

212. Justice Story also made considerable use of foreign sources of law in his circuit opinion in *United States v. La Jeune Eugenie*. 26 F. Cas. 832 (C.C.D. Mass. 1822) (No. 15,551).

213. 12 U.S. (8 Cranch) 155 (1814).

214. *The Rapid* is often cited for the Court's statement that "it is the unenvied province of this Court to be directed by the head, and not the heart. In deciding upon principles that must

one in which the Court looked to sources of law and practice beyond those established by American law. Justice Johnson was faced with deciding whether an American ship that had purchased goods in England before the United States declared war on England during the War of 1812, but had brought them back to the United States after the declaration of war, had violated a prohibition against trading with the enemy and was thus subject to capture.<sup>215</sup> Addressing the rights of war against the property of a citizen, the Court considered the relationship between citizens of warring nations, and the ban on intercourse between the two, finding that the "individuals who compose the belligerent states, exist, as to each other, in a state of utter occlusion. If they meet, it is only in combat."<sup>216</sup> The Court stated that "[o]n this point there is really no difference of opinion among jurists: there can be none among those who will distinguish between what it is in itself, and what it ought to be under the influence of a benign morality and the *modern practice of civilized nations*."<sup>217</sup>

The Court then considered the consequence of a citizen's breach of the duty to "acknowledge every individual of the other nation as his own enemy" and to refrain from commercial dealings with such individuals.<sup>218</sup> The Court found that the property of a citizen acquired through such trade was subject to condemnation as a prize of war, and provided additional support for its conclusion as follows:

This liability of the property of a citizen to condemnation as prize of war, may be likewise accounted for under other considerations. Every thing that issues from a hostile country is, *prima facie*, the property of the enemy; and it is incumbent upon the claimant to support the negative of the proposition. But if the claimant be a citizen or an ally at the same time that he makes out his interest, he confesses the commission of an offence which, *under a well known rule of the civil law*, deprives him of

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define the rights and duties of the citizen and direct the future decisions of justice, no latitude is left for the exercise of feeling." *Id.* at 164. See, e.g., Alfred L. Brophy, *Reason and Sentiment: The Moral Worlds and Modes of Reasoning of Antebellum Jurists*, 79 B.U. L. REV. 1161, 1179 (1999) (reviewing PETER KARSTEN, *HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH CENTURY AMERICA* (1997)).

215. *The Rapid* 12 U.S. (8 Cranch) at 159-60.

216. *Id.* at 160-61.

217. *Id.* at 160 (emphasis added).

218. *Id.* at 161-63.

his right to prosecute his claim. This doctrine, however, does not rest upon abstract reason. *It is supported by the practice of the most enlightened (perhaps we may say of all) commercial nations.*<sup>219</sup>

After stating the support of “the most enlightened ... commercial nations” for the proposition that condemnation was acceptable under the law of prize, the Court then confirmed that this was the “law of England before the revolution, and therefore constitutes a part of the admiralty and maritime jurisdiction conferred on this Court in pursuance of the constitution.”<sup>220</sup> The case of *The Rapid*, therefore, includes a briefer reference to the civil law and the law of nations than Justice Story was prone to make, but it does in fact refer to both of those foreign sources of law.<sup>221</sup> Again, it is theoretically possible that the Framers meant for the Court to refer to foreign law in admiralty or law of nations cases and not in Eighth Amendment cases. Again, if so, no one on either side of the debate in *Roper* has shown that this is the case.

We thus conclude that in the first fifty years of Supreme Court history there were references to foreign sources of law by three Justices—Marshall, Story, and Johnson. Justice Bushrod Washington, George Washington’s nephew, referred to foreign sources of law in a circuit court opinion, as well.<sup>222</sup> Justice Breyer, and other supporters of the Court’s reliance on foreign sources of law, might cite these cases to support their position, pointing to them as evidence that the early Court referred to foreign sources of law in its opinions. Certainly, the cases citing foreign law from this

219. *Id.* at 162 (emphasis added).

220. *Id.*

221. Other cases from this era that should be considered include *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 159-60 (1795) (Iredell, J., concurring) (stating that “all piracies and trespasses committed against the general law of nations, are enquirable, and may be proceeded against, in any nation”) and *Croudson v. Leonard*, 8 U.S. (4 Cranch) 434, 437 (1808) (discussing the English rule on an issue and stating that

[i]t is a well established rule in England, that the judgment, sentence, or decree of a court of exclusive jurisdiction directly upon the point, may be given in evidence as conclusive between the same parties, upon the same matter coming incidentally in question in another court for a different purpose. It is not only conclusive of the *right* which it establishes, but of the *fact* which it directly decides).

222. *Crawford v. William Penn*, 6 F. Cas. 781, 783-84 (C.C.D. N.J. 1819) (No. 3373) (citing European cases discussing the law of nations).

time period pose a problem for those who claim that the use of such sources by the Court is "unprecedented" and that foreign sources should never be referred to by federal courts.

## II. CASES INCLUDING FOREIGN LEGAL REFERENCES IN THE YEARS BETWEEN 1840 AND 1890

Supreme Court opinions referring to foreign law in the fifty years between 1840 and 1890 come from a rather eclectic mix of cases that includes some of the most controversial cases the Court has ever decided. Those who favor Supreme Court reliance on foreign law might cite for support a trilogy of cases decided in the 1880s, the *Head Money Cases*,<sup>223</sup> *Whitney v. Robertson*,<sup>224</sup> and the *Chinese Exclusion Case*,<sup>225</sup> which "established that treaties are on equal footing with federal statutes and that, where a treaty and statute cannot be reconciled, the later in time is controlling."<sup>226</sup> Of greater relevance to the debate, however, are two Supreme Court cases involving important and contentious social issues in American constitutional law: *Dred Scott v. Sandford*<sup>227</sup> and *Reynolds v. United States*.<sup>228</sup> It was also during this time period that Justice Matthews famously wrote, in a constitutional case, that "as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted."<sup>229</sup> This statement has since been invoked by some writers to support the argument that the United States Supreme Court can and should consider foreign law in reaching its decisions.<sup>230</sup>

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223. 112 U.S. 580, 597-99 (1884).

224. 124 U.S. 190, 194 (1888).

225. 130 U.S. 581, 600, 602-03 (1889).

226. Blackmun, *supra* note 60, at 40.

227. 60 U.S. (19 How.) 393 (1857).

228. 98 U.S. 145 (1878).

229. *Hurtado v. California*, 110 U.S. 516, 531 (1884).

230. *See, e.g., Bodansky, supra* note 22, at 424-25 (using this statement to illustrate his argument that international sources can be useful as a "source of good ideas").

### A. Social Issue Cases

Little introduction is necessary for two very familiar social issue cases decided in this era, *Dred Scott v. Sandford* and *Reynolds v. United States*. Though the holdings and significance of these cases are well known to most lawyers, the significance of the citation of foreign law in these opinions has not, as of yet, been as well recognized. The Court's opinion in *Reynolds* makes substantial reference to foreign legal case law and opinion,<sup>231</sup> and several concurring and dissenting opinions in *Dred Scott* extensively consider foreign law.<sup>232</sup> Of course, anyone who argues that it is legitimate for the Supreme Court to consider foreign law in constitutional cases because four of the concurring Justices did so in *Dred Scott* must prepare to meet with derisive laughter.<sup>233</sup>

Some believe the *Reynolds* case was also wrongly decided.<sup>234</sup> We suspect Justice Scalia would say that the citation of foreign law by the concurring Justices in *Dred Scott* and the Court in *Reynolds* proves the point that the Court refers to such sources when it is, in fact, making policy instead of doing what it ought to do, which is to interpret the original meaning of the Constitution. We thus believe Justice Scalia might well look to references to foreign law in the Justices' opinions in these cases, and say they prove exactly how dangerous the use of foreign sources of law in constitutional interpretation can be.

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231. See *infra* Part II.A.2.

232. See *infra* Part II.A.1.

233. See Mark A. Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271, 271-72 (1997) (discussing the voluminous criticism of the *Dred Scott* opinion, including statements that the decision was the "worst ever rendered by the Supreme Court" and "the worst atrocity in the Supreme Court's history" (citations omitted)).

234. See Harrop A. Freeman, *A Remonstrance for Conscience*, 106 U. PA. L. REV. 806, 822-26 (1958) (stating that the "*Reynolds* case is wrong"); Keith E. Sealing, *Polygamists Out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy Are Unconstitutional Under the Free Exercise Clause*, 17 GA. ST. U. L. REV. 691, 710 (2001) (stating that *Reynolds* "demonstrates the degree to which even the Supreme Court was in the grip of anti-Mormon hysteria and was willing to ignore constitutional concepts of fundamental fairness in trials against Mormons").



### 1. *Dred Scott v. Sandford*

In the famous 1857 case of *Dred Scott v. Sandford*,<sup>235</sup> the Supreme Court held that Dred Scott, a slave of African descent, was not a citizen of Missouri and thus the Court did not have diversity jurisdiction over his complaint, which asserted the "title of himself and his family to freedom."<sup>236</sup> Despite the brevity of the Court's actual holding, the opinions of the Court go on at great length, spanning well over two hundred pages in the U.S. Reports.<sup>237</sup> In addition to its great length, the case is also quite significant because six of the nine Justices, four joining concurring opinions and the two in dissent, make considerable reference to foreign law, including citing foreign scholars, Roman law, post-1776 English decisions, and the law of Europe.<sup>238</sup>

It must be noted at the outset that the majority opinion by Chief Justice Taney in *Dred Scott* explicitly rejected the consideration of foreign law on the issues of constitutional construction that were before the Court. Chief Justice Taney wrote:

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption.<sup>239</sup>

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235. 60 U.S. (19 How.) 393 (1857).

236. *Id.* at 400.

237. *Id.* at 393-633. The opinion of Justice Taney begins on page 399 and the final dissenting opinion, that of Justice Curtis, does not end until page 633. *See id.*

238. *Id. passim.* Chief Justice Taney briefly pointed to international sources of law in the 1860 case of *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 99-100 (1860). Regarding asylum for fugitives of political offenses, Taney noted that the policy of different nations, with respect to exceptions for political fugitives, was collected along "with the opinions of eminent writers upon public law" in *Wheaton on the Law of Nations*. *Id.* Chief Justice Taney also noted the practice of the English Government. *Id.* at 100.

239. *Dred Scott*, 60 U.S. (19 How.) at 426.

Despite this statement disapproving consideration of foreign public opinion in Taney's opinion, six justices wrote or joined opinions in *Dred Scott* that referred to foreign law. In fact, three Justices referred to foreign law in the separate concurrences and a fourth Justice joined one of those concurrences. For example, Justice Nelson, in a separate concurrence in *Dred Scott*, referred to the doctrine of Huberus, because the plaintiff's counsel had cited the doctrine as having some bearing on the issue before the Court.<sup>240</sup> However, Justice Nelson then said that the doctrine of Huberus had no real impact on the issue at hand and noted that Huberus's views regarding the law of one's domicile accompanying him wherever he might go had neither been entirely admitted to in the practice of nations, nor been "sanctioned by the most approved jurists of international law."<sup>241</sup>

Justice Nelson, along with several other members of the Court, also discussed at length the 1827 English case of *Ex parte Grace*,<sup>242</sup> a case also referred to as *The Slave, Grace*.<sup>243</sup> In *Grace*, an opinion written by Lord Stowell of the British High Court of Admiralty on November 6, 1827, fifty-one years after American independence, the English court was faced with the question of whether "slavery was so divested by landing in England that it would not revive on a return to the place of birth and servitude."<sup>244</sup> The High Court of Admiralty found that, although no dominion could be exercised over the slave while in England because that nation had abolished slavery, the right to exercise such dominion was revived upon return to the place of the slave's original birth and servitude.<sup>245</sup> Justice Nelson stated that

the case before Lord Stowell presented much stronger features for giving effect to the law of England in the case of the slave Grace than exists in the cases that have arisen in this country ... Yet, on the return of the slave to the colony, from a temporary

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240. *Id.* at 461-62. (Nelson, J., concurring).

241. *Id.* at 462.

242. *Id. passim.*

243. (1827) 166 Eng. Rep. 179, 2 Hagg. 94 (High Ct. Admlty).

244. *Id.*

245. *Id.*

residence in England, he held that the original condition of the slave attached.<sup>246</sup>

Justice Nelson's concurring opinion also quoted from correspondence between Lord Stowell and Justice Story regarding Lord Stowell's decision in *The Slave, Grace*. Justice Nelson included the following exchange in his opinion:

Lord Stowell, in communicating his opinion in the case of the slave Grace to Judge Story, states, in his letter, what the question was before him, namely: "Whether the emancipation of a slave brought to England insured a complete emancipation to him on his return to his own country, or whether it only operated as a suspension of slavery in England, and his original character devolved on him again upon his return." He observed, "the question had never been examined since an end was put to slavery fifty years ago," having reference to the decision of Lord Mansfield in the case of *Somerset*; but the practice, he observed, "has regularly been, that on his return to his own country, the slave resumed his original character of slave." And so Lord Stowell held in the case.<sup>247</sup>

Justice Story, in his letter in reply, observes:

"I have read with great attention your judgment in the slave case.... Upon the fullest consideration which I have been able to give the subject, I entirely concur in your views. If I had been called upon to pronounce a judgment in a like case, I should have certainly arrived at the same result." Again he observes: "In my native State, (Massachusetts,) the state of slavery is not recognised as legal; and yet, if a slave should come hither, and afterwards return to his own home, we should certainly think that the local law attached upon him, and that his servile character would be reintegrated."<sup>248</sup>

Justice Daniel discussed the case of *The Slave, Grace* in his separate concurrence as well.<sup>249</sup> Justice Daniel also considered the views

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246. *Dred Scott*, 60 U.S. (19 How.) at 468.

247. *Id.* at 467.

248. *Id.*

249. *Id.* at 486 (Daniel, J., concurring).

of the international community when he addressed the opinions of the nations of Europe, stating that there are certain

truths which a knowledge of the history of the world ... compels us to know—that the African negro race never have been acknowledged as belonging to the *family of nations*; that as amongst them there never has been known or recognised by the inhabitants of other countries anything partaking of the character of nationality, or civil or political polity; that this race has been by *all the nations of Europe* regarded as subjects of capture or purchase; as subjects of commerce or traffic; and that the introduction of that race into every section of this country was not as members of civil or political society, but as slaves, as *property* in the strictest sense of the term.<sup>250</sup>

Justice Daniel then embarked on an extensive discussion of the views of Vattel, a Swiss jurist and writer on the law of nations.<sup>251</sup> He quoted at length from the works of Vattel, including several paragraphs with statements from the author, such as the following:

By this same writer [Vattel] it is also said: “The citizens are the members of the civil society; bound to this society by certain duties, and subject to its authority; they *equally* participate in its advantages. The natives, or natural-born citizens, are those born in the country, of parents who are citizens. As society cannot perpetuate itself otherwise than by the children of the citizens, those children naturally follow the condition of their parents, and succeed to all their rights.”<sup>252</sup>

Justice Daniel stated that it must follow that “with the slave, with one devoid of rights or capacities, civil or political, there could be no pact; that one thus situated could be no party to, or actor in, the association of those possessing free will, power, discretion.”<sup>253</sup>

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250. *Id.* at 475 (first two emphases added).

251. See Shen, *supra* note 109.

252. *Dred Scott*, 60 U.S. (19 How.) at 476-77. Justice Daniel referred to Vattel repeatedly throughout his opinion. He also considered a work by Chancellor Kent that collated “the opinions of Grotius, Heineccius, Vattel, and Rutherford” and set forth the positions of “these and other learned publicists.” *Id.* at 484.

253. *Id.* at 477 (emphasis omitted).

Justice Daniel also devoted a significant portion of his opinion—more than two pages—to a discussion of the Roman law on the issue of slavery.<sup>254</sup> He considered the Roman law because he analogized the institution of slavery, as it existed in the United States, to the practice as it existed in ancient Rome, finding that the American form of slavery had “a closer resemblance to Roman slavery than it [did] to the condition of villanage, as it formerly existed in England.”<sup>255</sup> Justice Daniel argued that under Roman law emancipation of a former slave did not confer the status of citizenship upon him, rather he took on the status of the “lower grades of native domestic residents,”<sup>256</sup> known in Rome as “freedmen.”<sup>257</sup> As authority for his discussion of Roman law, Justice Daniel cited Edward Gibbon’s *Decline and Fall of the Roman Empire*.<sup>258</sup> He also stated that his account of Roman slavery was in “strictest conformity with the Institutes of Justinian” and quoted several passages of the Institutes.<sup>259</sup>

Justice Campbell, also writing in concurrence, wrote of European public law, stating that it “formerly permitted a master to reclaim his bondsman, within a limited period, wherever he could find him.”<sup>260</sup> He also stated that one of the ordinances of Charlemagne established the following:

[W]heresoever, within the bounds of Italy, either the runaway slave of the king, or of the church, or of any other man, shall be found by his master, he shall be restored without any bar or prescription of years; yet upon the provision that the master be a Frank or German, or of any other nation (foreign;) but if he be a Lombard or a Roman, he shall acquire or receive his slaves by

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254. *Id.* at 477-80.

255. *Id.* at 478 (emphasis omitted). Regarding villanage, Justice Daniel stated that there “were peculiarities, from custom or positive regulation, which varied it materially from the slavery of the Romans, or from slavery at any time period within the United States.” *Id.*

256. *Id.*

257. *Id.* at 478-79. Justice Daniel also noted that it was only in the decline of the Roman Empire that the rights of citizenship were extended, resulting in the gradual abolition of “the proud distinctions of the republic.” *Id.* at 478.

258. *Id.* at 479 n.\* (citing 3 EDWARD GIBBON, HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE ch. 44, at 183 (1825)).

259. *Id.* at 479.

260. *Id.* at 495 (Campbell, J., concurring).

that law which has been established from ancient times among them.<sup>261</sup>

Justice Campbell did add that, “[w]ithout referring for precedents abroad, or to the colonial history, for similar instances, the history of the Confederation and Union affords evidence to attest the existence of this ancient law,” and proceeded to examine early American practices.<sup>262</sup>

Justice Campbell also referred to the work of sixteenth-century jurist Bodin regarding the French law on the subject of slavery. He quoted Bodin as follows:

In France, although there be some remembrance of old servitude, yet it is not lawful here to make a slave or to buy any one of others, insomuch as the slaves of strangers, so soon as they set their foot within France, become frank and free, as was determined by an old decree of the court of Paris against an ambassador of Spain, who had brought a slave with him into France.<sup>263</sup>

Justice Campbell further reviewed the writings of Bodin regarding the French cases establishing the freedom of slaves upon arriving in the French city of Toulouse; he even included a direct quotation in Latin from the ordinance of Toulouse.<sup>264</sup> However, Justice Campbell then qualified these decisions by saying that they were “made upon special ordinances, or charters, which contained positive prohibitions on slavery, and where liberty had been granted as a privilege.”<sup>265</sup> In addition, he stated that “the history of Paris furnishes but little support for the boast that she was a ‘*sacro sancta civitas*,’ where liberty always had an asylum.”<sup>266</sup>

The two dissenting Justices in *Dred Scott* relied heavily upon foreign sources of law, a fact Justice Breyer might want to cite.

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261. *Id.* at 495-96.

262. *Id.* at 496.

263. *Id.*

264. *Id.* at 497.

265. *Id.*

266. *Id.* Finally, Justice Campbell joined the several other Justices who discussed the English case of *The Slave, Grace*. He found the case to be of value in reaching a decision in *Dred Scott*, as he saw no “distinguishable difference between the case before [the Court] and that determined in the admiralty of Great Britain.” *Id.* at 500.

Justice McLean referred to the civil law of Europe and Roman law regarding the issue of the locality of slavery:

The *civil law throughout the Continent of Europe*, it is believed, without an exception, is, that slavery can exist only within the territory where it is established; and that, if a slave escapes, or is carried beyond such territory, his master cannot reclaim him, unless by virtue of some express stipulation. There is *no nation in Europe* which considers itself bound to return to his master a fugitive slave, under the civil law or the law of nations. On the contrary, the slave is held to be free where there is no treaty obligation, or compact in some other form, to return him to his master. The *Roman law* did not allow freedom to be sold. An ambassador or any other public functionary could not take a slave to France, Spain, or any other country of Europe, without emancipating him. A number of slaves escaped from a Florida plantation, and were received on board of ship by Admiral Cochrane; by the King's Bench, they were held to be free.<sup>267</sup>

Justice McLean also addressed the case of *The Slave, Grace* in his dissent, arguing that it had not actually overruled the earlier English case of *Somerset*, as had been declared by the the two concurring Justices—Nelson and Daniel—who cited it.<sup>268</sup> The case of *Somerset* was an important one to Justice McLean because it was decided by Lord Mansfield before the American Revolution, when the United States was a part of the British Empire.<sup>269</sup> According to Justice McLean, that case was a “thoroughly examined”<sup>270</sup> judgment of the King's Bench, in which Lord Mansfield said:

The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion, and time itself, from whence it was created, is erased from the memory; it is of a nature that nothing can be suffered to support it but positive law.<sup>271</sup>

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267. *Id.* at 534 (McLean, J., dissenting) (emphasis added) (citations omitted).

268. *Id.* at 535.

269. *Id.* at 534-35.

270. *Id.* at 534.

271. *Id.* at 535.

Last, Justice Curtis, writing in dissent, also considered foreign law in his individual opinion. He too considered the 1827 English case of *The Slave, Grace*, but viewed its holding less conclusively than did the concurring Justices.<sup>272</sup> He argued that if “there had been an act of Parliament declaring that a slave coming to England with his master should thereby be deemed no longer to be a slave” a judge would not have arrived at Lord Stowell’s conclusion.<sup>273</sup> Justice Curtis also inquired into broader rules of international law. He considered the proscription of these rules regarding the change of status of the plaintiff.

It is generally agreed by writers upon international law, and the rule has been judicially applied in a great number of cases, that wherever any question may arise concerning the status of a person, it must be determined according to that law which has next previously rightfully operated on and fixed that status. And, further, that the laws of a country do not rightfully operate upon and fix the status of persons who are within its limits in itinere, or who are abiding there for definite temporary purposes, as for health, curiosity, or occasional business; that these laws, known to writers on public and private international law as personal statutes, operate only on the inhabitants of the country. Not that it is or can be denied that each independent nation may, if it thinks fit, apply them to all persons within their limits. But when this is done, not in conformity with the principles of international law, other States are not understood to be willing to recognise or allow effect to such applications of personal statutes.<sup>274</sup>

Justice Curtis further stated that he could not assent to the majority’s opinion, as he felt it was “in conflict with its previous decisions, with a great weight of judicial authority in other slaveholding States, and *with fundamental principles of private international law.*”<sup>275</sup>

There can thus be no question that six of the nine Justices, including the two dissenters, in *Dred Scott* relied on foreign law.

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272. *Id.* at 591-92 (Curtis, J., dissenting).

273. *Id.*

274. *Id.* at 595 (emphasis omitted).

275. *Id.* at 602 (emphasis added).



Moreover, *Dred Scott* raised pure issues of constitutional law. It is thus noteworthy that *Dred Scott* is one of the earliest constitutional law cases to turn on foreign law.

## 2. *Reynolds v. United States*

"Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people."<sup>276</sup> Chief Justice Waite made this statement referring to the views of other nations when discussing the constitutionality of a statute forbidding polygamy in another famous case from the second half century of our constitutional history, *Reynolds v. United States*,<sup>277</sup> decided in 1878. Even more strikingly, Chief Justice Waite referred at length to an 1868 British decision in his opinion for the Court in the *Reynolds* case.

*Reynolds* is quite well-known for its holding that a federal statute prohibiting polygamy in the territories was perfectly constitutional, even though that statute seemed to infringe on the right of various members of the Mormon Church to exercise their religion freely.<sup>278</sup> One key question for the Court, according to Chief Justice Waite, was whether an individual is guilty of a crime when he "knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong."<sup>279</sup> The Court stated that it was certain Congress could not pass a statute that prohibited the free exercise of religion in the territories, as "[t]he first amendment to the Constitution expressly forbids such legislation."<sup>280</sup> However, as Chief Justice Waite pointed out, "[t]he word 'religion' is not defined in the Constitution."<sup>281</sup> Thus, the Court turned to the history

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276. *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

277. *Id.*

278. *Id.* at 166. For more on the significance of *Reynolds*, see, for example, Richard A. Vazquez, Note, *The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting Reynolds in Light of Modern Constitutional Jurisprudence*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 225 (2001).

279. *Reynolds*, 98 U.S. at 162.

280. *Id.*

281. *Id.*

surrounding the adoption of the First Amendment to determine exactly what religious freedom it guarantees.<sup>282</sup>

Upon reviewing the historical origins of the First Amendment's protection of freedom of religion, including the views of Madison and Jefferson, the Court concluded that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."<sup>283</sup> Having concluded that actions that violated social duties or were dissident in nature were able to be regulated and even able to be condemned by Congress, the Court examined the character and history of polygamy, at which point Chief Justice Waite noted the relatively widespread disapproval of the practice of polygamy among the peoples of northern and western Europe.<sup>284</sup> After considering this disapproval of polygamy in European civilization, the Court found that "there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion," and thus the federal statute prohibiting polygamy in the territories was "within the legislative power of Congress."<sup>285</sup>

At this point, there was still one question remaining before the Court, "whether those who make polygamy a part of their religion are excepted from the operation of the statute."<sup>286</sup> The Court found that such individuals were not excepted, as "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."<sup>287</sup> To provide additional support for the logic of the Court's holding on this point and to develop further its finding, Chief Justice Waite discussed the difference between a positive act and an omission of action based upon religious beliefs. He pointed to an 1868 British case from the

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282. *Id.* The Court stated that "[t]he precise point of the inquiry is, what is the religious freedom which has been guaranteed." *Id.*

283. *Id.* at 164.

284. *Id.*; see *supra* text accompanying note 276.

285. *Reynolds*, 98 U.S. at 166.

286. *Id.*

287. *Id.* Chief Justice Waite also wrote that creating such an exception would introduce a "new element into criminal law," as those who practice polygamy based upon religious beliefs would be acquitted and go free, whereas those who practiced it for other reasons may be found guilty and punished. *Id.*

Central Criminal Court, *Regina v. Wagstaffe*,<sup>288</sup> which involved the prosecution of two parents of a sick child who refused to call in medical attention for her due to their religious conviction that God would heal the sick.<sup>289</sup> The Court stated:

In *Regina v. Wagstaff* [sic], the parents of a sick child, who omitted to call in medical attendance because of their religious belief that what they did for its cure would be effective, were held not to be guilty of manslaughter, while it was said the contrary would have been the result if the child had actually been starved to death by the parents, under the notion that it was their religious duty to abstain from giving it food. But when the offense consists of a positive act which is knowingly done, it would be dangerous to hold that the offender might escape punishment because he religiously believed the law which he had broken ought never to have been made. No case, we believe, can be found that has gone so far.<sup>290</sup>

The *Reynolds* case seems to us to be closely on par with the Supreme Court's recent decision in *Lawrence v. Texas*, although in *Reynolds* the Court looked to foreign law to uphold a statute, whereas in *Lawrence* the Court considered such law in striking down a statute.<sup>291</sup> Both *Reynolds* and *Lawrence* involved the hot-button social issues of their day and both cases resolved those issues by referring to the beliefs and practices of the peoples of northern and western Europe.<sup>292</sup> Both cases decidedly rejected appeal to the practices of peoples in Africa, Asia, and the Islamic world where polygamy is legal, contrary to *Reynolds*, and where gay rights are

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288. *Id.* at 167 (citing *Regina v. Wagstaffe*, reprinted in 10 REPORTS OF CASES IN CRIMINAL LAW ARGUED AND DETERMINED IN THE COURTS OF ENGLAND 530 (Edward W. Cox, ed., 1846)) [hereinafter CRIMINAL CASES].

289. *Id.* at 167.

290. *Id.* (citation omitted). In regard to the distinction between withholding medical treatment and withholding food, the English criminal court, in an opinion by Mr. Justice Willes, stated that there is a "very great difference between neglecting a child in respect to food, with regard to which there could be but one opinion, and neglect of medical treatment, as to which there might be many opinions." CRIMINAL CASES at 533.

291. See *infra* note 673 and accompanying text.

292. Of course, the cases differ in that *Reynolds* involved the First Amendment and the Free Exercise Clause, while *Lawrence* was a substantive due process decision. Also, *Reynolds* upheld a statute while *Lawrence* struck one down. Compare *Reynolds*, 98 U.S. at 145, with *Lawrence v. Texas*, 539 U.S. 558 (2003).

nonexistent, contrary to *Lawrence*. Since the Justices who decided *Lawrence* might well be very uncomfortable knowing they are in the same company as the Justices who decided *Reynolds*, we think the parallel between these two cases suggests Justice Scalia is on to something in his complaints about citation of foreign law in *Lawrence*. In fact, the Court seems to look to such law when it senses it is at sea in the policy-making realm and it is no longer interpreting the Constitution. This practice implies that the Court ought not to have cited foreign law in either *Reynolds* or *Lawrence*.

### *B. Civil and Roman Law and the Supreme Court in the Mid-1800s*

Citations to Roman and civil sources of law continued to find their way into many Supreme Court opinions during this time period. For example, in *Osborn v. Nicholson*,<sup>293</sup> a case involving the sale of a slave and the Contract Clause of the Constitution, the Court declared:

All contracts are inherently subject to the paramount power of the sovereign, and the exercise of such power is never understood to involve their violation, and is not within that provision of the National Constitution which forbids a State to pass laws impairing their obligation. The power acts upon the property which is the subject of the contract, and not upon the contract itself.<sup>294</sup>

The Court supported this statement by noting that this rule “also is the rule of the French law and such was the Roman law.”<sup>295</sup> The Court cited the work of Domat for the proposition that a “seller is not bound to warrant the buyer against ... the act of the sovereign,”<sup>296</sup> and Justinian’s Digest for the proposition that “[a]fter the bargain is completed the purchaser stands to all losses.”<sup>297</sup>

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293. 80 U.S. (13 Wall.) 654 (1871).

294. *Id.* at 660.

295. *Id.*

296. *Id.* (quoting 1 JEAN DOMAT, THE CIVIL LAW IN ITS NATURAL ORDER, pt. 1, bk. 1, tit. 2, § 10).

297. *Id.* (quoting Digest 2, 14, 77 THE INSTITUTES OF JUSTINIAN 615 (Thomas Cooper ed., 1812)). The Court noted that this case “is one in which the maxim applies *Res perit suo domino*.” *Id.* (citing *Paine v. Meller*, (1801) 31 Eng. Rep. 1088, 6 Vesey 349 (High Ct. Ch.);

In the 1871 case of *Ex parte McNiel*,<sup>298</sup> the Court considered Roman and civil law in upholding a New York State statute which governed the subject of pilotage, even though it was a regulation of commerce. The issue raised was whether laws governing pilotage were regulations of commerce that might be invalidated under the dormant Commerce Clause. Writing for the Court, Justice Swayne pointed to the fact that the obligation of a captain to take a pilot was "prescribed in the Roman law."<sup>299</sup> He further stated that the requirement of a pilot was also found in the Hanseatic ordinances, and the sixteenth- and seventeenth-century maritime laws of Sweden, France, and England, as well as in the *Pays Bas*, the maritime code of the Netherlands.<sup>300</sup> Prior to its examination of these foreign laws, the Court noted that there was "nothing new" in the provisions of the New York statute, and presumably looked to these sources as evidence to that effect.<sup>301</sup> Justice Swayne wrote that such statutes existed from early times and "are to be found in the laws of most commercial states."<sup>302</sup> Notwithstanding this conclusion that state

BALTHAZARD-MARIE EMERIGON, A TREATISE ON INSURANCES 419 (Samuel Meredith ed. & trans. 1850)).

298. 80 U.S. (13 Wall.) 236 (1871). In *Place v. Norwich & New York Transportation Co.*, another admiralty case decided in 1886, Justice Bradley discussed at great length the "history of opinion amongst maritime writers" on whether owners who abandon their ship to creditors are obliged to abandon the insurance on the ship. 118 U.S. 468, 496-502 (1886). Although Justice Bradley did not specifically address the Roman law, he discussed in detail the civil law and the laws of nations founded on this law. In fact, Justice Bradley devoted several pages of the opinion to discussing the views of foreign scholars of maritime law, such as Valin and Emerigon, "two great French jurists," as well as the maritime law and practices of both France and Germany during the 1800s. *Id.* After looking to these foreign sources of law, Justice Bradley wrote that it appeared, "therefore, that the disposition of our statute is in conformity with the general maritime law of Europe." *Id.* at 502.

299. *Ex parte McNiel*, 80 U.S. (13 Wall.) at 239.

300. *Id.*

301. *Id.*

302. *Id.* In the tort case of *Wooden-Ware Co. v. United States*, 106 U.S. 432 (1882) (finding that the owner of timber stolen by an intentional trespasser should receive the increased value of cordwood), Justice Miller wrote of the difference between the rights of an individual who purchases commodities from an unintentional trespasser as opposed to an intentional trespasser and noted that such was "the distinction taken in the Roman law." *Id.* at 436. Justice Miller cited THE INSTITUTES OF JUSTINIAN, *supra* note 297, lib. II, tit. I., § 34. *Id.* In *Campbell v. Holt*, 115 U.S. 620 (1885), Justice Miller again remarked on the Roman law, in this instance regarding the property law doctrine of prescription. Justice Miller noted that, although the doctrine was "mainly applied to incorporeal hereditaments" in England, "in the Roman law, and the codes founded on it, [it] is applied to property of all kinds." *Id.* at 622. Justice Miller noted that the doctrine was historically called *proscripto* in the Roman law.

laws regulating pilotage were regulations of commerce as suggested by foreign law, the Court concluded that in this case the New York statute did not so burden commerce that it should be struck down under the dormant Commerce Clause.

### *C. Other Cases from the Second Half Century of Our Constitutional History*

The other cases decided between 1840 and 1890 that refer to foreign law are a varied lot. Two cases speak to the legitimacy of the Court's consideration of international and foreign law and address the status of such law in American courts.<sup>303</sup> Two other cases, *Knox v. Lee* and *Juilliard v. Greenman*, upholding the constitutionality of paper money refer explicitly to foreign law.<sup>304</sup> And *Ker v. Illinois*<sup>305</sup> used foreign case law to "provide respected and significant confirmation for [the Court's] own conclusions"<sup>306</sup> in much the same way as the Court did more than one hundred years later in *Roper v. Simmons*.<sup>307</sup>

#### *1. New York Life Insurance Co. v. Hendren*

*New York Life Insurance Co. v. Hendren*,<sup>308</sup> an 1876 case growing out of the Civil War, was the only statement by the Waite Court on the laws of war—a branch of international law.<sup>309</sup> Chief Justice Waite's majority opinion refused to review the judgment of a state court regarding the effect of the Civil War on a contract for life insurance, finding that the Court had no jurisdiction over the issue.<sup>310</sup> The Court held that there was no federal question presented by the case, but rather that it presented "questions of general law alone."<sup>311</sup>

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*Id.* at 623.

303. See *infra* Part II.C.1-2.

304. See *infra* Part II.C.3.

305. 119 U.S. 436 (1886).

306. *Roper v. Simmons*, 125 S. Ct. 1183, 1200 (2005); see *infra* Part II.C.4.

307. See *infra* Part IV.B.7.

308. 92 U.S. 286 (1876).

309. See Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 *FORDHAM L. REV.* 393, 427 (1997).

310. *N.Y. Life Ins.*, 92 U.S. at 286-87.

311. Stephens, *supra* note 309, at 427-29 (quoting *N.Y. Life Ins.*, 92 U.S. at 286). Justice Scalia, on the other hand, has argued it is "[t]he nonfederal nature of the law of nations,"

Justice Bradley, in dissent, attacked the majority's conclusion, arguing that when a citizen claims exemption from a contractual obligation based upon a war between his government and the other parties to the contract, "the claim is made under the laws of the United States," which forbid trade with the enemy.<sup>312</sup> Accordingly, Justice Bradley thought there was a federal question present in *New York Life*. Justice Bradley argued that the states could not prevent such contractual intercourse, but rather, only the federal government had the ability and prerogative to do so.<sup>313</sup> In his dissent, Justice Bradley spoke of the relationship between international law, specifically the laws of war, and the laws of the United States, stating:

It is in accordance with international law, it is true; but international law has the force of law in our courts, because it is adopted and used by the United States. It could have no force but for that, and may be modified as the government sees fit. Of course, the government would not attempt to modify it in matters affecting other nations, except by treaty stipulations with them: if it did, it would prepare itself to carry out its resolutions by military force. But, in many things that *prima facie* belong to international law, the government will adopt its own regulations: such as the extent to which intercourse shall be prohibited; how far property of enemies shall be confiscated; what shall be deemed contraband, [etc]. All this only shows that the laws which the citizens of the United States are to obey in regard to intercourse with a nation or people with which they are at war are laws of the United States. *These laws will be the unwritten international law, if nothing be adopted or announced to the contrary*; or the express regulations of the government, when it sees fit to make them. But in both cases it is the law of the United States for the time being, whether written or unwritten.<sup>314</sup>

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which encompasses the laws of war, that explains the Court's holding that it lacked jurisdiction. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2770 (2004) (Scalia, J., dissenting).

312. *N.Y. Life Ins.*, 92 U.S. at 287 (Bradley, J., dissenting).

313. *Id.* (stating "a separate State cannot wage war: that is the prerogative of the general government").

314. *Id.* at 287-88 (second emphasis added).

Justice Bradley's dissent then referred to foreign, i.e., international, sources of law and seemed to suggest that law was incorporated into American law much as Justices Kennedy and O'Connor might argue.<sup>315</sup>

## 2. *Hurtado v. California*

In *Hurtado v. California*,<sup>316</sup> the Supreme Court was asked to affirm the proposition that "indictment or presentment by a grand jury, as known to the common law of England, is essential to that 'due process of law,' when applied to prosecutions for felonies, which is secured" by the Fourteenth Amendment of the Constitution.<sup>317</sup> The majority, in an opinion by Justice Matthews, refused to find that the grand jury requirement of the Fifth Amendment was made applicable to the states by the Fourteenth Amendment, but rather held that proceeding by information was a constitutionally acceptable procedure for initiating a felony prosecution.<sup>318</sup>

The idea that foreign law can help determine what rights from the Bill of Rights are so fundamental that they are incorporated into the Fourteenth Amendment is often associated with *Palko v. Connecticut*.<sup>319</sup> But, the Court's statements in *Hurtado*, decided some fifty years earlier, make exactly the same point.<sup>320</sup> Considering the flexibility of the notion of due process, Justice Matthews suggested looking to the laws and practices of other nations for sources of ideas for our own legal system, much as Justice Breyer proposes

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315. Of course, Justice Scalia can easily riposte that Justice Bradley's opinion was only a dissent and that he was thus not speaking for the Court.

316. 110 U.S. 516 (1884).

317. *Id.* at 520.

318. *Id.* at 538. The Court stated:

[W]e are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law.

*Id.*

319. 302 U.S. 319, 325-26 & n.3 (1937) (holding that allowing a new trial after a prosecutor's appeal is consistent with due process).

320. See Neuman, *supra* note 22, at 83.



today.<sup>321</sup> Considering the possible inspiration to be drawn from foreign law, Justice Matthews wrote:

The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice—*suum cuique tribuere*. There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms.<sup>322</sup>

Of course, in *Hurtado*, unlike in *Roper*, the reference to foreign sources of law is arguably dicta because the Court finds no constitutional right to indictment by a grand jury after referring to the absence of such a right in the civil law nations of western Europe.<sup>323</sup> Nonetheless, *Hurtado* is a leading nineteenth-century criminal law case, and it certainly seems to treat European civil law as if it were binding on American courts.

*Hurtado* thus provides some support for Justice Kennedy's and Justice O'Connor's reliance on foreign law in *Roper* and on Justice Kennedy's reliance on foreign law in *Lawrence*. *Hurtado*, like *Lawrence*, is styled as a case in which the Fourteenth Amendment imposes a requirement of reasonableness on the states and assess-

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321. *Hurtado*, 110 U.S. at 530-31.

322. *Id.*

323. *Id.* at 538.

ments of reasonableness are often made with references to foreign law. We think the Court was wrong to make a reasonableness inquiry in both *Lawrence* and *Hurtado*.<sup>324</sup> However, if the reasonableness of laws or procedure were the proper test of their constitutionality under the Fourteenth Amendment, looking to the practices in foreign jurisdictions would make more sense. Since we do not believe the Fourteenth Amendment requires the states to have a reasonable law of criminal procedure or reasonable substantive morals laws, we remain unconvinced that the Court was correct in consulting foreign law in either case.

### 3. *The Legal Tender Cases: Knox v. Lee and Juilliard v. Greenman*

During the Civil War, Congress passed the Legal Tender Act of 1862 which authorized the Secretary of the Treasury to issue 150 million paper dollars, officially known as United States Notes, which soon became known to the public as “greenbacks” because they were printed with green ink.<sup>325</sup> Several cases, which later came to be known as the *Legal Tender Cases*, challenged the constitutionality of the greenbacks on different grounds in the decades following the passage of this Act.<sup>326</sup> In the second of these legal tender cases, *Knox v. Lee*, the Court, in a five-to-four decision, upheld the constitutionality of the legal tender greenbacks as payment for both future and preexisting debts, largely because the Act creating them was the result of an extreme emergency—the Civil War.<sup>327</sup> In so holding, the Court specifically considered the practice of France, stating that her “assignats, issued at the commencement and during the Revolution, performed the same office as our Continental bills; and enabled the nation to gather up its latent strength and call out its energies.”<sup>328</sup> The Court further stated that “[a]lmost every nation of Europe at one time or another, has found it necessary, or expedi-

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324. Professor Calabresi has argued that the Court was wrong to make a reasonableness inquiry in *Lawrence*. See Calabresi, *supra* note 36.

325. *Knox v. Lee*, 79 U.S. 457, 458 (1870).

326. See, e.g., *id.*

327. *Id.* at 541. The Court decided *Knox* in conjunction with *Parker v. Davis*. *Id.* at 457.

328. *Id.* at 569.

ent, to resort to the same method of carrying on its operations or defending itself against aggression."<sup>329</sup>

In the 1884 legal tender case of *Juilliard v. Greenman*,<sup>330</sup> the Supreme Court addressed a subsequent issuance of greenbacks that was *not* made as the result of an emergency, as the prior issuances had been. The Court found this issuance of greenbacks to be constitutional because it said the power to issue paper money was inherent in the concept of sovereignty.<sup>331</sup> In so holding, the Supreme Court referred to foreign law as follows:

The power ... of impressing upon those bills or notes the quality of being a legal tender for the payment of private debts, was a power universally understood to belong to sovereignty, in Europe and America, at the time of the framing and adoption of the Constitution of the United States. The governments of Europe, acting through the monarch or the legislature, according to the distribution of powers under their respective constitutions, had and have as sovereign a power of issuing paper money as of stamping coin. This power has been distinctly recognized in an important modern case, ably argued and fully considered, in which the Emperor of Austria, as King of Hungary, obtained from the English Court of Chancery an injunction against the issue in England, without his license, of notes purporting to be public paper money of Hungary.<sup>332</sup>

Thus, in both of these legal tender cases, the Supreme Court upheld congressional statutes that provided for the issuance of the controversial greenbacks, in part by looking to foreign law for evidence that sovereign governments throughout Europe had taken similar action and that the power to issue paper money was universally viewed as a power of a sovereign. The legal tender cases are striking nineteenth-century examples of the Supreme Court relying upon foreign law to uphold federal legislation.

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329. *Id.*

330. 110 U.S. 421 (1884).

331. *Id.* at 447.

332. *Id.* (citing *Austria v. Day* (1861) 66 Eng. Rep. 263, 2 Giff. 628 (High Ct. Ch.); *Austria v. Day* (1861) 45 Eng. Rep. 861, 3, Deg. F. & J. 216, 219 (K.B.)).

#### 4. *Ker v. Illinois*

In *Ker v. Illinois*,<sup>333</sup> decided in 1886, the Supreme Court held that the forcible abduction of a criminal defendant from a foreign country, by itself, was not enough to defeat the jurisdiction of the Court over that defendant.<sup>334</sup> On appeal from his Illinois conviction for larceny, Ker, a resident of Peru who had been forcibly seized and transferred to Illinois to stand trial, argued that he had, by virtue of his residence in Peru and the extradition treaty between the United States and Peru, acquired a positive right that he could only be forcibly removed from Peru to Illinois in accordance with the provisions of the treaty.<sup>335</sup> The Court, in a unanimous opinion written by Justice Miller, rejected Ker's argument, stating that

[t]here is no language in this treaty, or in any other treaty made by this country on the subject of extradition, of which we are aware, which says in terms that a party fleeing from the United States to escape punishment for crime becomes thereby entitled to an asylum in the country to which he has fled.<sup>336</sup>

Justice Miller noted that the Court found no protection guaranteed in the Constitution, laws, or treaties of the United States against forcible seizure and transfer that would allow a defendant to resist trial in state court.<sup>337</sup> In support of its decision, the Court stated that

[t]here are authorities of the highest respectability which hold that such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such court.<sup>338</sup>

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333. 119 U.S. 436 (1886).

334. *Id.* at 444.

335. *Id.* at 441.

336. *Id.* at 442.

337. *Id.* at 444.

338. *Id.*

The Court listed as “[a]mong the authorities which support the proposition,” two nineteenth century cases from England<sup>339</sup>: *Ex parte Scott*,<sup>340</sup> decided by Lord Tenterden in 1829, and *Lopez & Sattler’s Case*,<sup>341</sup> decided in 1858. Again, it is important to note that, since these English cases were decided more than fifty years after the signing of the Declaration of Independence, they are foreign sources of law rather than possible domestic law precedents for the Court. In both cases, the English court held that improper and illegal apprehension of a defendant in a foreign nation did not deprive the court of jurisdiction to try the defendant for his alleged offenses.<sup>342</sup> By including reference to these foreign cases, the Court sought to bolster its demonstration of the inherent logic of its own decision, using the English cases as evidence that other learned judges, in a legal system that evolved from the same foundation as our own, had reached a similar conclusion. This seems very similar to what the Justices were trying to do in *Roper* and *Lawrence* where foreign sources of law were used to validate the Court’s decisions to strike down the juvenile death penalty and laws against sodomy.

### III. CASES INCLUDING FOREIGN LEGAL REFERENCES IN THE YEARS 1890 TO 1940

Two significant developments occurred during the years between 1890 and 1940 that have had a considerable impact on the Supreme Court’s practice of referring to foreign sources of law. The first came in 1900 when the Supreme Court said of customary international law in its prominent statement in *The Paquete Habana* that “[i]nternational law is part of our law.”<sup>343</sup> It is impossible to overemphasize the importance that writers addressing the current debate over the legitimacy of considering foreign sources of law have placed on this lone statement.<sup>344</sup> For example, Yale Law School Dean Harold Koh has suggested that by making this statement the

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339. *Id.*

340. (1829) 109 Eng. Rep. 166, 9 B. & C. 446 (K.B.).

341. *Regina v. Benito Lopez & Christian Sattler*, (1858) 169 Eng. Rep. 1105, 1 Dears. & Bell 528 (Q.B.).

342. *Ker*, 119 U.S. at 444; *Scott*, (1829) 109 Eng. Rep. at 166-67, 9 B. & C. at 446-48.

343. 175 U.S. 677, 700 (1900).

344. See, e.g., Koh, *supra* note 23.

Court in *The Paquete Habana* was implying that American courts should not decide cases without, in the words of the Declaration of Independence, "paying 'a decent respect to the opinions of mankind.'"<sup>345</sup> Justice Blackmun, a champion of the transnationalist position on the Burger and early Rehnquist Courts,<sup>346</sup> found the import of *The Paquete Habana* to be clear: "[c]ustomary international law informs the construction of domestic law, and, at least in the absence of any superseding positive law, is controlling."<sup>347</sup> The second significant development during the third half century of our constitutional history was the advent of the Brandeis brief, which directed the Court's attention toward social and scientific data relevant to the issues before it. As we shall see, once the Court decided to pay attention to domestic empirical data, it was only natural that the Court became interested in empirical data from foreign legal experiments, as well. The Court also referred to the Roman law frequently in the early part of this time period, and there are several other cases that made significant use of foreign law that will be addressed below.

### A. *The Paquete Habana*

*The Paquete Habana*,<sup>348</sup> decided in 1900, arose out of the capture of two Spanish fishing vessels on the coast of Cuba by United States warships during the Spanish-American War.<sup>349</sup> The issue before the Court, as stated by Justice Gray, was whether "the fishing smacks were subject to capture by the armed vessels of the United States during the recent war with Spain."<sup>350</sup> In reaching a decision on the issue, the Court first noted that "[b]y an ancient usage among *civilized nations*, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their

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345. *Id.* at 43-44.

346. *Id.* at 53. Koh writes that a transnationalist jurisprudence "assumes America's political and economic interdependence with other nations operating within the international legal system," and contrasts it with a "national jurisprudence, which rejects foreign and international precedents and looks for guidance primarily to national territory, political institutions, and executive power." *Id.*

347. Blackmun, *supra* note 60, at 40.

348. 175 U.S. 677 (1900).

349. *Id.* at 678-79.

350. *Id.* at 686.

vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war."<sup>351</sup> The Court reached this conclusion after spending extensive time tracing the history of the rule,<sup>352</sup> the more recent practices of nations, and the wisdom of international scholars. The Court discussed, among other historically relevant details, the first governmental acts on the subject that emanated from England, the fact that "herring fish[ing] was permitted, in time of war, by French and Dutch edicts in 1536," and the practice of France until the end of the seventeenth century of "alleviating the evils of war in favor of all coast fishermen."<sup>353</sup> The Court also noted the rule's familiarity in the United States since "the time of the War of Independence."<sup>354</sup>

As illustrative of more contemporary international practice, the Court gave as an example the practices of France during the Crimean War in 1854 and Germany during the Franco-Prussian War in 1870, forbidding "her cruisers to trouble the coast fisheries, or to seize any vessel or boat engaged therein, unless naval or military operations should make it necessary."<sup>355</sup> The Court stated that, since 1810, "no instance has been found in which the exemption from capture of private coast fishing vessels, honestly pursuing their peaceful industry, has been denied by England, or by any other nation."<sup>356</sup> The Court also noted contemporaneous practice in Japan, stating that

the Empire of Japan, (the last State admitted to the rank of civilized nations,) by an ordinance promulgated at the beginning of its war with China in August, 1894, established prize courts, and ordained that "the following enemy's vessels are exempt from detention"—including in the exemption "boats engaged in coast fisheries," as well as "ships engaged exclusively on a voyage of scientific discovery, philanthropy or religious mission."<sup>357</sup>

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351. *Id.* (emphasis added).

352. *Id.* at 679-86. The Court stated that it was "worth the while to trace the history of the rule, from the earliest accessible sources, through the increasing recognition of it, with occasional setbacks, to what we may now justly consider as its final establishment in our own country and generally throughout the civilized world." *Id.* at 686.

353. *Id.* at 686-88.

354. *Id.* at 689.

355. *Id.* at 699.

356. *Id.* at 700.

357. *Id.* (quoting S. TAKAHASHI, CASES ON INTERNATIONAL LAW DURING CHINO-JAPANESE

In examining scholarly statements of international law, the Court referred to several sources, including General Halleck's 1861 work *International Law or Rules Regulating the Intercourse of States in Peace and War*, Wharton's *Digest of International Law of the United States*, and Ortolan's fourth edition of the *Regles Internationales et Diplomatie de la Mer*, published in 1864.<sup>358</sup> The Court also found it "convenient" to refer to leading French treatises on international law that addressed the issue before the Court, "not as one of the law of France only, but as one determined by the general consent of civilized nations."<sup>359</sup> The Court also noted that "modern German books on international law ... treat the custom, by which the vessels and implements of coast fishermen are exempt from seizure and capture, as well established by the practice of nations."<sup>360</sup> Finally, as there were "writers of various maritime countries, not yet cited, too important to be passed by without notice," the Court discussed their views as well.<sup>361</sup>

At the end of its lengthy examination of foreign sources of law, the Court reached the following conclusion:

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WAR 11, 178 (Cambridge Univ. Press 1899)).

358. *Id.* at 697-702. Justice White repeatedly cited scholarly writings on international law, especially Halleck's, in his concurring opinion in *Downes v. Bidwell*, 182 U.S. 244, 298-344 (1901), which was decided just one year after *The Paquete Habana*. Justice Gray also considered international sources of law extensively in *Fong Yue Ting v. United States*, 149 U.S. 698 (1893). He quoted Wharton's *International Digest* for the proposition that "[t]he control of the people within its limits, and the right to expel from its territory persons who are dangerous to the peace of the State, are too clearly within the essential attributes of sovereignty to be seriously contested." *Id.* at 707 (quoting 2 A DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES § 206 at 518 (Francis Wharton ed., Wash., D.C., Gov't Printing Office 1886)). He also discussed "statements of leading commentators on the law of nations," including Vattel, Ortolan, Phillimore, and Bar. *Id.* at 707-09.

359. *The Paquete Habana*, 175 U.S. at 701. The Court thus discussed the writings of many French scholars, including Calvo, "who, though writing in French, [was] a citizen of the Argentine Republic." *Id.* at 703.

360. *Id.* at 704.

361. *Id.* at 706-08. The Court noted the opinions of the following writers: "Jan Helenus Ferguson, Netherlands Minister to China;" Ferdinand Attlmayr, "Captain in the Austrian Navy" and author of a manual for naval officers; "Ignacio de Negrin, First Official of the Spanish Board of Admiralty, in his *Elementary Treatise on Maritime International Law*;" Carlos Testa, a captain in the Portuguese Navy and a naval professor; and the writings of "the distinguished Italian jurist" Pasquale Fiore. *Id.*



This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the *general consent of the civilized nations of the world*, and independently of any express treaty or other public act, it is *an established rule of international law*, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent States, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.<sup>362</sup>

In the course of the Court's opinion, Justice Gray described the value of international law in American courts as follows:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.<sup>363</sup>

Because the Court had established that international law prohibited the capture of fishing boats as prizes of war, it found the capture of the two Spanish boats by U.S. warships to be unlawful and without probable cause.<sup>364</sup> Thus, the Court ordered that proceeds from the sale of the vessels and cargo be restored to the original owners.<sup>365</sup>

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362. *Id.* at 708 (emphasis added). In dissent, Justice Fuller stated that he was "unable to conclude that there is any such established international rule." *Id.* at 715 (Fuller, J., dissenting).

363. *Id.* at 700 (majority opinion).

364. *Id.* at 686, 714.

365. *Id.* at 714.

Justice Fuller, in dissent, anticipated Justice Scalia's dim view of citation of foreign sources of law. Fuller took issue with the discussion of foreign law and the views of international writers in the Court's opinion directly, stating:

I am not aware of adequate foundation for imputing to this country the adoption of any other than the English rule.... It is needless to review the speculations and repetitions of the writers on international law. Ortolan, De Boeck and others admit that the custom relied on as consecrating the immunity is not so general as to create an absolute international rule; Heffter, Calvo and others are to the contrary. Their lucubrations may be persuasive, but are not authoritative.<sup>366</sup>

*The Paquete Habana* thus provides some support for the majority's reliance on foreign sources of law in *Roper*,<sup>367</sup> however, Justice Scalia might dispute this support by noting that it is far more legitimate for the Court to look to foreign sources of law in determining the law of prize than in determining the meaning of the Eighth and Fourteenth Amendments of the U.S. Constitution.

### *B. Reasonableness Cases*

During the early twentieth century, the Supreme Court built on its belief, expressed in *Hurtado*, that the Constitution mandated a reasonable state law of criminal procedure, and it concluded more broadly that all state exercises whatsoever of the police power had to be reasonable whenever liberty—broadly understood—was infringed upon.<sup>368</sup> This style of decision making reached full flower in, and is associated with, the landmark 1905 case of *Lochner v. New York*.<sup>369</sup> *Lochner*-style reasonableness review resulted in two notable cases where at least some members of the Court referred to foreign sources of law for guidance in determining what was reasonable.<sup>370</sup> Since determinations of reasonableness are inher

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366. *Id.* at 719-20 (Fuller, J., dissenting).

367. *Roper v. Simmons*, 125 S. Ct. 1183, 1198-200 (2005).

368. See *Lochner v. New York*, 198 U.S. 45, 56 (1905); see also *Hurtado v. California*, 110 U.S. 516, 537 (1884).

369. *Lochner*, 198 U.S. at 45.

370. See *Muller v. Oregon*, 208 U.S. 412, 419 n.1 (1908); *Lochner*, 198 U.S. at 66, 71

ently open-ended, it is not surprising that cases involving such determinations would lead to references to foreign sources of law. The Court made these references to provide both legal and factual information about what practices were prevalent in foreign jurisdictions, and to obtain guidance in determining the reasonableness, or lack thereof, of regulations before it.<sup>371</sup> In examining both *Lochner v. New York* and *Muller v. Oregon*, the focus is often on disagreement with the Court's claim in these cases that it has the power to review, de novo, the reasonableness of the state statute before the Court. Thus, scholars often overlook the fact that a dissenting opinion in *Lochner* and the Court's opinion in *Muller* make reference to foreign factual and legal evidence.<sup>372</sup> Nonetheless, both Justice Harlan's dissent in *Lochner* and Justice Brewer's opinion in *Muller* cited and made reference to factual information about foreign law.

### 1. *Lochner v. New York* (Harlan Dissent)

In his dissent in *Lochner v. New York*,<sup>373</sup> Justice Harlan, joined by Justices White and Day, looked to statistical information from foreign countries to bolster his factual support for the proposition that the New York statute limiting the hours of laborers in bakeries and confectionaries to ten hours per day, and sixty hours in any one week, was a reasonable decision within the power of the State to enact.<sup>374</sup> In considering the New York statute's ten-hour limit, Justice Harlan examined the average workday in other nations, and found as follows:

Statistics show that the average daily working time among workingmen in different countries is, in Australia, 8 hours; in Great Britain, 9; in the United States, 9  $\frac{3}{4}$ ; in Denmark, 9  $\frac{3}{4}$ ; in Norway, 10; Sweden, France, and Switzerland, 10  $\frac{1}{2}$ ; Germany, 10  $\frac{1}{4}$ ; Belgium, Italy, and Austria, 11; and in Russia, 12 hours.<sup>375</sup>

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(Harlan, J., dissenting).

371. See *Muller*, 208 U.S. at 419 & n.1; *Lochner*, 198 U.S. at 66, 71 (Harlan, J., dissenting).

372. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* 14-15 (1980).

373. *Lochner*, 198 U.S. at 65.

374. *Id.* at 45-46; *id.* at 66, 71 (Harlan, J., dissenting).

375. *Id.* at 71.

Using these figures, Justice Harlan placed New York State's attempt to limit bakers' hours to ten per day in an international empirical perspective. He stated that the Court "judicially know[s] that the question of the number of hours during which a workman should continuously labor has been, for a long period, and is yet, a subject of serious consideration *among civilized peoples*, and by those having special knowledge of the laws of health."<sup>376</sup> Justice Harlan then gave as an extreme example a statute that would prohibit labor in bakeries and confectionaries for eighteen hours per day, and stated that "[n]o one ... could dispute the power of the State to enact such a statute."<sup>377</sup> Justice Harlan also pointed out that the New York statute at issue did not embrace such "extreme or exceptional cases."<sup>378</sup> Rather, he stated in reference to the statistics from foreign nations, the statute's restriction of labor to ten hours per day "may be said to occupy a middle ground in respect of the hours of labor."<sup>379</sup> Thus, Justice Harlan would have employed foreign sources of law as a means of upholding the New York statute at issue.

Such a reference to foreign legal regimes for factual, empirical proof of what other countries thought reasonable would make perfect sense if the majority in *Lochner* had been right in its basic presupposition that the Fourteenth Amendment banned unreasonable exercises of the police power. In fact, however, the Fourteenth Amendment protects only fundamental rights deeply rooted in our nation's history and tradition.<sup>380</sup> For this reason, we find the reference to foreign empirical data in Justice Harlan's *Lochner* dissent to be problematic. We do think, however, that the dissent provides support for the Court looking to foreign sources of law in *Roper* because there, the issue was whether the juvenile death penalty was unusual.<sup>381</sup> We think determinations of unusualness for Eighth Amendment purposes are a form of reasonableness review that the text of the Constitution actually mandates. We thus think the *Roper* Court and Justice O'Connor in her dissent ought to be able to cite

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376. *Id.* (emphasis added).

377. *Id.*

378. *Id.* at 71-72.

379. *Id.*

380. Calabresi, *supra* note 36, at 1099 (citing *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) and *Bowers v. Hardwick*, 478 U.S. 186, 192-94 (1986)).

381. *Roper v. Simmons*, 125 S. Ct. 1183, 1187, 1198-200 (2005).

Justice Harlan's *Lochner* dissent as authority for their own citation of foreign law.

## 2. *Muller v. Oregon*

In 1908, just three years after the *Lochner* decision, the Court held in *Muller v. Oregon*<sup>382</sup> that an Oregon statute imposing maximum hours of employment for women was constitutional due, in large part, to the physical differences between men and women.<sup>383</sup> In the *Muller* opinion, the Court formalized the early twentieth-century approach of examining social science and empirical data as a means of aiding the decision-making process by considering, rather extensively in the "margins," a brief filed by future Supreme Court Justice Louis D. Brandeis.<sup>384</sup> The Brandeis brief relied on by the Court as "general knowledge" worthy of judicial cognizance<sup>385</sup> included not only reference to legislation of the states regarding restrictions upon the hours of women's labor, it also incorporated extensive citation to foreign laws and empirical practices in its opinion which upheld the Oregon statute at issue.<sup>386</sup> The Court in *Muller* thus picked up on the reliance on foreign sources of law in Harlan's *Lochner* dissent and wrote such analysis into a majority opinion of the Supreme Court.

382. 208 U.S. 412 (1908).

383. *Id.* at 416-17, 421-23.

384. *Id.* at 419-20 & n.1. For more on the emergence of the Brandeis brief and social science data as a significant factor in Court decisions, see Martha F. Davis, *International Human Rights and United States Law: Predictions of a Courtwatcher*, 64 ALB. L. REV. 417, 423-24 (2000). Davis argues:

The *Muller v. Oregon* Court accepted this social science data not because it was necessary to reach a decision, but because a decision which took this data into account would be better—more defensible as a matter of public policy, and responsive to the growing public expectation that decisions by all branches of government would reflect the growing body of social science knowledge as well as logical reasoning. Of course, *Muller* created a new (and still thriving) cottage industry in developing social science evidence to submit for judicial consideration.

*Id.* at 423.

385. *Muller*, 208 U.S. at 419-21.

386. *Id.* at 416-17, 419-20 & n.1; see Davis, *supra* note 384, at 424 (noting the "little discussed fact" that *Muller v. Oregon* and the Brandeis brief submitted in the case included extensive citation to foreign laws).

In *Muller*, Justice Brewer, writing for a unanimous Court, stated that “[i]t may not be amiss, in the present case, before examining the constitutional question, to notice the course of legislation as well as expressions of opinion from other than judicial sources.”<sup>387</sup> He stated that the Brandeis brief contained a “very copious collection of all these matters”<sup>388</sup> and included “an epitome of which is found in the margin.”<sup>389</sup> In a footnote, Justice Brewer compiled some of what he found to be appropriate information from the Brandeis brief, citing first the legislation of the states, and then the foreign laws on the issue of restricted hours of labor for women, including relevant laws from Great Britain, France, Switzerland, Austria, Holland, Italy, and Germany.<sup>390</sup> Justice Brewer cited foreign laws and reports from Europe in the footnote, explaining:

In foreign legislation Mr. Brandeis calls attention to these statutes: Great Britain: Factories Act of 1844, chap. 15, pp. 161, 171; Factory and Workshop Act of 1901, chap. 22, pp. 60, 71; and see 1 Edw. VII, chap. 22. France, 1848; Act Nov. 2, 1892, and March 30, 1900. Switzerland, Canton of Glarus, 1848; Federal Law 1877, art. 2, § 1. Austria, 1855; Acts 1897, art. 96a, §§ 1-3. Holland, 1889; art. 5, § 1. Italy, June 19, 1902, art. 7. Germany, Laws 1891.

Then follow extracts from over ninety reports of committees, bureaus of statistics, commissioners of hygiene, inspectors of factories, *both in this country and in Europe*, to the effect that long hours of labor are dangerous for women, primarily because of their special physical organization. The matter is discussed in these reports in different aspects, but all agree as to the danger. It would of course take too much space to give these reports in detail. Following them are extracts from similar reports discussing the general benefits of short hours from an economic aspect of the question. In many of these reports individual instances are given tending to support the general conclusion. Perhaps the general scope and character of all these reports may be summed up in what an inspector for Hanover says: “The reasons for the reduction of the working day to ten hours—(a) the physical organization of women, (b) her maternal functions, (c) the rearing

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387. *Muller*, 208 U.S. at 419.

388. *Id.*

389. *Id.* (citation omitted).

390. *Id.* at 419 n.1.

and education of the children, (d) the maintenance of the home—are all so important and so far reaching that the need for such reduction need hardly be discussed.”<sup>391</sup>

Justice Brewer then addressed the importance of the legislation and opinions, both foreign and domestic, to the decision before the Court. Though admitting that the sources “referred to in the margin” were not, “technically speaking, authorities,” nor did they contain noteworthy discussion of the “constitutional question presented,” he found that they were “significant of a widespread belief that woman’s physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil.”<sup>392</sup> Justice Brewer then discussed the purpose that the sources cited in the margin, including the foreign sources, might serve for the Court in deciding a constitutional issue. He stated, again for a unanimous Court, that such sources could help to show longstanding beliefs and provide “general knowledge” to the Court.<sup>393</sup> Specifically, Justice Brewer wrote the following of the Court’s reasons for considering and referring to such information from the Brandeis brief:

Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge.<sup>394</sup>

The Court’s opinion in *Muller* thus suggests that reference to foreign sources of law may be appropriate in situations where the reason-

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391. *Id.* (emphasis added).

392. *Id.* at 420.

393. *Id.* at 420-21.

394. *Id.*

ableness of laws is truly at issue. As we have already mentioned, we do think the *Roper* case required that the Court make an assessment of the reasonableness of the juvenile death penalty, and so we think the citation there to foreign sources of law is supported, at least in part, by the *Muller* precedent.

### *C. Roman Law During the Late Nineteenth and Early Twentieth Centuries*

In addition to playing an important role in decisions of the early Supreme Court, Roman law played a role in opinions in the late 1800s and early 1900s, especially opinions written by Justice Edward D. White.<sup>395</sup> One such case of significant importance to the state-ownership doctrine was the 1896 constitutional case of *Geer v. Connecticut*.<sup>396</sup> In *Geer*, the Court employed foreign sources of law to uphold the constitutionality of a Connecticut statute that regulated the killing of game and prohibited its transportation outside of the state boundaries as an exception to the dormant Commerce Clause.<sup>397</sup> In reaching this conclusion, the Court stated that from “the earliest traditions, the right to reduce animals *ferae naturae* to possession has been subject to the control of the law-giving power.”<sup>398</sup> The Court extensively analyzed Roman law on the subject, including Roman law classifications of things as public and common, in which animals *ferae naturae* with no owner were considered to belong “in common to all the citizens of the state.”<sup>399</sup>

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395. See, e.g., *Hovey v. Elliott*, 167 U.S. 409, 421-22 (1897); *Geer v. Connecticut*, 161 U.S. 519, 522-23 (1896); *Coffin v. United States*, 156 U.S. 432, 453-55 (1895). For a more detailed discussion of Roman law in the twentieth-century Supreme Court, see Samuel J. Astorino, *Roman Law in American Law: Twentieth Century Cases of the Supreme Court*, 40 DUQ. L. REV. 627 (2002). Professor Astorino states that American courts' use of Roman law was “an integral part of the larger jurisprudential process by which American jurists reached back to find a line of argument to be employed in understanding the case.” *Id.* at 627-28. He also points out that American courts' use of Roman and Civil law had come to an end by 1920 for two reasons: (1) World War I had “generated a broad anti-German feeling, thereby closing off a major source of civil law influence,” and (2) the “dramatic decline in language skills, especially Greek and Latin, among lawyers and jurists.” *Id.* at 628.

396. 161 U.S. 519 (1896).

397. *Id.* at 522-25, 535.

398. *Id.* at 522.

399. *Id.* at 522-23. The Court also considered general civil law, specifically the law and practice of France, as well as “all other civilized countries of Europe.” *Id.* at 524-26 (citation omitted). The Court then considered the practice of England and cases recognizing the right



Two other cases from the 1890s, *Hovey v. Elliot*<sup>400</sup> and *Coffin v. United States*,<sup>401</sup> looked to Roman law for foundational principles of our system of justice. In *Hovey*, Justice White looked to Roman law and English doctrines for the principle that a person had the right to appear and be heard—in this case, for contempt of court.<sup>402</sup> Justice White quoted extensively from Lord Chief Baron Gilbert's *Forum Romanum* and Comyn's *Digest*<sup>403</sup> and argued that a right to be heard in one's defense is a fundamental right of due process.<sup>404</sup> In *Coffin*, Justice White looked to Roman law as a foundational source for the principle "that there is a presumption of innocence in favor of the accused."<sup>405</sup> In his majority opinion in *Knowlton v. Moore*,<sup>406</sup> Justice White again looked to foreign sources of law as part of a historical survey of the subject of "death duties."<sup>407</sup> In assessing foreign practice, Justice White noted Roman, French, English, and German laws on such taxes to demonstrate that death taxes in the United States rested upon the "same fundamental conception which has caused the adoption of like statutes in other countries."<sup>408</sup>

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of American states to control and regulate the common property in game. *Id.* at 526-29. The Court considered its "foregoing analysis of the principles upon which alone rests the right of an individual to acquire a qualified ownership in game, and the power of the State, deduced therefrom, to control such ownership for the common benefit, clearly demonstrates the validity of the statute of the State of Connecticut." *Id.* at 529 (emphasis added).

400. 167 U.S. 409 (1897).

401. 156 U.S. 432 (1895).

402. *Hovey*, 167 U.S. at 420-23.

403. *Id.* at 420-24.

404. *Id.* at 417 (asking if it can "be doubted that due process of law signifies a right to be heard in one's defence").

405. *Coffin*, 156 U.S. at 453. The Court stated that "there can be no question that the Roman law was pervaded with the results of this maxim of criminal administration." *Id.* at 454. The Court included several extracts from Roman law for support. *Id.* The opinion traced the history of the presumption of innocence from one of its claimed origins in Deuteronomy to its use in the Roman law and its subsequent adoption in the English common law as well as the common law of the United States. *Id.* at 454-58. The Court further discussed an "anecdote" of Emperor Julian, which illustrated the enforcement of the principle in Roman law and noted that the Roman rule, "along with many other fundamental and humane maxims of that system," was "preserved for mankind by the canon law." *Id.* at 455 (citations omitted).

406. 178 U.S. 41 (1900).

407. *Id.* at 47-49.

408. *Id.* Numerous property cases from this time period also looked to Roman law. *See, e.g.,* *Cunnius v. Reading Sch. Dist.*, 198 U.S. 458, 469-70 (1905); *United States v. Chavez*, 175 U.S. 509, 523 (1899); *Hayes v. United States*, 170 U.S. 637, 650-51 (1898). Note also the 1890 case of *Jones v. United States*, 137 U.S. 202 (1890), in which the Court observed that dominion

### *D. Other Cases from This Era*

There are five other cases from the period between 1890 and 1940 that deserve significant mention.<sup>409</sup> One of these opinions, *Palko v.*

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could be acquired by discovery and occupation under the law of nations “recognized by all civilized States,” and considered the international laws of discovery as stated by foreign writers, including Vattel. *Id.* at 212. Justice White wrote for the majority in *Hayes*, 170 U.S. at 637, a case which involved a dispute over the title of land gained during the Mexican cession. Justice White noted that the Spanish law, as well as the Code Napoleon and the Louisiana Code, all were derived from Roman law. *Id.* at 650. The Court discussed Roman and foreign law at length, stating that all commentators on the Roman law agreed that “*juris error* is never a good foundation for acquiring property.” *Id.* at 649-51. Under Roman law and systems founded on it, the Court noted, one with no legal title could not convey such a title, even by means of prescription. *Id.* at 650. In *Chavez*, a case also involving property ceded from Mexico, Justice McKenna wrote of the Roman law, and the codes founded thereupon, as recognizing the principle of adverse possession. *Chavez*, 175 U.S. at 522-23. The Court stated that the general rule of American law, which was one of general jurisprudence and a feature of Mexican law at the time of the cession due to its derivation from Roman law, was that “a grant will be presumed upon proof of an adverse, exclusive, and uninterrupted possession for twenty years.” *Id.* at 522.

In *Cunnius v. Reading School District*, Justice White looked to foreign sources of law in a Fourteenth Amendment case that addressed the question of whether a Pennsylvania state statute that provided for the administration of the property of an absentee was “so beyond the scope of the State’s authority as to constitute a want of due process of law within the intendment of the Fourteenth Amendment.” *Cunnius*, 198 U.S. at 469. The Court stated that it would consider “the general power of government to provide for the administration of the estates of absentees,” and discussed Roman law, as well as the ancient law of France, the Code Napoleon and the Louisiana Civil Code. *Id.* at 469-71. The Court also noted the law of England on the subject of absentees. *Id.* at 471. After its analysis of these foreign sources, the Court upheld the statute and concluded that as

the right to regulate the estates of absentees, both in the common and civil law, has ever been recognized as being within the scope of governmental authority, it must follow that the proposition that the State of Pennsylvania was wholly without power to legislate concerning the property of an absentee, is without merit.

*Id.* Finally, the Court looked to Roman law during the late nineteenth and early twentieth centuries in cases involving navigable waters. In *Cubbins v. Mississippi River Commission*, 241 U.S. 351 (1916), for example, the Court considered Roman and other foreign sources of law in deciding whether a riverbank owner could interrupt the natural flow of the river. *Id.* at 363-66. In an opinion by Justice White, the Court devoted three pages to an analysis of Roman law, as well as the Code Napoleon and the laws of Europe, and noted the contemporaneous laws of France, Scotland, and England on the topic of riparian rights. *Id.* Roman law, as well as the law of those systems that developed from it, was found to hold that there was a duty not to “unduly deflect or change” the unrestrained flow of rivers and streams except in the cases of “accidental and extraordinary floods.” *Id.* at 366.

409. In addition to these cases, other cases from this era making reference to foreign sources include *Hilton v. Guyot*, 159 U.S. 113, 163 (1895) (Gray, J.) (stating that international law “in its widest and most comprehensive sense ... is part of our law, and must be ascertained

*Connecticut*,<sup>410</sup> is illustrative of the role that foreign law played in the discussion of the Fourteenth Amendment and the incorporation of the Bill of Rights,<sup>411</sup> and is foreshadowed by the discussion of *Hurtado* above.<sup>412</sup> Two of the four other cases that made reference to foreign sources of law between 1890 and 1940 involve, rather surprisingly, tax-related issues.<sup>413</sup> In both of these cases, the Court arguably looked to foreign law as a means of providing additional support for the decision reached by the majority by showing that other nations had reached similar results in similar circumstances.<sup>414</sup> The fourth and fifth cases from this era, involving the constitutionality of the military draft and an emergency rent control measure, respectively, also looked to foreign law to provide further support for the decisions of the Court.<sup>415</sup>

### 1. *Palko v. Connecticut*

In *Palko v. Connecticut*, the Supreme Court held that a Connecticut statute allowing the State to appeal in a criminal case did not deny an individual petitioner due process of law under the Fourteenth Amendment.<sup>416</sup> The Court found that because the retrial resulting from the appeal was done so that the trial would remain "free from the corrosion of substantial legal error," rather than to harass the petitioner,<sup>417</sup> it did not violate "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."<sup>418</sup> The Court, in an opinion by Justice Cardozo, stated that while certain measures, such as the right to trial by jury, are of "value and importance," they are "not of the very essence of

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and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination"), and *Twining v. New Jersey*, 211 U.S. 78, 110-11 (1908) (discussing the "fundamental conditions" of jurisdiction and notice of and opportunity for a hearing which "seem to be universally prescribed in all systems of law established by civilized countries").

410. 302 U.S. 319 (1937).

411. See, e.g., Neuman, *supra* note 22, at 83-84.

412. See *supra* Part II.C.2.

413. See *infra* Part III.D.2-3.

414. See *infra* Part III.D.2-3.

415. See *infra* Part III.D.4-5.

416. 302 U.S. 319, 328 (1937).

417. *Id.*

418. *Id.* (quoting *Herbert v. Louisiana*, 272 U.S. 312, 316 (1926)).

a scheme of ordered liberty.”<sup>419</sup> Thus, Cardozo opined, the abolition of these rights would not violate a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>420</sup>

The Court noted that immunity from compulsory self-incrimination was a measure of the sort that could “be lost, and justice still be done.”<sup>421</sup> Indeed, the Court stated that “today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether.”<sup>422</sup> In a footnote to this comment, Justice Cardozo referred to foreign law, stating that “[c]ompulsory self-incrimination is part of the established procedure in the law of Continental Europe. Double jeopardy too is not everywhere forbidden.”<sup>423</sup> Cardozo thus implied that, just as *Hurtado* had noted, the right to grand jury indictment was not fundamental because European civil law countries did not recognize it, and so, too, the right against self-incrimination might not be fundamental for the same reason. *Palko* thus, like *Hurtado*, is a direct example of the Court relying on foreign law to find that a right is *not* protected by the U.S. Constitution, and thus upholding a state statute and practice.

Justice Scalia might dismiss *Palko* and *Hurtado* by saying that looking to foreign law in criminal cases to confirm the absence of a right is less offensive than looking to foreign law in order to create a new constitutional right, as in *Lawrence* or *Roper*. Such a distinction seems to us to be a bit forced; however, we would tend to dismiss *Palko* and *Hurtado* on the ground that the Fourteenth Amendment incorporates the Bill of Rights and does not, as those Courts thought, require that the states adopt a reasonable law of criminal procedure.

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419. *Id.* at 325.

420. *Id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). The Court said that “[f]ew would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them.” *Id.*

421. *Id.*

422. *Id.* at 325-26.

423. *Id.* at 326 n.3 (citations omitted).

## 2. *United States v. Perkins*

The issue in the 1896 case of *United States v. Perkins*<sup>424</sup> was “whether personal property bequeathed by will to the United States is subject to an inheritance tax under the laws of New York.”<sup>425</sup> Justice Brown, writing for the Court, found the case to present two questions, the first of which was “[w]hether it is within the power of the State to tax bequests to the United States.”<sup>426</sup> In holding in the affirmative, Justice Brown stated:

While the laws of *all civilized States* recognize in every citizen the absolute right to his own earnings, and to the enjoyment of his own property, and the increase thereof, during his life, except so far as the State may require him to contribute his share for public expenses, the right to dispose of his property by will has always been considered purely a creature of statute and within legislative control.<sup>427</sup>

Justice Brown considered the common law of England on the issue of the disposition of property by will, as well as the Statute of Wills enacted in 1540 during the reign of Henry VIII.<sup>428</sup> Strikingly, he then addressed testamentary practices in the foreign countries of France and Italy:

By the *Code Napoleon*, gifts of property, whether by acts *inter vivos* or by will, must not exceed one half the estate if the testator leave but one child; one third, if he leaves two children; one fourth, if he leaves three or more. If he have no children, but leaves ancestors, both in the paternal and maternal line, he may give away but one half of his property, and but three fourths if he have ancestors in but one line. By the *law of Italy*, one half a testator's property must be distributed equally among all his children; the other half he may leave to his eldest son or to whomsoever he pleases. Similar restrictions upon the power of disposition by will are found in the *codes of other continental*

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424. 163 U.S. 625 (1896).

425. *Id.* at 625-26.

426. *Id.* at 627. The second question presented was whether “the United States are a corporation exempted by law from taxation.” *Id.*

427. *Id.* (emphasis added) (emphasis in original omitted).

428. *Id.*

*countries*, as well as in the State of Louisiana. Though the general consent of the most *enlightened nations* has, from the earliest historical period, recognized a natural right in children to inherit the property of their parents, we know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition or imposing such conditions upon its exercise as it may deem conducive to public good.<sup>429</sup>

*Perkins* is thus another majority opinion that takes cognizance of foreign legal practice in upholding a statute and determining what might be reasonable practice in the United States. Though *Perkins* did not involve the recognition of a new constitutional right, it clearly referred to and relied upon foreign law in reviewing, and ultimately upholding, a state statute.

### 3. *O'Malley v. Woodrough*

In 1939, in the well-known judicial compensation case of *O'Malley v. Woodrough*,<sup>430</sup> the Supreme Court referred to foreign law and precedents in reaching the conclusion that applying a general income tax to federal judicial salaries was not unconstitutional. The majority, in an opinion by Justice Frankfurter, gave a negative answer to the question of whether "Congress exceeded its constitutional power in providing that United States judges appointed after the Revenue Act of 1932 shall not enjoy immunity from the incidences of taxation to which everyone else within the defined classes of income is subjected."<sup>431</sup> The Court in *O'Malley* thus upheld

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429. *Id.* at 627-28 (emphasis added).

430. 307 U.S. 277 (1939).

431. *Id.* at 279. Justice Frankfurter described the issue of the case earlier in the opinion as follows:

Is the provision of § 22 of the Revenue Act of 1932 (47 Stat. 169, 178), re-enacted by § 22(a) of the Revenue Act of 1936 (49 Stat. 1648, 1657), constitutional insofar as it included in the "gross income," on the basis of which taxes were to be paid, the compensation of "judges of courts of the United States taking office after June 6, 1932."

*Id.* at 278-79. The Court cast doubt on the 1920 case of *Evans v. Gore*, 253 U.S. 245 (1920), with its *O'Malley* opinion. In *Evans*, the Court had previously held that a provision requiring that the compensation received by United States judges be included in "gross income" for tax purposes, even though merely a part of a general, nondiscriminatory taxing measure that applied to all citizens earning income, was "contrary to Article III, § 1, of the Constitution which provides that the 'Compensation' of the 'Judges' 'shall not be diminished during their

a congressional statute by finding that applying a nondiscriminatory tax laid generally on net income to a federal judge is not a diminution of his salary within the meaning of the Article III's prohibition.<sup>432</sup> Rather, the Court found that subjecting federal judges to a general tax is "merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering."<sup>433</sup>

In explaining the reasons for its movement away from the reasoning of a prior case, *Evans v. Gore*,<sup>434</sup> which had come to the opposite conclusion, the *O'Malley* Court noted that *Evans* had been met with "wide and steadily growing disfavor from legal scholarship and professional opinion," and was "rejected by most of the courts before whom the matter came after that decision."<sup>435</sup> The Court stated that the meaning that *Evans* "imputed to the history which explains Article III, § 1, was contrary to the way in which it was read by other *English-speaking* courts."<sup>436</sup> In a footnote to this statement, Justice Frankfurter noted the foreign Australian judgment in *Cooper v. Commissioner of Income Tax*,<sup>437</sup> which interpreted a portion of the Queensland Constitution Act of 1867 that prohibited reduction or diminution of judicial salaries, as well as the foreign Canadian judgment in *Judges v. Attorney-General of*

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Continuance in Office." *O'Malley*, 307 U.S. at 280. Justice Holmes had written in dissent in *Evans*, and it was this position that many in the 1930s viewed as "cut from the same cloth as his dissents in *Lochner v. New York* and *Abrams v. United States*," which Frankfurter adopted in the *O'Malley* majority opinion. See Adrian Vermeule, *The Constitutional Law of Official Compensation*, 102 COLUM. L. REV. 501, 521 (2002) (footnotes omitted).

432. *O'Malley*, 307 U.S. at 282. Although it never stated that its opinion overruled *Evans*, the Court in *O'Malley* did state that *Miles v. Graham*, 268 U.S. 501 (1925), a similar case, was overruled "to the extent that what the Court now says is inconsistent with" *Miles*. *O'Malley*, 307 U.S. at 282-83.

433. *Id.* at 282. In 2001, the Supreme Court explicitly overruled *Evans*, citing *O'Malley* and stating that it was overruling *Evans*, "insofar as it holds that the Compensation Clause forbids Congress to apply a generally applicable, nondiscriminatory tax to the salaries of federal judges, whether or not they were appointed before enactment of the tax." *United States v. Hatter*, 532 U.S. 557, 567 (2001).

434. 253 U.S. 245 (1920).

435. *O'Malley*, 307 U.S. at 281 (footnotes omitted).

436. *Id.* (footnote omitted) (emphasis added).

437. (1907) 4 C.L.R. 1304 (Austl.).

*Saskatchewan*,<sup>438</sup> which construed a portion of the British North America Act requiring that judicial salaries be fixed and provided by the Canadian Parliament.<sup>439</sup> In another footnote to this portion of the opinion, Justice Frankfurter stated that “[p]articular attention should be called to the decision of the Supreme Court of South Africa” in *Krause v. Commissioner for Inland Revenue*,<sup>440</sup> which construed a section of the South Africa Act that was identical to the clause in Article III, § 1, of the U.S. Constitution.<sup>441</sup>

In dissent, Justice Butler, again foreshadowing Justice Scalia’s position in *Lawrence* and *Roper*, took issue with the majority’s citation of foreign cases, both because of their status as such and because of their factual situations. Justice Butler wrote:

Now the Court cites, as if entitled to prevail against those well-sustained opinions and the deliberate judgments of this Court, opposing views—if indeed upon examination they reasonably may be so deemed—of English speaking judges in foreign countries. It refers, footnote 6, to the decision of the Privy Council in *Judges v. Attorney-General of Saskatchewan* (1937), 2 D. L. R. 209, construing income tax statutes of Saskatchewan. Neither the Dominion nor the Province has any law forbidding diminution of compensation of judges while in office and that decision has nothing to do with the question before us. The Australian and South African cases cited, footnotes 6 and 8, involved construction of income tax statutes under constitutions or charters created by legislative enactments and subject to authoritative interpretation or change by the local or British parliament. They shed no light upon the issue in this case.<sup>442</sup>

The *O’Malley* case is thus another example of the Court citing foreign law to illuminate the meaning of U.S. law. But, as Justice Scalia might note, it is not really analogous to a case of the Court finding a new right for gays or juvenile capital defendants based on such sources and, arguably, *O’Malley* is thus not precedent for the Court’s holdings in *Roper* and *Lawrence*.

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438. [1937] D.L.R. 209 (P.C.).

439. *O’Malley*, 307 U.S. at 281 n.6.

440. 1929 A.D. at 286 (S. Afr.).

441. *O’Malley*, 307 U.S. at 281 n.8.

442. *Id.* at 298 (Butler, J., dissenting).



#### 4. *Selective Draft Law Cases*

In the 1918 *Selective Draft Law Cases*,<sup>443</sup> the Supreme Court found that a 1917 Act passed by Congress with intent to “supply temporarily the increased military force which was required by the existing emergency, the war then and now flagrant”<sup>444</sup> was constitutional. The Court found that the power to raise an army in conjunction with the Necessary and Proper Clause of the Constitution authorized a compulsory draft. Specifically, the Court stated:

The possession of authority to enact the statute must be found in the clauses of the Constitution giving Congress power “to declare war; ... to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; ... to make rules for the government and regulation of the land and naval forces.” And of course the powers conferred by these provisions like all other powers given carry with them as provided by the Constitution the authority “to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.” As the mind cannot conceive an army without the men to compose it, on the face of the Constitution the objection that it does not give power to provide for such men would seem to be too frivolous for further notice.<sup>445</sup>

The Court then looked to foreign law for evidence that compelled military service is not repugnant to a free government.<sup>446</sup> Writing for the Court, Justice White cited Vattel’s *Law of Nations* for the proposition that the “very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it.”<sup>447</sup> The Court further wrote that it was “absolutely unnecessary” to do more than state this proposition, as it was illustrated by the “almost universal legislation to that effect” then in force.<sup>448</sup> In a footnote, the

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443. 245 U.S. 366 (1918).

444. *Id.* at 375.

445. *Id.* at 377 (citations omitted).

446. *Id.* at 378-79.

447. *Id.* at 378 (citing to VATTEL, *LAW OF NATIONS*, Book III, chs. 1-2 (1879)).

448. *Id.*

Court supported its statement that there was virtually universal legislation enforcing military service by providing a broad survey of the contemporary practices of foreign nations, noting governments who enforced military service, such as the Argentine Republic, Bolivia, Columbia, China, Ecuador, Honduras, Nicaragua, Peru, Romania, Russia, Serbia, and Turkey.<sup>449</sup>

The Court also noted English practice, where the "duty of the great militant body of the citizens was recognized and enforceable" before the Norman conquest, and the contemporaneous English Military Service Act of 1916, which exemplified the right of the English Parliament to "impose compulsory duty upon the citizen to perform military duty wherever the public exigency exacted, whether at home or abroad."<sup>450</sup> The Court next considered American history—both before and after the separation from England—regarding the right to enforce military service.<sup>451</sup> Summarizing its review of both foreign and domestic sources, the Court stated:

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449. *Id.* at 378-79 n.1. The footnote, in its entirety, reads as follows:

In the argument of the Government it is stated: "The Statesman's Year-book for 1917 cites the following governments as enforcing military service: Argentine Republic, p. 656; Austria-Hungary, p. 667; Belgium, p. 712; Brazil, p. 738; Bulgaria, p. 747; Bolivia, p. 728; Colombia, p. 790; Chile, p. 754; China, p. 770; Denmark, p. 811; Ecuador, p. 820; France, p. 841; Greece, p. 1001; Germany, p. 914; Guatemala, p. 1009; Honduras, p. 1018; Italy, p. 1036; Japan, p. 1064; Mexico, p. 1090; Montenegro, p. 1098; Netherlands, p. 1119; Nicaragua, p. 1142; Norway, p. 1152; Peru, p. 1191; Portugal, p. 1201; Roumania, p. 1220; Russia, p. 1240; Serbia, p. 1281; Siam, p. 1288; Spain, p. 1300; Switzerland, p. 1337; Salvador, p. 1270; Turkey, p. 1353." See also the recent Canadian conscription act, entitled, "Military Service Act" of August 27, 1917, expressly providing for service abroad (printed in the Congressional Record of September 20, 1917, 55th Cong. Rec., p. 7959); the Conscription Law of the Orange Free State, Law No. 10, 1899, Military Service and Commando Law, sections 10 and 28, Laws of Orange River Colony, 1901, p. 855; of the South African Republic, "De Locale Wetten en Volksraadsbesluiten der Zuid-Afr. Republiek," 1898, Law No. 20, pp. 230, 233, article 6, 28; Constitution, German Empire, April 16, 1871, Art. 57, 59, Dodd, 1 Modern Constitutions, p. 344; Gesetz, betreffend Aenderungen der Wehrpflicht, vom 11 Feb. 1888, No. 1767, Reichs-Gesetzblatt, p. 11, amended by law of July 22, 1913, No. 4264, RGBl., p. 593; Loi sur le recrutement de l'armée of 15 July, 1889 (Duvergier, vol. 89, p. 440), modified by act of 21 March, 1905 (Duvergier, vol. 105, p. 133).

*Id.*

450. *Id.* at 379 (citing Military Service Act, 1916, 5 & 6 Geo. 5, c. 104, § 1 (Eng.); Military Service Act Amendment, 1916, 6 & 7 Geo. 5, c. 15, § 1 (Eng.)).

451. *Id.* at 379-87.

Thus sanctioned as is the act before us by the text of the Constitution, and by its significance as read in the light of the fundamental principles with which the subject is concerned, *by the power recognized and carried into effect in many civilized countries*, by the authority and practice of the colonies before the Revolution, of the States under the Confederation and of the Government since the formation of the Constitution, the want of merit in the contentions that the act in the particulars which we have been previously called upon to consider was beyond the constitutional power of Congress, is manifest.<sup>452</sup>

In the *Selective Draft Law Cases*, the Court thus again looked to foreign law as a part of its rationale for upholding a congressional statute—in this instance, one enforcing the military draft. The *Selective Draft Law Cases*, like the *Legal Tender Cases*, are a major instance of the Supreme Court relying on foreign law to expand the powers of the national government.

##### 5. *Block v. Hirsh*

In the post-World War I rent control case of *Block v. Hirsh*,<sup>453</sup> the Court, in a majority opinion by Justice Holmes, noted foreign practice in upholding a District of Columbia law that created residential rent control terms during post-wartime emergency.<sup>454</sup> The Court stated that, as the emergency declared by Congress in passing the statute was assumed to exist,<sup>455</sup> the question for the Court was whether “Congress was incompetent to meet it in the way in which it has been met by *most of the civilized countries of the world*.”<sup>456</sup> The Court upheld the congressional statute, noting that such an emergency was sufficient to clothe “the letting of buildings in the

452. *Id.* at 387-88 (emphasis added).

453. 256 U.S. 135 (1921).

454. *Id.* at 158.

455. The Court noted that Congress stated “a publicly notorious and almost world-wide fact” as justification for the statute. *Id.* at 154. Congress stated that the statute was passed to impose rent control in the District in response to “emergencies growing out of the war, resulting in rental conditions in the District dangerous to the public health and burdensome to public officers, employees and accessories, and thereby embarrassing the Federal Government in the transaction of the public business.” *Id.*

456. *Id.* at 155 (emphasis added).

District of Columbia with a public interest so great as to justify regulation by law."<sup>457</sup>

The Court also considered whether the statute was a taking without due process of law. In that respect, the Court stated as follows:

All the elements of a public interest justifying some degree of public control are present. The only matter that seems to us open to debate is whether the statute goes too far. For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort pressed to a certain height might amount to a taking without due process of law.<sup>458</sup>

The Court found the statute not to be a taking, especially due to its temporary nature and its provision of "[m]achinery" to "secure to the landlord a reasonable rent."<sup>459</sup> The Court also found acceptable the preference the statute gave to the tenant in possession, as it found this to be an almost necessary component of the statute, and noted that such a preference is "traditional in English law."<sup>460</sup> Justice Holmes concluded the Court's opinion by addressing the relevance of the legitimacy of the statute, in light of the practices in other nations, as follows:

Assuming that the end in view otherwise justified the means adopted by Congress, we have no concern of course with the question whether those means were the wisest, whether they may not cost more than they come to, or will effect the result desired. It is enough that we are not warranted in saying that legislation that has been resorted to *for the same purpose all over the world*, is futile or has no reasonable relation to the relief sought.<sup>461</sup>

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457. *Id.* In regard to the preference the statute gave to the tenant in possession, the Court stated that this was "an almost necessary incident of the policy and *is traditional in English law.*" *Id.* at 157 (emphasis added).

458. *Id.* at 156.

459. *Id.* at 157.

460. *Id.*

461. *Id.* at 158 (citation omitted) (emphasis added).

Thus, Justice Holmes<sup>462</sup> in *Block*, much like Justice Harlan in *Lochner* and Justice Brewer in *Muller*, looked to foreign law and practice as evidence of the reasonableness of an American statute. *Block* followed the *Selective Draft Law Cases* and the *Legal Tender Cases* in using foreign law to expand the power of the national government.

#### IV. CASES INCLUDING FOREIGN SOURCES OF LAW FROM 1940 TO THE PRESENT

During the years from 1940 to the present, the Supreme Court has greatly accelerated the number of references it has made to foreign law in constitutional cases. This Part of our Article will discuss some of the most significant citations of foreign law the Court has made over the past sixty-five years. It does not, however, address every instance in which the members of the Court have looked to such sources.<sup>463</sup> The trend during these years has been toward a dramatic increase in the frequency with which the Court

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462. It deserves mention that Justice Holmes was also a Harvard professor prior to his service on the Supreme Court. See G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 198-202 (1993).

463. For some additional cases decided from 1940 to the present that invoke foreign sources of law, see *Zadvydas v. Davis*, 533 U.S. 678, 721 (2001) (Kennedy, J., dissenting) (stating that the view that detention of inadmissible aliens incident to removal "cannot be justified as punishment nor can the confinement or its conditions be designed in order to punish ... accords with international views on detention of refugees and asylum seekers" and citing to the report of the United Nations Working Group on Arbitrary Detention, U.N. Comm. on Human Rights [UNCHR] Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/2000/4 (Dec. 28, 1999), as well as the United Nations High Commissioner for Refugees, Guidelines on Applicable Criteria and Standards Relating to the Detention on Asylum-Seekers (Feb. 10, 1999)); *Raines v. Byrd*, 521 U.S. 811, 828 (1997) (holding that individual members of Congress did not have standing to maintain a suit challenging the constitutionality of the Line Item Veto Act, and stating, in an opinion by Chief Justice Rehnquist, that there would be nothing irrational about a system that would grant standing in such a case, as "some European constitutional courts operate under one or another variant of such a regime," but pointing out that the American "regime contemplates a more restricted role for Article III courts"); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421 n.21 (1964) (discussing the practice of foreign nations, including England and civil law nations, regarding the act of state doctrine); *Poe v. Ullman*, 367 U.S. 497, 548 (1961) (Harlan, J., dissenting) (stating that the statute at issue in the case, which proscribed criminal penalties for using contraceptive drugs or devices, involved "what, by common understanding throughout the English-speaking world, must be granted to be a most fundamental aspect of 'liberty,' the privacy of the home in its most basic sense"); *Betts v. Brady*, 316 U.S. 455, 462 (1942) (noting that certain actions may be shocking to a "universal sense of justice").

turns to foreign law, especially in the area of criminal law, and in progressively more controversial and groundbreaking cases. There has also been, as those familiar with the current debate are keenly aware, much more public and vigorous disagreement among the members of the Court regarding the relevance of foreign law in recent years than in the past. Much of the disagreement has been played out in majority and dissenting opinions. More recently, members of the Rehnquist Court have begun to speak publicly of their views on this subject.<sup>464</sup>

For ease of discussion, we have organized the recent cases in which the Supreme Court has considered foreign law into four groups. The first and fourth groups include cases in which either Justice Felix Frankfurter or Justice Stephen Breyer made the foreign reference, as these two Justices have frequently looked to foreign sources of law for guidance during this period and have advocated their use. Both Justices were professors at Harvard Law School early in their careers,<sup>465</sup> as well as Supreme Court Justices, and both make significant references to foreign sources of law in some of the opinions for which they are most well known. We consider below two famous comparative judicial opinions by Justice Frankfurter,<sup>466</sup> and in a later section we discuss two important comparative opinions by Justice Breyer.<sup>467</sup> We think it is no accident that three former Harvard Law School professors, Justices Story, Frankfurter, and Breyer, would end up being by themselves almost a cottage industry for Supreme Court citation of foreign sources of law. It is not surprising that former academics who become Justices will be more knowledgeable about foreign law than are other justices, and it is also not surprising that such justices will thus be tempted to cite what they know. Indeed, the harder phenomenon to explain may be why Harvard graduate and former comparative law professor Antonin Scalia has been as resistant to reliance on foreign sources of law as he has been.

The second group of cases in which the Court looked to foreign law for guidance during this period includes criminal law cases in determining the evolving meaning of the Eighth Amendment.

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464. See *supra* notes 11-15 and accompanying text.

465. 2 DAVID G. SAVAGE, GUIDE TO THE U.S. SUPREME COURT 992, 1023 (4th ed. 2004).

466. See *infra* Part IV.A.

467. See *infra* Part IV.D.

We have arranged the criminal law cases chronologically to demonstrate how the modern Supreme Court has considered such sources in criminal matters more frequently since the Warren Court's plurality opinion in *Trop v. Dulles*.<sup>468</sup> That opinion began the current inquiry into foreign law and opinion under the "evolving standards of decency" framework of the Eighth Amendment, and culminated in the landmark opinion striking down the juvenile death penalty in *Roper v. Simmons*.<sup>469</sup>

The third group of cases in which the Supreme Court refers to foreign sources of law includes cases related to major social issues, including the revolutionary decision in *Roe v. Wade*<sup>470</sup> where the reference made to foreign law is often overlooked.

### A. *Opinions of Justice Frankfurter*

Strikingly, Justice Frankfurter, who was born in Vienna, Austria,<sup>471</sup> often wrote of the "notions of justice of English-speaking peoples"<sup>472</sup> and of the practices of "the English-speaking world."<sup>473</sup> In addition to the two famous Frankfurter opinions discussed below, *Adamson v. California*<sup>474</sup> and *Wolf v. Colorado*,<sup>475</sup> Justice Frankfurter, in his concurrence in *Smith v. California*,<sup>476</sup> considered foreign law to show the importance of including certain forms of evidence in a trial for violation of obscenity laws.<sup>477</sup> Justice Frankfurter asserted that there was a due process right to introduce evidence regarding the prevailing literary standards and moral criteria by which books are deemed obscene. He stated that the "importance of this type of evidence in prosecutions for obscenity has been im-

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468. 356 U.S. 86 (1958).

469. 125 S. Ct. 1183 (2005).

470. 410 U.S. 113 (1973).

471. HELEN SHIRLEY THOMAS, FELIX FRANKFURTER: SCHOLAR ON THE BENCH 4 (1960).

472. *Rochin v. California*, 342 U.S. 165, 169 (1952); *Adamson v. California*, 332 U.S. 46, 67-68 (1947) (Frankfurter, J., concurring).

473. *Wolf v. Colorado*, 338 U.S. 25, 29 (1949).

474. 332 U.S. 46 (1947).

475. 338 U.S. 25 (1949).

476. 361 U.S. 147, 160-67 (1959) (Frankfurter, J., concurring).

477. Justice Frankfurter also looked to foreign law in two footnotes of his majority opinion for the Court in *New York v. United States*, 326 U.S. 572, 580 n.4, 583 n.5 (1946). In *New York*, Justice Frankfurter noted the laws of Argentina, Canada, and Australia in upholding Congress's right to tax the State of New York on sales of mineral waters. *Id.*

pressively attested by the recent debates in the House of Commons dealing with the insertion of such a provision in the enactment of the Obscene Publications Act."<sup>478</sup>

### 1. *Adamson v. California*

Justice Stanley F. Reed wrote the Supreme Court's majority opinion in the highly controversial 1947 case of *Adamson v. California*.<sup>479</sup> The case involved the question of whether the Fourteenth Amendment prohibited the state of California from allowing a prosecutor or a court to comment upon, and the jury to consider, a criminal defendant's failure to testify in proceedings against him.<sup>480</sup> The majority held that such commentary by state prosecutors and courts was not unconstitutional.<sup>481</sup>

Justice Frankfurter, in a concurring opinion that provided the fifth and decisive vote for the majority in this hotly contested case, agreed with the Court that the Fifth Amendment was not made effective against the states by the Fourteenth Amendment.<sup>482</sup> Rather, Justice Frankfurter argued that the relevant question in

478. *Smith*, 361 U.S. at 166 (Frankfurter, J., concurring).

479. 332 U.S. 46 (1947).

480. *Id.* at 48-49.

481. *Id.* at 50-51. Justice Reed wrote:

It is settled law that the clause of the Fifth Amendment, protecting a person against being compelled to be a witness against himself, is not made effective by the Fourteenth Amendment as a protection against state action on the ground that freedom from testimonial compulsion is a right of national citizenship, or because it is a privilege and immunity secured by the Federal Constitution as one of the rights of man that are listed in the Bill of Rights.

*Id.*

482. Justice Frankfurter believed that any construction which gives to due process no independent function but turns it into a summary of the specific provisions of the Bill of Rights would, as has been noted, tear up by the roots much of the fabric of law in the several States, and would deprive the States of opportunity for reforms in legal process designed for extending the area of freedom.

*Id.* at 67 (Frankfurter, J., concurring). *Adamson* reflected a long-standing conflict of ideology (and personality) between Justice Frankfurter and Justice Black, who penned an adamant dissent to the majority opinion. *Id.* at 68-92. Commentators have noted that the five-to-four decision in *Adamson* was Justice Frankfurter's last major "victory" on the Court. Richard L. Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 CHI.-KENT L. REV. 1197, 1224 (1995). For more discussion regarding Justice Frankfurter and his *Adamson* concurrence, see generally *id.*



reviewing the due process claim in *Adamson* was "whether the criminal proceedings which resulted in conviction deprived the accused of the due process of law to which the United States Constitution entitled him."<sup>483</sup>

Judicial review in this instance, Justice Frankfurter argued, imposed a duty of judgment on the Court to determine if the proceedings "offend those canons of decency and fairness which express the notions of justice of *English-speaking peoples* even toward those charged with the most heinous offenses."<sup>484</sup> In so stating, Justice Frankfurter was offering his own version of the *Hurtado* and *Palko* Courts' reasonableness in criminal procedure test, although, unlike those prior Courts, Frankfurter was measuring reasonableness in criminal procedure by the practice in other common law instead of civil law jurisdictions. Justice Frankfurter stated that, as the standards of English-speaking peoples "are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia," judges must be restrained by accepted notions of justice in determining what is decent and fair.<sup>485</sup> He explicitly said that those notions of fairness should derive not only from the American people, but from all "English-speaking peoples."<sup>486</sup>

Just a few years later in *Rochin v. California*,<sup>487</sup> a case which held that using capsules that were forcibly pumped from a defendant's stomach as evidence against him in a criminal trial violated the Due Process Clause of the Fourteenth Amendment,<sup>488</sup> Justice Frankfurter used the same language regarding the "notions of justice of English-speaking peoples" in his opinion for the Court.<sup>489</sup> In these cases, Justice Frankfurter clearly made reference to foreign sources of law by suggesting that the content of American criminal procedural rules could be divined by references to the practices of English-speaking peoples. Frankfurter thus put himself in line with the more liberal Justices on the current Court with respect to reliance on foreign law.

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483. *Adamson*, 332 U.S. at 67 (Frankfurter, J., concurring).

484. *Id.* at 67-68 (emphasis added).

485. *Id.*

486. *Id.*

487. 342 U.S. 165 (1952).

488. *Id.* at 172.

489. *Id.* at 169.

## 2. *Wolf v. Colorado*

The 1949 majority opinion written by Justice Frankfurter in *Wolf v. Colorado*<sup>490</sup> not only referred to the opinions of foreign jurisdictions regarding illegally obtained evidence, it also included an entire table compiling relevant decisions from Australia, Canada, England, India, and Scotland.<sup>491</sup> In 1914 in *Weeks v. United States*,<sup>492</sup> the Court ruled that evidence obtained in an illegal search and seizure in violation of the Fourth Amendment was inadmissible in federal criminal trials.<sup>493</sup> However, thirty-five years later in *Wolf* the Court held that the *Weeks* exclusionary rule was not incorporated by the Due Process Clause of the Fourteenth Amendment and, thus, it was not a rule imposed upon the states.<sup>494</sup> In so holding, Justice Frankfurter once again looked to the practices of the states and the “English-speaking world,”<sup>495</sup> as he had done two years earlier in his *Adamson* concurrence.

Justice Frankfurter first referred to “English-speaking peoples” when stating that the “security of one’s privacy against arbitrary intrusions by the police—which is at the core of the Fourth Amendment—is basic to a free society.”<sup>496</sup> He explained:

It is therefore implicit in “the concept of ordered liberty” and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.<sup>497</sup>

However, the Court found that the methods of “enforcing such a basic right raise questions of a different order.”<sup>498</sup> Justice

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490. 338 U.S. 25 (1949).

491. *Id.* at 30, 39.

492. 232 U.S. 383 (1914).

493. *Id.* at 392.

494. *Wolf*, 338 U.S. at 33.

495. *Id.* at 29.

496. *Id.* at 27.

497. *Id.* at 27-28 (emphasis added).

498. *Id.* at 28.

Frankfurter stated that the *Weeks* exclusionary rule was not derived explicitly from the Fourth Amendment's requirements or Congressional legislation; rather, the *Weeks* decision was "a matter of judicial implication."<sup>499</sup> Thus, the immediate question before the Court was "whether the basic right to protection against arbitrary intrusion by the police demands the exclusion of logically relevant evidence obtained by an unreasonable search and seizure because, in a federal prosecution for a federal crime, it would be excluded."<sup>500</sup>

In reaching the decision on the issue at hand, the Court pointed out that "[a]s a matter of inherent reason," men entirely devoted to protecting the right of privacy might arrive at differing answers.<sup>501</sup> Justice Frankfurter then stated that "[w]hen we find that in fact *most of the English-speaking world* does not regard as vital to such protection the exclusion of evidence thus obtained, we must hesitate to treat this remedy as an essential ingredient of the right."<sup>502</sup> Justice Frankfurter examined the practices of other nations, stating that "[o]f 10 jurisdictions within the United Kingdom and the British Commonwealth of Nations which have passed on the question, none has held evidence obtained by illegal search and seizure inadmissible."<sup>503</sup> The Court also included a table, Table J, that compiled the decisions of these foreign nations, finding that evidence obtained through an illegal search and seizure was admissible evidence in a criminal trial.<sup>504</sup> The table the Court included follows:

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499. *Id.*

500. *Id.*

501. *Id.* at 28-29.

502. *Id.* at 29 (emphasis added). Justice Frankfurter first examined the practices of forty-seven states that had passed on the admissibility of evidence obtained by illegal search and seizure, concluding that thirty-one states had rejected the *Weeks* exclusionary doctrine, while sixteen agreed with it. *Id.* The Court also included tables further demonstrating the breakdown of the states in their decisions regarding the *Weeks* doctrine. *See id.* at 33-39 tbls.A, B, C, D, E, F, G, H & J.

503. *Id.* at 30.

504. *Id.* at 39 tbl.J.

TABLE J.<sup>505</sup>

JURISDICTIONS OF THE UNITED KINGDOM AND THE BRITISH  
COMMONWEALTH OF NATIONS WHICH HAVE HELD ADMISSIBLE  
EVIDENCE OBTAINED BY ILLEGAL SEARCH AND SEIZURE.

AUSTRALIA	<i>Miller v. Noblet</i> , [1927] S.A.S.R. 385.
CANADA	
ALTA.	<i>Rex v. Nelson</i> , [1922] 2 W.W.R. 381, 69 D.L.R. 180.
MAN.	<i>Rex v. Droussel</i> , 41 Man. 15, [1933] 2 D.L.R. 446.
ONT.	<i>Regina v. Doyle</i> , 12 Ont. 347.
SASK.	<i>Rex v. Kostachuk</i> , 24 Sask. 485, 54 Can. C.C. 189.
ENGLAND	<i>See Elias v. Pasmore</i> , [1934] 2 K.B. 164.
INDIA	
ALL.	<i>Ali Ahmad Khan v. Emperor</i> , 81 I.C. 615 (1).
CAL.	<i>Baldeo Bin v. Emperor</i> , 142 I.C. 639.
RANG.	<i>Chwa Hum Htive v. Emperor</i> , 143 I.C. 824.
SCOTLAND	<i>See Hodgson v. Macpherson</i> , [1913] S.C. (J.) 68, 73.

*Wolf v. Colorado* thus stands along with Frankfurter's concurrence in *Adamson* and with the Court's prior opinions in *Hurtado* and *Palko* in support of the notion that the Fourteenth Amendment requires the states to have reasonable rules of criminal procedure, and that the reasonableness of such rules can be divined by looking to foreign law. We disagree with this construction of the Fourteenth Amendment, but we note that there are provisions of the Constitution that do require reasonableness, such as the Fourth Amendment in its ban on unreasonable searches and seizures, and the Eighth Amendment in its ban on cruel and unusual punishments. We think that, as to those amendments, reasonableness review in light of foreign sources of law is supported by the *Adamson*, *Wolf*, *Hurtado*, and *Palko* line of cases.

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505. *Id.*

## B. Criminal Cases

The second significant set of cases that relies on foreign sources of law during the last sixty-five years includes cases involving issues of criminal law. While the use of foreign law is not isolated to just recent criminal law cases, the trend of considering such sources in criminal cases seems to have accelerated rather significantly in recent years beyond its simple origin in cases like *Hurtado* and *Palko*. In fact, there is scarcely a prominent Eighth Amendment case decided during the last sixty-five years that does *not* at least mention foreign legal opinion and practice. Other criminal cases that did not involve the Eighth Amendment, such as *Miranda v. Arizona*, also made lengthy references to foreign law.<sup>506</sup>

### 1. *Trop v. Dulles*

Much of the modern Court's citation of foreign law in its Eighth Amendment jurisprudence traces its roots to the plurality opinion in *Trop v. Dulles*<sup>507</sup> and before that to *Wilkerson v. Utah*,<sup>508</sup> an 1879 Eighth Amendment case that briefly mentions foreign law. The *Trop* opinion started the Court down the path of looking to foreign sources of law to determine what are evolving standards of decency in evaluating what punishments are unconstitutionally cruel and unusual.<sup>509</sup> Justice Kennedy himself wrote in *Roper v. Simmons* that "at least from the time of the Court's decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'"<sup>510</sup> *Trop* is also a very significant case as it is the first instance we have found in the Supreme Court's history in which the Court turned to foreign

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506. 384 U.S. 436 (1966); see *infra* Part IV.B.2.

507. 356 U.S. 86 (1958). See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 830 n.31 (1988) (stating that the Court has "previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual" and citing *Trop v. Dulles*).

508. 99 U.S. 130, 134 (1879). See *Jackson*, *supra* note 10, at 109 n.3.

509. See, e.g., Dwight Aarons, *Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?*, 29 SETON HALL L. REV. 147, 199 (1998).

510. *Roper v. Simmons*, 125 S. Ct. 1183, 1198 (2005) (emphasis added).

sources of law in the course of a decision that struck down, rather than upheld, an existing statute. There can be no question then of the seminal importance of Chief Justice Warren's plurality opinion in *Trop v. Dulles*.

The question in *Trop* was whether forfeiture of citizenship as punishment for a conviction by court-martial for wartime desertion was constitutional.<sup>511</sup> A plurality of the Court, in an opinion written by Chief Justice Warren and joined by Justices Black, Douglas, and Whittaker, first concluded that "citizenship is not subject to the general powers of the National Government and therefore cannot be divested in the exercise of those powers."<sup>512</sup> However, the plurality did not stop at this, although Chief Justice Warren stated that "[o]n this ground alone the judgment in this case should be reversed."<sup>513</sup> Rather, the plurality continued to examine whether, if the government did have the innate power to divest citizenship, divestiture of citizenship for commission of a crime violated the Eighth Amendment's prohibition on cruel and unusual punishment.<sup>514</sup> In concluding that the "Eighth Amendment forbids Congress to punish by taking away citizenship,"<sup>515</sup> the plurality examined the philosophy and history of the proscription against cruel and unusual punishment. Chief Justice Warren wrote:

The exact scope of the constitutional phrase "cruel and unusual" has not been detailed by this Court. But the basic policy reflected in these words is *firmly established in the Anglo-American tradition of criminal justice....* The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.<sup>516</sup>

The Court then recognized the imprecise nature of the words of the Eighth Amendment, and stated, famously, that the Amendment

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511. *Trop*, 356 U.S. at 87.

512. *Id.* at 92.

513. *Id.* at 93.

514. *Id.* at 93-104.

515. *Id.* at 103.

516. *Id.* at 99-100 (emphasis added) (footnotes omitted).

“must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>517</sup>

In considering the constitutionality of divestiture of citizenship as a criminal sanction, the plurality did not limit itself solely to American norms. Rather, it considered international standards of punishment as well.<sup>518</sup> Considering the effects of divestiture of citizenship on the convicted criminal, Chief Justice Warren found the punishment to be “offensive to cardinal principles for which the Constitution stands,”<sup>519</sup> in part because the individual “may be subject to banishment, a fate *universally decried by civilized people*” and because he becomes stateless, “a condition deplored in the *international community of democracies*.”<sup>520</sup> In support of these statements, Chief Justice Warren cited directly a United Nations study on statelessness.<sup>521</sup>

The plurality reviewed foreign law and opinion regarding divestiture of citizenship as a punishment, including looking to a United Nations survey. Chief Justice Warren stated that:

The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime. It is

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517. *Id.* at 100-01. One author has suggested that the use of comparative law to decide what constitutes cruel and unusual punishment can be traced back to Justice Goldberg’s dissent from a denial of certiorari in *Rudolph v. Alabama*, 375 U.S. 889 (1963), which built off of the “evolving standards of decency” language in *Trop v. Dulles*. David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. Rev. 539, 546 n.31 (2001). Justice Goldberg asserted that the Court should consider whether the execution of rapists violated the Eighth Amendment, “[i]n light of the trend both in this country and throughout the world against punishing rape by death.” *Rudolph*, 375 U.S. at 889-90 (Goldberg, J., dissenting). Justice Goldberg also pointed to a United Nations survey on the “laws, regulations and practices relating to capital punishment throughout the world” and noted that all but five of the nations responding to the survey, Nationalist China, Northern Rhodesia, Nyasaland, Republic of South Africa, and the United States, no longer permitted the imposition of the death penalty for rape.” *Id.* at 889 n.1.

518. *See, e.g.*, Consuelo Alden Vasquez, Note, *Prometheus Rebound by the Devolving Standards of Decency: The Resurrection of the Chain Gang*, 11 ST. JOHN’S J. LEGAL COMMENT. 221, 251 (1995).

519. *Trop*, 356 U.S. at 102.

520. *Id.* (emphasis added).

521. *Id.* at 102 n.35. Chief Justice Warren cited a United Nations study on statelessness, U.N. Dep’t of Social Affairs, A Study on Statelessness, U.N. Doc. No. E/112, U.N. Sales No. 1949.XIV.2 (1949), and he also cited two other sources in this footnote: (1) CATHERYN SECKLER-HUDSON, STATELESSNESS: WITH SPECIAL REFERENCE TO THE UNITED STATES (1934), and (2) EDWIN M. BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD § 262, § 334 (1915). *Trop*, 356 U.S. at 102 n.35.

true that several countries prescribe expatriation in the event that their nationals engage in conduct in derogation of native allegiance. Even statutes of this sort are generally applicable primarily to naturalized citizens. But use of denationalization as punishment for crime is an entirely different matter. The United Nations' survey of the nationality laws of 84 nations of the world reveals that only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion.<sup>522</sup>

The plurality concluded that “[i]n this country the Eighth Amendment forbids this to be done.”<sup>523</sup>

Justice Frankfurter wrote a dissenting opinion that was joined by Justices Burton, Clark, and Harlan.<sup>524</sup> Frankfurter, like the plurality Justices, also discussed the views of “civilized nations” regarding divestiture of citizenship as punishment for certain prohibited behaviors, but he characterized these foreign laws differently than the majority.<sup>525</sup> The dissent did not, however, take issue with the possible relevance of international opinion to the decision before the Court. Considering the response of other nations to deprivation of citizenship, Frankfurter stated:

Many civilized nations impose loss of citizenship for indulgence in designated prohibited activities. Although these provisions are often, but not always, applicable only to naturalized citizens, they are more nearly comparable to our expatriation law than to our denaturalization law. Some countries have made wartime

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522. *Trop*, 356 U.S. at 102-03.

523. *Id.* at 103. Justice Brennan concurred in the decision that it was unconstitutional to divest an individual of his citizenship as punishment for the crime of wartime desertion, but he pointed to international response as a justification for expatriating citizens who vote in foreign political elections, which was held constitutional in *Perez v. Brownell*, 356 U.S. 44 (1958). Justice Brennan stated:

Whatever the realities of the situation, many foreign nations may well view political activity on the part of Americans, even if lawful, as either expressions of official American positions or else as improper meddling in affairs not their own. In either event the reaction is liable to be detrimental to the interests of the United States.

*Trop*, 356 U.S. at 106 (Brennan, J., concurring).

524. *Trop*, 356 U.S. at 114 (Frankfurter, J., dissenting).

525. *Id.* at 126.



desertion result in loss of citizenship—native-born or naturalized.<sup>526</sup>

Following the assertion that some countries divested citizenship for wartime desertion, Justice Frankfurter cited as an example the Philippine Commonwealth Act.<sup>527</sup> He also referred to a United Nations report on Laws Concerning Nationality.<sup>528</sup> In a footnote to these statements, Justice Frankfurter pointed out a difference in the theory of expatriation between the United States and other nations, stating that “[i]n the United States, denaturalization is based exclusively on the theory that the individual obtained his citizenship by fraud; the laws of many countries making naturalized citizens subject to expatriation for grounds not applicable to natural-born citizens do not relate those grounds to the actual naturalization process.”<sup>529</sup> In support of this statement, Justice Frankfurter gave as an example the British Nationality Act.<sup>530</sup> Thus, both the plurality and dissenting opinions in *Trop v. Dulles* used foreign law to support their positions.

## 2. *Miranda v. Arizona*

Supreme Court reference to foreign law in criminal cases since *Trop* has not, however, been confined to the Eighth Amendment area.<sup>531</sup> The 1966 case of *Miranda v. Arizona*,<sup>532</sup> one of the most

526. *Id.* (citations omitted).

527. *Id.* (citing Philippine Comm. Act No. 63 § 1(6) (Oct. 21, 1936), as amended by Rep. Act No. 106 (June 2, 1947)).

528. *Trop*, 356 U.S. at 126 (Frankfurter, J., dissenting). The citation given for the United Nations report was “Laws Concerning Nationality, U.N. Doc. No. ST/LEG/SER.B/4 (July 1954).” *Id.*

529. *Trop*, 356 U.S. at 126 n.6 (Frankfurter, J., dissenting) (citation omitted).

530. *Id.* (citing British Nationality Act, 1948, 11 & 12 Geo. 6, c. 56, § 20(3)).

531. One should also consider Justice Jackson’s pre-*Trop* concurring opinion in *Krulewitch v. United States*, 336 U.S. 440, 450 (1949), in which he distinguished American criminal conspiracy laws from the laws of other nations. Justice Jackson stated that the doctrine of conspiracy “does not commend itself to jurists of civil-law countries, despite universal recognition that an organized society must have legal weapons for combatting organized criminality.” *Id.* He noted that the doctrine was “utterly unknown to the Roman law” and not a part of modern continental codes. *Id.* at 450 n.14. Justice Jackson further stated that most other nations had “devised what they consider more discriminating principles upon which to prosecute criminal gangs, secret associations and subversive syndicates.” *Id.* at 450.

532. 384 U.S. 436 (1966).

prominent and influential cases decided during the sixteen-year span of the Warren Court, strikingly cited foreign law in support of its revolutionary holding. The Court in *Miranda*, for the first time, “extended the Fifth Amendment privilege against compulsory self-incrimination to individuals subjected to custodial interrogation by the police.”<sup>533</sup>

In making its determination that requiring the interrogational safeguard of a *Miranda* warning would not place too high a burden on law enforcement officials,<sup>534</sup> the Court, in its majority opinion authored by Chief Justice Warren, looked at the laws and experiences of other countries, including England, Scotland, India, and Ceylon.<sup>535</sup> The Court stated that the “experience in some other countries also suggests that the danger to law enforcement in curbs on interrogation is overplayed.”<sup>536</sup> The Court first discussed contemporaneous English law:

The English procedure since 1912 under the Judges’ Rules is significant. As recently strengthened, the Rules require that a cautionary warning be given an accused by a police officer as

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533. *New York v. Quarles*, 467 U.S. 649, 654 (1984). Since the *Miranda* decision, police have been required, as a prerequisite to any custodial interrogation, to inform a criminal suspect that (1) he has the right to remain silent, (2) anything he says can be used against him in a court of law, and (3) he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires. *Miranda*, 384 U.S. at 479.

534. The Court stated that “[i]n announcing these principles, we are not unmindful of the burdens which law enforcement officials must bear, often under trying circumstances.” *Miranda*, 384 U.S. at 481. The Court, however, found that requiring that suspects be apprised of their Fifth Amendment rights was necessary as a procedural safeguard of the privilege against self-incrimination, *id.* at 478-79, and that these limits “should not constitute an undue interference with a proper system of law enforcement,” *id.* at 481.

535. *Id.* at 486-90. The Court also discussed the history and sources of the privilege against self-incrimination, *id.* at 458-60, noting that thirteenth-century scholars found an “analogue to the privilege grounded in the Bible,” *id.* at 458 n.27. The Court also discussed the trial of John Lilburn, a “vocal anti-Stuart Leveller,” in 1637, at which he stated that “no man’s conscience ought to be racked by oaths imposed, to answer to questions concerning himself in matters criminal, or pretended to be so.” *Id.* at 459 (quoting *THE LEVELLER TRACTS 1647-1653*, at 454 (William Haller & Godfrey Davies eds., 1944)). The Court noted that after the Lilburn trial, Parliament abolished its Court of Star Chamber (which required an oath binding one to answer all questions posed to him) and the “lofty principles” to which Lilburn had appealed to were accepted in England. *Id.* “These sentiments,” stated the Court, “worked their way over to the Colonies and were implanted after great struggle into the Bill of Rights.” *Id.*

536. *Id.* at 486.

soon as he has evidence that affords reasonable grounds for suspicion; they also require that any statement made be given by the accused without questioning by police. The right of the individual to consult with an attorney during this period is expressly recognized.<sup>537</sup>

In a footnote, the court quoted the relevant portions of the English Judges' Rules and stated that "[d]espite suggestions of some laxity in enforcement of the Rules and despite the fact some discretion as to admissibility is invested in the trial judge, the Rules are a significant influence in the English criminal law enforcement system."<sup>538</sup>

The Court then addressed the safeguards present in Scottish law, saying that they "may be even greater than in England."<sup>539</sup> Scottish judicial decisions do not allow the use in evidence of "most confessions obtained through police interrogation."<sup>540</sup> In a footnote to this text, the Court quoted Lord Justice General's summation of the theory behind the Scottish safeguards in *Chalmers v. H.M. Advocate*:

The theory of our law is that at the state of initial investigation the police may question anyone with a view to acquiring information which may lead to the detection of the criminal; but that, when the stage has been reached at which suspicion, or more than suspicion, has in their view centred upon some person as the likely perpetrator of the crime, further interrogation of that person becomes very dangerous, and, if carried too far, *e.g.*, to the point of extracting a confession by what amounts to cross-examination, the evidence of that confession will almost certainly be excluded. Once the accused has been apprehended and charged he has the statutory right to a private interview with a solicitor and to be brought before a magistrate with all convenient speed so that he may, if so advised, emit a declaration in presence of his solicitor under conditions which safeguard him against prejudice.<sup>541</sup>

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537. *Id.* at 486-88 (footnotes omitted).

538. *Id.* at 488 n.57.

539. *Id.* at 488.

540. *Id.*

541. *Id.* at 488 n.59 (citing *Chalmers v. H.M. Advocate*, [1954] J.C. 66, 78).

Moving on to other countries, the Court noted that both India and Ceylon provide procedural safeguards for the custodial interrogation setting.<sup>542</sup> Considering India, the Court stated that, since 1872, the rules of evidence have excluded "confessions made to police not in the presence of a magistrate."<sup>543</sup> The Evidence Order of Ceylon, the Court noted, has since 1895 contained a provision identical to that in India.<sup>544</sup> The Court also pointed out that these provisions were similar to those of the Uniform Code of Military Justice in our own country, as it has "long provided that no suspect may be interrogated without first being warned of his right not to make a statement and that any statement he makes may be used against him."<sup>545</sup>

Looking at the experiences of these other nations, the Court observed that there was no apparent "detrimental effect on criminal law enforcement in these jurisdictions" due to the rules safeguarding the criminal interrogation environment.<sup>546</sup> The Court then concluded its discussion of foreign law by drawing a parallel between the United States criminal justice system and the criminal justice systems existent in the previously described foreign nations. The Court found its discussion of foreign laws relevant because

[c]onditions of law enforcement in our country are sufficiently similar to permit reference to this experience as assurance that lawlessness will not result from warning an individual of his rights or allowing him to exercise them. Moreover, it is consistent with our legal system that we give at least as much protection to these rights as is given in the jurisdictions described.<sup>547</sup>

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542. *Id.* at 488-89.

543. *Id.* In 1872, India operated under British law. *Id.* at 489. In a footnote, the Court quoted the Indian Evidence Act § 25 as stating that "[n]o confession made to a police officer shall be proved as against a person accused of any offence." *Id.* at 489 n.60. Indian Evidence Act § 26 states that "[n]o confession made by any person whilst he is in the custody of a police officer unless it be made in the immediate presence of a Magistrate, shall be proved as against such person." *Id.*

544. *Id.* at 489.

545. *Id.* (citing 10 U.S.C. § 831(b) (1964)).

546. *Id.*

547. *Id.* at 489. The Court continued, stating that we "deal in our country with rights grounded in a specific requirement of the Fifth Amendment of the Constitution, whereas other jurisdictions arrived at their conclusions on the basis of principles of justice not so specifically defined." *Id.* at 489-90.

This reference to foreign law in *Miranda v. Arizona* has not gone unnoticed or unheeded by subsequent Courts. In her concurring opinion in *New York v. Quarles*, Justice O'Connor stated that in *Miranda*, "the Court looked to the experience of countries like England, India, Scotland, and Ceylon in developing its code to regulate custodial interrogations."<sup>548</sup> Justice O'Connor concluded that because the "learning of these countries" was important to the development of the initial *Miranda* rule, it should therefore be "of equal importance in establishing the scope of the *Miranda* exclusionary rule."<sup>549</sup> As a result, Justice O'Connor looked to the experiences of these nations to provide support for her conclusion in *Quarles* that a gun retrieved based upon a defendant's questioning prior to receiving his *Miranda* warnings should not be excluded because of its nontestimonial nature and that it was unjustified to recognize a "public safety" exception to the *Miranda* requirement that was established in the majority opinion.<sup>550</sup>

The questionable decision in *Miranda*, then, could support the Court's more recent invocations of foreign law in *Lawrence*<sup>551</sup> and *Roper*.<sup>552</sup> Justice Scalia would no doubt respond that *Miranda*, like

548. *New York v. Quarles*, 467 U.S. 649, 672 (1984) (O'Connor, J., concurring in part).

549. *Id.* at 673.

550. *Id.* at 672. Reviewing the laws of England, India, Scotland, and Ceylon, Justice O'Connor found that

[t]hose countries had also adopted procedural rules to regulate the manner in which police secured confessions to be used against accused persons at trial. Confessions induced by tricky or physical abuse were never admissible at trial, and any confession secured without the required procedural safeguards could, in the courts' discretion, be excluded on grounds of fairness or prejudice. But nontestimonial evidence derived from all confessions "not blatantly coerced" was and still is admitted. Admission of nontestimonial evidence of this type is based on the very sensible view that procedural errors should not cause entire investigations and prosecutions to be lost.

*Id.* at 673 (citations omitted). Note that neither the majority nor the dissent in *Quarles* referred, in any way, to Justice O'Connor's reference to foreign laws. See *id.* at 651-60 (majority opinion); *id.* at 674-90 (Marshall, J., dissenting). One author has argued that Justice O'Connor's *Quarles* concurrence misinterpreted the Court's use of foreign law in *Miranda*. David A. Wollin, *Policing the Police: Should Miranda Violations Bear Fruit?*, 53 OHIO ST. L.J. 805, 863 (1992). Wollin proposes that the *Miranda* Court did not look to foreign law to develop the scope and boundaries of the warning requirement, but rather "as a way of ascertaining whether its own new restrictions would have an adverse impact on criminal law enforcement." *Id.*

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

552. *Roper v. Simmons*, 125 S. Ct. 1183 (2005).

*Dred Scott*<sup>553</sup> and *Reynolds*,<sup>554</sup> is an example of the Court making social policy, and controversial policy at that. He would likely argue that *Miranda*'s use of foreign law shows that the Court was on shaky ground—a fact further revealed by the continuing controversy that has swirled around the Court's opinion.

### 3. *Coker v. Georgia*

The Court next cited foreign law in a criminal case again involving the Eighth Amendment. In *Coker v. Georgia*,<sup>555</sup> the Supreme Court, in an opinion written by Justice White, held that a sentence of death was grossly disproportionate and excessive punishment for the crime of rape.<sup>556</sup> Thus, imposing the death penalty for rape was a cruel and unusual punishment that violated the Eighth Amendment.<sup>557</sup> In a footnote to this opinion, the Court pointed to the legislative determinations of foreign nations and stated:

Because the death sentence is a disproportionate punishment for rape, it is cruel and unusual punishment within the meaning of the Eighth Amendment even though it may measurably serve the legitimate ends of punishment and therefore is not invalid for its failure to do so. We observe that in the light of the legislative decisions in almost all of the States and *in most of the countries around the world*, it would be difficult to support a claim that the death penalty for rape is an indispensable part of the States' criminal justice system.<sup>558</sup>

The Court also examined prior Eighth Amendment cases, such as *Gregg v. Georgia*,<sup>559</sup> as well as the trend in the sentences that state legislatures were imposing for the crime of rape.<sup>560</sup> After canvassing

553. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

554. *Reynolds v. United States*, 98 U.S. 145 (1878).

555. 433 U.S. 584 (1977).

556. *Id.* at 592.

557. *Id.*

558. *Id.* at 592 n.4 (emphasis added).

559. 428 U.S. 153 (1976). The Court in *Gregg* sustained the imposition of the death penalty and "firmly embraced the holdings and dicta from prior cases ... to the effect that the Eighth Amendment bars not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime committed." *Coker*, 433 U.S. at 592 (discussing *Gregg*).

560. *Coker*, 433 U.S. at 593-96.

state laws, the Court stated that the "current judgment with respect to the death penalty for rape is not wholly unanimous among state legislatures, but it obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman."<sup>561</sup> In a footnote to this text, the Court invoked *Trop v. Dulles*<sup>562</sup> to justify its looking to international opinion, stating:

In *Trop v. Dulles* ... the plurality took pains to note the climate of international opinion concerning the acceptability of a particular punishment. It is thus not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue.<sup>563</sup>

The Court in *Coker* thus again considered foreign sources of law in striking down a state criminal statute, as it had first done in *Trop v. Dulles*. *Coker v. Georgia* therefore stands as direct precedent for the majority's and Justice O'Connor's use of foreign law in *Roper*—the juvenile death penalty case.

#### 4. *Enmund v. Florida*

The Supreme Court looked to the "climate of international opinion" in 1982 in yet another Eighth Amendment capital punishment case, *Enmund v. Florida*.<sup>564</sup> At issue in *Enmund* was the constitutionality of imposing the death penalty as a sentence for vicarious felony murder in a case where the defendant participated in a robbery in which another robber committed murder.<sup>565</sup> The majority of the Court held that a sentence of death in this situation was

561. *Id.* at 596.

562. 356 U.S. 86 (1958).

563. *Coker*, 433 U.S. at 596 n.10 (citing U.N. DEP'T OF ECON. & SOC. AFFAIRS, CAPITAL PUNISHMENT 40, 86 (1968)). The dissent, written by Chief Justice Burger and joined by Justice Rehnquist, argued that the Georgia statute authorizing a sentence of death for the crime of rape in certain situations was constitutional. *Id.* at 604 (Burger, C.J., dissenting). The dissent, however, contained absolutely no mention of the majority's use of foreign law, neither by way of disagreement with this manner of using such laws nor by pointing toward foreign laws that would indicate the propriety of the dissent's position. *See id.* at 604-22.

564. 458 U.S. 782 (1982).

565. *Id.* at 787. Justice White, the author of the majority opinion, framed the issue as "whether death is a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life." *Id.*

inconsistent with the Eighth and Fourteenth Amendments.<sup>566</sup> The majority looked to the fact that only eight U.S. states authorized the imposition of the death penalty in such circumstances and, in a footnote, referred to foreign views on the issue of vicarious felony murder, noting the practices of Canada, England, India, and continental Europe.<sup>567</sup> In this respect, the Court stated:

“[T]he climate of international opinion concerning the acceptability of a particular punishment” is an additional consideration which is “not irrelevant.” It is thus worth noting that the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe.<sup>568</sup>

In a dissent joined by Chief Justice Burger, Justice Powell, and Justice Rehnquist, Justice O'Connor addressed the practice relating to felony murder that was used in England until 1957 and its impact on American law. Justice O'Connor wrote:

[T]he felony-murder doctrine, and its corresponding capital penalty, originated hundreds of years ago, and was a fixture of English common law until 1957 when Parliament declared that an unintentional killing during a felony would be classified as manslaughter. The common-law rule was transplanted to the American Colonies, and its use continued largely unabated into the 20th century, although legislative reforms often restricted capital felony murder to enumerated violent felonies.<sup>569</sup>

However, Justice O'Connor also made it clear that contemporary English law may have been quite different from the law of American states. She stated that the “English attitude toward capital punishment, as reflected in recent legislation, differs significantly from American attitudes as reflected in state legislation.”<sup>570</sup> *Enmund v.*

566. *Id.* at 788. Justice White wrote the majority opinion and was joined by Justices Brennan, Marshall, Blackmun, and Stevens. *Id.* at 783. Justice Brennan filed a concurring opinion stating his view that the death penalty is “in all circumstances cruel and unusual punishment.” *Id.* at 801 (Brennan, J., concurring).

567. *Id.* at 796 n.22.

568. *Id.* (quoting *Coker*, 433 U.S. at 596 n.10).

569. *Id.* at 816-17 (O'Connor, J., dissenting) (citations omitted).

570. *Id.* at 816 n.29. Justice O'Connor noted that England abolished the death penalty for



*Florida* thus provides an additional example of the citation of foreign sources of law in an Eighth Amendment case and the use of such sources in striking down a state criminal statute.

### 5. *Thompson v. Oklahoma*

Once again, the Court addressed the issue of reliance on foreign sources of law in the Eighth Amendment context with respect to the constitutionality of the death penalty for juvenile murderers younger than sixteen. In *Thompson v. Oklahoma*,<sup>571</sup> the Supreme Court moved its consideration of foreign law from the footnotes, where it had often been relegated in previous Eighth Amendment cases, to the text of the plurality opinion written by Justice Stevens.<sup>572</sup> The Court found support for its conclusion that such executions are in conflict with civilized standards of decency in its consistency with the judgments of other nations. The Court stated:

The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.... Although the death penalty has not been entirely abolished in the United Kingdom or New Zealand (it has been abolished in Australia, except in the State of New South Wales, where it is available for treason and piracy), in neither of those countries may a juvenile be executed. The death penalty has been abolished in West Germany, France, Portugal, The Netherlands, and all of the Scandinavian countries, and is available only for exceptional crimes such as treason in Canada, Italy, Spain, and Switzerland. Juvenile executions are also prohibited in the Soviet Union.<sup>573</sup>

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all murders in 1965. *Id.*

571. 487 U.S. 815 (1988) (plurality opinion).

572. *Id.* at 830-31. Justices Brennan, Blackmun, and Marshall joined Justice Stevens's plurality opinion. *Id.* at 818. Justice O'Connor concurred in the judgment and made no mention of foreign law. *Id.* at 848-59. Justice Scalia, joined by Chief Justice Rehnquist and Justice White, wrote in dissent. *Id.* at 859. Justice Kennedy did not participate in the decision. *Id.* at 838.

573. *Id.* at 830-31 (citations omitted).

In a footnote at the beginning of this discussion, the Court harkened back to the fact that it had “previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual.”<sup>574</sup> Other footnotes in this discussion refer to additional statements of international sentiment. The Court quoted from the American Law Institute commentary to the Model Penal Code: “[C]ivilized societies will not tolerate the spectacle of execution of children.”<sup>575</sup> The Court also stated that “three major human rights treaties explicitly prohibit juvenile death penalties:” the International Covenant on Civil and Political Rights, the American Convention on Human Rights, and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.<sup>576</sup> Thus, the Court in *Thompson* revisited foreign sources of law in striking down a state criminal statute, a practice that seemingly began in the 1958 decision in *Trop v. Dulles*.

In dissent, Justice Scalia, joined by Chief Justice Rehnquist and Justice White, took issue with the plurality’s consideration of international laws and viewpoints, stating that it is the views and practices of the States that are determinative, not the practices of the world community.<sup>577</sup> Justice Scalia wrote that:

When the Federal Government, and almost 40% of the States, including a majority of the states that include capital punishment as a permissible sanction, allow for the imposition of the death penalty on any juvenile who has been tried as an adult, which category can include juveniles under 16 at the time of the offense, it is obviously impossible for the plurality to rely upon any evolved societal consensus discernible in legislation—or at least discernable in the legislation of *this* society, which is assuredly all that is relevant.<sup>578</sup>

Justice Scalia added to this critique a footnote directly responding to the plurality’s citation of foreign opinion that clearly expressed

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574. *Id.* at 830 n.31. (citing *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977); *Trop v. Dulles*, 356 U.S. 86, 102 & n.35 (1958)).

575. *Id.* at 830 n.33 (emphasis added) (citing MODEL PENAL CODE § 210.6 cmt. 5 at 133 (Official Draft and Revised Comments 1980)).

576. *Id.* at 831 n.34.

577. *Id.* at 868-69 & n.4 (Scalia, J., dissenting).

578. *Id.* at 868.

his views on considerations of and citations to foreign laws. He stated:

The plurality's reliance upon Amnesty International's account of what it pronounces...to be civilized standards of decency in other countries ... is totally inappropriate as a means of establishing the fundamental beliefs of this Nation. That 40% of our States do not rule out capital punishment for 15-year-old felons is determinative of the question before us here, even if that position contradicts the uniform view of the rest of the world. We must never forget that it is a Constitution for the United States of America that we are expounding. The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so "implicit in the concept of ordered liberty" that it occupies a place not merely in our mores but, text permitting, in our Constitution as well. But where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution. In the present case, therefore, the fact that a majority of foreign nations would not impose capital punishment upon persons under 16 at the time of the crime is of no more relevance than the fact that a majority of them would not impose capital punishment at all, or have standards of due process quite different from our own.<sup>579</sup>

*Thompson* is, thus, yet another Eighth Amendment decision that is founded upon foreign sources of law.

### 6. *Atkins v. Virginia*

The recent Eighth Amendment capital punishment case of *Atkins v. Virginia*<sup>580</sup> highlights not only the differences in opinions of the Rehnquist Court Justices regarding the execution of the mentally retarded, but also regarding the Supreme Court's citation and use of foreign laws. In *Atkins*, the issue before the court was whether executions of mentally retarded criminals were "cruel and unusual

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579. *Id.* at 868 n.4 (citations omitted).

580. 536 U.S. 304 (2002).

punishments” prohibited by the Eighth Amendment.<sup>581</sup> The majority, in an opinion by Justice Stevens, held that such executions were prohibited, noting that the practice had become “truly unusual” and finding that a national consensus had developed against the practice.<sup>582</sup> In a footnote to the Court’s statement that a national consensus had developed against executing mentally retarded offenders, the Court looked to evidence of a consensus on the issue that went well beyond our nation’s borders. It stated:

Additional evidence makes it clear that this legislative judgment reflects a much broader social and professional consensus. For example, several organizations with germane expertise have adopted official positions opposing the imposition of the death penalty upon a mentally retarded offender. In addition, representatives of widely diverse religious communities in the United States, reflecting Christian, Jewish, Muslim, and Buddhist traditions, have filed an *amicus curiae* brief explaining that even though their views about the death penalty differ, they all “share a conviction that the execution of persons with mental retardation cannot be morally justified.” *Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved....* Although these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue.<sup>583</sup>

Thus, the Court in *Atkins* again pointed to foreign law in the course of striking down a state statute regulating capital punishment.

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581. *Id.* at 307. This same question had been answered in the negative thirteen years earlier in *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989). The Court had previously held, in the 1986 case of *Ford v. Wainwright*, 477 U.S. 399 (1986), that the Eighth Amendment prohibited the execution of an insane prisoner, *id.* at 409-10. In *Ford*, the Court noted the “natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity.” *Id.* at 409.

582. *Atkins*, 536 U.S. at 316.

583. *Id.* at 316 n.21 (second emphasis added) (citations omitted). In citation, the Court noted that *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988), had considered the views of “respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.” *Atkins*, 536 U.S. at 316 n.21.

Chief Justice Rehnquist wrote in dissent,<sup>584</sup> separately from Justice Scalia, to highlight his objection to the Court's reliance on the views of foreign nations, as well as to its consideration of the views of religious and professional organizations and public opinion polls.<sup>585</sup> Chief Justice Rehnquist said:

The Court's suggestion that these sources are relevant to the constitutional question finds little support in our precedents and, in my view, is antithetical to considerations of federalism, which instruct that any "permanent prohibition upon all units of democratic government must [be apparent] in the operative acts (laws and the application of laws) that the people have approved."<sup>586</sup>

Explicitly addressing the majority's use of foreign law and opinion, Chief Justice Rehnquist wrote that he failed to see "how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination."<sup>587</sup> Chief Justice Rehnquist said that, in his opinion, only two sources, "the work product of legislatures and sentencing jury determinations," were relevant to determining contemporary notions of decency in America under the Eighth Amendment.<sup>588</sup> While he conceded that some of the Court's prior opinions had looked to foreign law,<sup>589</sup> he said that the Court had since "explicitly rejected" the idea that other nations' sentencing practices had any bearing on whether the American people accepted a particular practice.<sup>590</sup> Chief Justice Rehnquist also refuted the majority's use of precedent to bolster its citation of foreign legal views by stating that the past cases citing to foreign opinion "rely only on the bare citation of international laws by the *Trop* plurality as authority to deem other countries' sentencing

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584. Chief Justice Rehnquist's dissent was joined by Justice Scalia and Justice Thomas. *Atkins*, 536 U.S. at 321 (Rehnquist, C.J., dissenting).

585. *Id.* at 322.

586. *Id.* (quoting *Stanford v. Kentucky*, 492 U.S. 361, 377 (1989) (plurality opinion)) (alteration in original).

587. *Id.* at 325.

588. *Id.* at 324.

589. *Id.* at 325 (observing the Court's reference to the "climate of international opinion" in *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977)).

590. *Id.*

choices germane.”<sup>591</sup> Chief Justice Rehnquist then pointed to the fact that the *Trop* citation was found not in a majority opinion, but in a plurality opinion, and the “plurality—representing the view of only a minority of the Court—offered no explanation for its own citation, and there is no reason to resurrect this view given our sound rejection of the argument in *Stanford*.”<sup>592</sup>

Justice Scalia, also writing in dissent,<sup>593</sup> set forth a scathing commentary on the majority’s reference to foreign law and the views of professional and religious organizations. Justice Scalia expressed his view that the notions of justice in foreign nations will not always be aligned with those of the United States and thus should not be considered in situations involving the determination of a national consensus.<sup>594</sup> Justice Scalia chastised the majority, stating:

But the Prize for the Court’s Most Feeble Effort to fabricate “national consensus” must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called “world community,” and respondents to opinion polls. I agree with the Chief Justice that the views of professional and religious organizations and the results of opinion polls are irrelevant. Equally irrelevant are the practices of the “world community,” whose notions of justice are (thankfully) not always those of our people. “We must never forget that it is a Constitution for the United States of America that we are expounding.... [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.”<sup>595</sup>

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591. *Id.*

592. *Id.* (referring to *Stanford v. Kentucky*, 492 U.S. 361 (1989) (plurality opinion), which held the juvenile death penalty constitutional).

593. Chief Justice Rehnquist and Justice Thomas joined Justice Scalia’s dissent. *Id.* at 337 (Scalia, J., dissenting).

594. *Id.* at 347-48.

595. *Id.* (citations and footnotes omitted) (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 868 n.4 (Scalia, J., dissenting)).

### 7. *Roper v. Simmons*

As noted above, in reaching its controversial holding that the juvenile death penalty for sixteen- and seventeen-year-old murderers is unconstitutional, Justice Kennedy's majority opinion in *Roper v. Simmons*<sup>596</sup> included a considerable and lengthy discussion of the laws and practices of foreign nations as well as international opinion and agreements. Justice Kennedy stated that the majority considered the views of the world at such length because the "opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."<sup>597</sup> Thus, the majority claimed that it acknowledged foreign law in striking down the state statute allowing for juvenile executions as a way of providing additional support for its arguments and demonstrating that its conclusion that the juvenile death penalty is a cruel and unusual punishment was logical and supported by reason, as many other nations had reached similar conclusions in abolishing the juvenile death penalty within their own countries.

The majority began its detailed consideration of foreign law by stating that the Court's determination that "the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."<sup>598</sup> Although the majority acknowledged that international "reality" was not controlling of the Court's decision, Justice Kennedy declared that, "at least from the time of the Court's decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'"<sup>599</sup> The Court specifically noted that the United States stood alone as an executor of juvenile offenders, as each of the seven nations that had executed juveniles since 1990—Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and

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596. 125 S. Ct. 1183 (2005). Justices Stevens, Souter, Ginsburg, and Breyer joined Justice Kennedy's majority opinion. *Id.* at 1187.

597. *Id.* at 1200.

598. *Id.* at 1198.

599. *Id.* (internal quotation marks omitted).

China—had since “either abolished capital punishment for juveniles or made public disavowal of the practice.”<sup>600</sup>

The majority also considered the United Nations Convention on the Rights of the Child, which prohibits the death penalty for crimes committed by juveniles under eighteen years of age.<sup>601</sup> The Court noted that the Convention on the Rights of the Child had been ratified by every nation in the world “save for the United States and Somalia.”<sup>602</sup> The Court’s discussion of the Convention on the Rights of the Child perhaps demonstrates the pressure some members of the current Court may feel to avoid construing the Eighth Amendment, with the intrinsic flexibility of the “evolving standards of decency” analysis, in such a way that the United States would be very much out of line with the rest of the world in its treatment of criminal offenders.

The Court also specifically considered the practices of the United Kingdom in regard to the juvenile death penalty, as it argued that its experience “bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment’s own origins,” because it was modeled on a parallel provision in the English Declaration of Rights of 1689.<sup>603</sup> The Court stated that decades before the United Kingdom abolished the death penalty entirely, it “recognized the disproportionate nature of the juvenile death penalty” and “abolished [it] as a separate matter.”<sup>604</sup> Thus, based on the foregoing analysis of the laws of foreign nations and international agreements and practice, the majority concluded that it was proper to “acknowledge the overwhelming weight of international opinion as against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime.”<sup>605</sup>

In response to the majority’s detailed analysis of foreign sources of law, Justice Scalia, in a dissent joined by Chief Justice Rehnquist

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600. *Id.* at 1199.

601. *Id.*

602. *Id.*

603. *Id.*

604. *Id.*

605. *Id.* at 1200.



and Justice Thomas,<sup>606</sup> wrote a lengthy rebuttal arguing vehemently against the use of such sources in this type of case. He also rejected the notion that the majority included the international references for purposes of “acknowledgment” and simply to support further an already legitimate decision, instead declaring that the majority used the foreign sources as a part of the actual basis for the Court’s judgment.<sup>607</sup> In keeping with his other scathing dissents arguing against the use of foreign law in constitutional adjudication, Justice Scalia contended that the idea that American law should conform with the rest of the world’s laws “ought to be rejected out of hand.”<sup>608</sup>

In making his case that the Court should not use foreign law in an attempt to force the United States to conform with the laws of other nations, Justice Scalia pointed out that in “many significant respects the laws of most other countries differ from our law,” including explicit constitutional provisions, such as the right to jury trial, and interpretive decrees, such as the exclusionary rule.<sup>609</sup> He also cogently argued that the majority’s use of foreign law in this instance is rather opportunistic, as these sources serve to affirm “the Justices’ own notion of how the world ought to be.”<sup>610</sup> In many other instances, he argued, the Court has felt free to remain “oblivious” to the views of foreign nations,<sup>611</sup> such as in interpreting the Establishment Clause, an area in which most other nations “do not insist on the degree of separation between church and state that this Court requires.”<sup>612</sup> Justice Scalia also pointed out that the Court’s abortion jurisprudence differs dramatically from that of the rest of the world, as the United States is “one of only six countries that allow[s] abortion on demand until the point of viability.”<sup>613</sup>

Justice Scalia also found indefensible the majority’s “special reliance on the laws of the United Kingdom.”<sup>614</sup> He argued that the Court’s consideration of them was not the proper contemplation of English law because it was not a consideration of “18th-century

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606. *Id.* at 1217 (Scalia, J., dissenting).

607. *Id.* at 1229.

608. *Id.* at 1226.

609. *Id.*

610. *Id.* at 1229.

611. *Id.* at 1227.

612. *Id.*

613. *Id.*

614. *Id.*

English law and legal thought,” and the Court had already long ago rejected a purely originalist approach to the Eighth Amendment.<sup>615</sup> He stated that the Court had instead undertaken the “majestic task of determining (and thereby prescribing) *our* Nation’s *current* standards of decency” and found it “beyond comprehension” why the Court should look “to a country that has developed, in the centuries since the Revolutionary War ... a legal, political, and social culture quite different from our own.”<sup>616</sup>

Justice O’Connor wrote separately in dissent, in part to make clear her disagreement with Justice Scalia’s contention “that foreign and international law have no place in our Eighth Amendment jurisprudence.”<sup>617</sup> Considering both the history of referring to foreign sources in this area of the law, as well as the benefits of considering such sources, Justice O’Connor wrote as follows:

Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency. This inquiry 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. Obviously, American law is distinctive in many respects, not least where the specific provisions of our Constitution and the history of its exposition so dictate. But this Nation’s evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement—expressed in international law or in the domestic laws of individual countries—that a particular form of punishment is inconsistent with fundamental human rights. At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus.<sup>618</sup>

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615. *Id.* at 1228.

616. *Id.*

617. *Id.* at 1215 (O’Connor, J., dissenting).

618. *Id.* at 1215-16 (citations omitted).

However, because Justice O'Connor found that no domestic consensus existed against the imposition of the juvenile death penalty, it was her opinion that the "recent emergence of an otherwise global consensus" was not enough to overcome or "alter that basic fact."<sup>619</sup>

### C. Social Issue Cases

In the last thirty-five years, the Supreme Court has decided three key social issue cases that refer to and cite foreign sources of law: *Roe v. Wade*,<sup>620</sup> *Washington v. Glucksberg*,<sup>621</sup> and *Lawrence v. Texas*.<sup>622</sup> Most famously, *Roe v. Wade* contains considerable discussion of English statutory and case law from the years after the signing of the Declaration of Independence, when England was a foreign country. *Roe* also contains substantial references to the factual experiences of other nations that allowed legalized abortion as a medical procedure. The assisted suicide case, *Washington v. Glucksberg*, also made extensive reference to foreign law and practice to provide factual evidence of the harmful consequences of a legal rule allowing assisted suicide, paying a great deal of attention to the experiences of the Netherlands, where assisted suicide led rapidly to involuntary euthanasia. Finally, *Lawrence's* reliance on foreign sources of law has been especially controversial because it differs in some respects from the way in which the Court used such sources in *Roe* and *Glucksberg*. Setting aside the *Roe* Court's discussion of English law, the two earlier social issue cases in this time period primarily looked to foreign nations for factual evidence of the consequences of a particular legal rule. The references to foreign law were thus primarily empirical efforts to determine what the consequences of particular legal rules had been when they were employed by a foreign legal culture. In contrast, the *Lawrence* Court looked at foreign sources of law for moral guidance as to what the content of American law ought to be. This is inevitably a far more controversial use of foreign law, and one which we think is much more appropriately open to criticism.

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619. *Id.* at 1216.

620. 410 U.S. 113 (1973).

621. 521 U.S. 702 (1997).

622. 539 U.S. 558 (2003).

### 1. *Roe v. Wade*

In 1973, in its landmark abortion case, *Roe v. Wade*, the Burger Court held that the Constitution protects a woman's right to have an abortion in certain situations.<sup>623</sup> The Court's opinion in *Roe* has its roots in *Griswold v. Connecticut*<sup>624</sup> which was foreshadowed by Justice Harlan's famous dissent in *Poe v. Ullman*.<sup>625</sup> Strikingly, in *Poe* Justice Harlan said that the statute at issue, which prescribed criminal penalties for using birth control, involved "what, by common understanding throughout the English-speaking world, must be granted to be a most fundamental aspect of 'liberty,' the privacy of the home in its most basic sense."<sup>626</sup> Harlan's dissent in *Poe*, which gave rise to *Roe v. Wade* and *Lawrence v. Texas*, thus specifically referred to foreign conceptions of law throughout the English-speaking world as the source for the right to privacy.

The Court's majority opinion in *Roe v. Wade* was written by Justice Blackmun, and it summarily stated that the "right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action ... or ... in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."<sup>627</sup> In finding that a woman has a "fundamental right" to an abortion,<sup>628</sup> the Court reviewed five "aspects" of the history of abortion in order to gain such "insight as that history may

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623. Specifically, the Court held that state criminal abortion statutes that exempt "from criminality only a *lifesaving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment." *Roe*, 410 U.S. at 164. The Court held that there can be no state regulation of first trimester abortion. *Id.* During the second trimester, the state may regulate abortion only to the extent that such regulation promotes the health of the mother. *Id.* (stating that regulation must be "reasonably related" to maternal health). In the third trimester, the stage "subsequent to viability," the State may regulate and proscribe abortion except where necessary for the preservation of the life or health of the mother. *Id.* at 164-65.

624. 381 U.S. 479 (1965).

625. 367 U.S. 497 (1961).

626. *Id.* at 548 (Harlan, J., dissenting).

627. *Roe*, 410 U.S. at 153.

628. *See id.* at 152. The Court stated that zones of privacy existed under the Constitution and that prior decisions made it clear that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy." *Id.* (citation omitted).

afford":<sup>629</sup> (1) ancient attitudes toward abortion,<sup>630</sup> (2) the significance of the Hippocratic Oath,<sup>631</sup> (3) the common law's treatment of abortion,<sup>632</sup> (4) the treatment of abortion under English statutory law,<sup>633</sup> and (5) the historical treatment of abortion in American law.<sup>634</sup>

While the Court's historical exegesis has been widely criticized,<sup>635</sup> far less attention has been paid to the fact that an entire section of the Court's historical analysis actually refers to foreign law, specifically English statutory law during the nineteenth and twentieth centuries.<sup>636</sup> Justice Blackmun began this section of his opinion in *Roe* by stating that England's first criminal abortion statute was adopted in 1803.<sup>637</sup> This statute, known as Lord Ellenborough's Act,

629. *Id.* at 129.

630. *Id.* at 130. While the Court found that ancient attitudes were "not capable of precise determination," it reviewed the criminalization of abortion by the Persian Empire, the fact that abortion was practiced ("resorted to without scruple") during Greek and Roman times, Soranos's (an Ephesian and the "greatest of the ancient gynecologists") opposition to Rome's free-abortion practices, and the fact that "[a]ncient religion did not bar abortion." *Id.*

631. *Id.* at 130-32. The Court stated that the Hippocratic Oath, which is a long-standing ethical guide for the medical profession, includes the command not to "give to a woman a pessary to produce abortion." *Id.* at 131. The Court then noted, however, that the Hippocratic Oath was "not uncontested, even in Hippocrates' day; only the Pythagorean school of philosophers frowned upon the related act of suicide. Most Greek thinkers, on the other hand, commended abortion, at least prior to viability." *Id.*

632. *Id.* at 132-36. The Court stated that it is "undisputed that at common law, abortion performed *before* 'quickening'—the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy—was not an indictable offense." *Id.* at 132 (footnote omitted). The Court said this "absence of a common-law crime for pre-quickening abortion appears to have developed from a confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins." *Id.* at 132-33. The Court then reviewed the foundations for such concepts. *Id.* at 133-36.

633. *Id.* at 136-38. In this section, the Court considered English statutory law from 1803 through 1967, a time period well after the signing of the Declaration of Independence in 1776; thus, the Court was considering foreign law.

634. *Id.* at 138-41.

635. See, e.g., Paul Benjamin Linton, *Roe v. Wade and the History of Abortion Regulation*, 15 AM. J.L. & MED. 227, 228 (1989) (published as part of a series of articles under the heading: *The Webster Amicus Curiae Briefs: Perspectives on the Abortion Controversy and the Role of the Supreme Court*) (stating that the "Court's examination of the history of abortion regulation was seriously flawed and failed to take into account the state of medical technology in which the law of abortion evolved").

636. Again, it should be stressed that for the purposes of this Article, all citations to English law established after the signing of the Declaration of Independence, in 1776, are considered foreign law.

637. *Roe*, 410 U.S. at 136.

made abortion of a "quick fetus"<sup>638</sup> a capital crime, but it provided "lesser penalties for the felony of abortion before quickening, and thus preserved the 'quickening' distinction" of the common law.<sup>639</sup>

The *Roe* Court then went on to discuss a "seemingly notable"<sup>640</sup> development in English law, the 1939 case of *Rex v. Bourne*,<sup>641</sup> which held that an abortion performed to save the life of the mother was exempted from the criminal penalties of the Offenses Against the Person Act of 1861.<sup>642</sup> The Court then discussed Judge Macnaghten's conclusion that England's 1861 Act, like its 1929 Act, contained an exception for abortions performed to preserve the life of the mother and noted the judge's broad construction of what it meant to preserve the mother's life as including "a serious and permanent threat to the mother's health."<sup>643</sup> The Court concluded its survey by summarizing the English Abortion Act of 1967:

The Act permits a licensed physician to perform an abortion where two other licensed physicians agree (a) "that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated," or (b) "that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped." The Act also provides that, in making this determination, "account may be taken of the pregnant woman's actual or reasonably foreseeable environment." It also permits a physician, without the concurrence of others, to terminate a pregnancy where he is of the good-faith opinion that the abortion

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638. See *id.* at 132 (stating that quickening was the first recognizable movement of the fetus *in utero*); see also *supra* note 632.

639. *Roe*, 410 U.S. at 136. The *Roe* Court noted that the English distinction between abortions before and after quickening disappeared from 1837 until 1861, and failed to reappear in the Offenses Against the Person Act of 1861, which formed the "core of English anti-abortion law until the liberalizing reforms of 1967." *Id.* According to Justice Blackmun, England passed another related Act in 1929, the Infant Life (Preservation) Act, which made it a felony to destroy "the life of a child capable of being born alive," but made an exception for abortions "done in good faith for the purpose only of preserving the life of the mother." *Id.* at 136-37.

640. *Id.* at 137.

641. [1939] 1 K.B. 687 (C.C.C.).

642. *Roe*, 410 U.S. at 137.

643. *Id.*

“is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman.”<sup>644</sup>

The *Roe* Court clearly believed that this 1967 English statute bolstered its own case that the U.S. Constitution created a right to an abortion, even though the Court never explained why foreign law ought to control the meaning of the Fourteenth Amendment.

The Court moved beyond examining abortion practices and laws in England and also looked to the experiences of other foreign countries that had legalized abortion to rebut the argument that abortion, as a medical procedure, “was a hazardous one for the woman.”<sup>645</sup> The Court stated that

[m]ortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth. Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared.<sup>646</sup>

The assertion that modern medical advances had led to low abortion mortality rates was supported, in a footnote, by citation to summaries of the experiences of England, Wales, Japan, Czechoslovakia, and Hungary.<sup>647</sup> Accordingly, *Roe v. Wade* relied significantly on foreign sources of law in the process of fashioning new constitutional rights for Americans out of the vague constitutional guarantee against being deprived of liberty without due process of law. *Roe* is controversial on so many grounds that its references to foreign sources of law have been largely overlooked, but the references are there for all to see.

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644. *Id.* at 137-38.

645. *Id.* at 148-49 & n.44.

646. *Id.* at 149 (footnote omitted).

647. *Id.* at 149 n.44.

## 2. *Washington v. Glucksberg*

*Washington v. Glucksberg*<sup>648</sup> required the Supreme Court to determine whether Washington State's "prohibition against 'caus[ing]' or 'aid[ing]' a suicide offends the Fourteenth Amendment to the United States Constitution."<sup>649</sup> Both the majority opinion in *Glucksberg* and an individual concurrence are inundated with references to the laws and practices of other nations. Most prominently, in the majority opinion, Chief Justice Rehnquist, joined by four other Justices, including most strikingly Justice Scalia and Justice Thomas,<sup>650</sup> discussed at great length the laws and experiences of the Netherlands with legalized euthanasia. In holding that the Washington State statute was not unconstitutional, or in other words, that there is no "right to die,"<sup>651</sup> the Court began, according to Chief Justice Rehnquist, "as we do in all due process cases, by examining our Nation's history, legal traditions, and practices."<sup>652</sup> However, the Court's examination of the issue was *not* limited only to American law and history. Immediately after asserting what the Court was about to examine, Chief Justice Rehnquist stated that in "almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide."<sup>653</sup> In a footnote to this statement, he cited a 1993 case from the Supreme Court of Canada, which stated that a "blanket prohibition on assisted suicide ... is the norm among western democracies."<sup>654</sup> The case, *Rodriguez v. British Columbia*,

648. 521 U.S. 702 (1997).

649. *Id.* at 705-06 (alterations in original).

650. Along with Justices Scalia and Thomas, Justices Kennedy and O'Connor joined Chief Justice Rehnquist's majority opinion. *Id.* at 704. Justice Scalia spoke about joining the decision in spite of its references to foreign law:

I have also joined an opinion dealing with the question of whether there is a constitutional right to assisted suicide that discussed, in a footnote, the fact that "[o]ther countries are embroiled in similar debates"—citing materials from Canada, England, New Zealand, Australia, and Colombia. I have no problem with reciting such interesting background, so long as the laws of those countries are not asserted to be relevant to the interpretation of our Constitution. (In the case I mentioned, they were not.)

Scalia, *supra* note 7, in 98 AM. SOC'Y INT'L L. PROC. 305, 307 (alteration in original) (footnote omitted).

651. *Glucksberg*, 521 U.S. at 709.

652. *Id.* at 710.

653. *Id.* (emphasis added).

654. *Id.* at 710 n.8 (quoting *Rodriguez v. British Columbia*, [1993] 107 D.L.R. (4th) 342, 404



as Chief Justice Rehnquist noted, discussed assisted-suicide provisions in the laws of Austria, Spain, Italy, the United Kingdom, the Netherlands, Denmark, Switzerland, and France.<sup>655</sup>

Chief Justice Rehnquist's majority opinion stated that the Anglo-American common law tradition has typically "punished or otherwise disapproved of both suicide and assisting suicide."<sup>656</sup> The Court, in considerable detail, addressed the early English views against suicide and assisted suicide and their adoption into early American laws and practices.<sup>657</sup> The Court considered the changes in American attitudes toward and legal responses to suicide since the country's founding<sup>658</sup> and found that, although it is an issue of present debate, American "voters and legislators continue for the most part to reaffirm their States' prohibitions on assisting suicide."<sup>659</sup> The Court also pointed out that the United States is not alone in questioning the legal and moral position of assisted suicide. Rather, it noted, "[o]ther countries are embroiled in similar debates."<sup>660</sup> The Court again referred to foreign sources of law in a footnote, where it reviewed the practice of other nations with respect to the issue of assisted suicide:

The Supreme Court of Canada recently rejected a claim that the Canadian Charter of Rights and Freedoms establishes a fundamental right to assisted suicide; the British House of Lords Select Committee on Medical Ethics refused to recommend any change in Great Britain's assisted-suicide prohibition; New Zealand's Parliament rejected a proposed "Death With Dignity Bill" that would have legalized physician-assisted suicide in August 1995; and the Northern Territory of Australia legalized assisted suicide and voluntary euthanasia in 1995. As of February 1997, three persons had ended their lives with physician assistance in

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(Can. 1993)).

655. *Id.* (citing *Rodriguez*, [1993] 107 D.L.R. (4th) at 464).

656. *Id.* at 711.

657. *Id.* at 711-15.

658. The Court noted that, over time, the American colonies abolished harsh common law penalties against the families of those who committed suicide. *Id.* at 713. However, the Court noted that this movement away from the harsh punishments of the common law did not signify an acceptance of suicide; rather the "change reflected the growing consensus that it was unfair to punish the suicide's family for his wrongdoing." *Id.*

659. *Id.* at 716.

660. *Id.* at 718 n.16.

the Northern Territory. On March 24, 1997, however, the Australian Senate voted to overturn the Northern Territory's law. On the other hand, on May 20, 1997, Columbia's Constitutional Court legalized voluntary euthanasia for terminally ill people.<sup>661</sup>

Later in the opinion, to highlight the rationality of the states' concern over the possibility that permitting physician-assisted suicide may lead to voluntary and even involuntary euthanasia,<sup>662</sup> the *Glucksberg* Court brought its detailed discussion of foreign laws out of the footnotes and into the text of the opinion by addressing specifically the sorry experience of the Netherlands with legalized physician-assisted suicide and so-called voluntary euthanasia.<sup>663</sup> Specifically, the Court pointed to a Dutch government survey that revealed possible problems with the country's regulation of the practice of assisted suicide.<sup>664</sup> The survey showed "that in 1990, there were 2,300 cases of voluntary euthanasia (defined as 'the deliberate termination of another's life at his request'), 400 cases of assisted suicide, and more than 1,000 cases of euthanasia without an explicit request."<sup>665</sup> The study also found "an additional 4,941 cases where physicians administered lethal morphine overdoses without the patients' explicit consent."<sup>666</sup> The majority found this conclusion suggestive of the fact that,

despite the existence of various reporting procedures, euthanasia in the Netherlands has not been limited to competent, terminally ill adults who are enduring physical suffering, and that regulation of the practice may not have prevented abuses in cases involving vulnerable persons, including severely disabled neonates and elderly persons suffering from dementia.<sup>667</sup>

Observing that the experience of the Netherlands is evidence that there is a close link between assisted suicide and euthanasia, the

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661. *Id.* (citations omitted).

662. *Id.* at 732-33. The Court was thus faced with determining whether the Washington State statute was rationally related to a legitimate governmental interest.

663. *Id.* at 734.

664. *Id.*

665. *Id.*

666. *Id.*

667. *Id.*

*Glucksberg* Court found that "Washington, like most other States, reasonably ensures against this risk by banning, rather than regulating, assisted suicide."<sup>668</sup>

Justice Souter, in his concurring opinion, also discussed the experiences of the Netherlands at some length.<sup>669</sup> He did so in order to address the respondent's claim that improper degeneration of assisted suicide into involuntary euthanasia could be achieved by careful legislative draftsmanship.<sup>670</sup> Justice Souter stated:

[A]t least at this moment there are reasons for caution in predicting the effectiveness of the teeth proposed. Respondents' proposals, as it turns out, sound much like the guidelines now in place in the Netherlands, the only place where experience with physician-assisted suicide and euthanasia has yielded empirical evidence about how such regulations might affect actual practice. Dutch physicians must engage in consultation before proceeding, and must decide whether the patient's decision is voluntary, well considered, and stable, whether the request to die is enduring and made more than once, and whether the patient's future will involve unacceptable suffering. There is, however, a substantial dispute today about what the Dutch experience shows. Some commentators marshal evidence that the Dutch guidelines have in practice failed to protect patients from involuntary euthanasia and have been violated with impunity.... The day may come when we can say with some assurance which side is right, but for now it is the substantiality of the factual disagreement, and the alternatives for resolving it, that matter. They are, for me, dispositive of the due process claim at this time.<sup>671</sup>

Justice Souter thus referred to the Dutch practice, much as the first Justice Harlan referred to European practice in his *Lochner* dissent, to shed empirical light on the consequences of a particular legal

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668. *Id.* at 734-35.

669. *Id.* at 785-86 (Souter, J., concurring).

670. *Id.* Such proposed legislation could include a requirement of confirmation of a patient's diagnosis, prognosis, and competence by two qualified physicians; mandate that repeated requests by the patient be witnessed by at least two others over a specified timespan; and impose reporting requirements and criminal penalties for coercive acts. *Id.* at 785.

671. *Id.* at 785-86 (citations omitted).

regulatory regime. *Glucksberg* is thus yet another case in the long line of cases that referred to and was influenced by foreign law.

### 3. *Lawrence v. Texas*

In *Lawrence v. Texas*,<sup>672</sup> the case that initially gave rise to much of the current controversy and debate regarding the Supreme Court's reliance on foreign sources of law, the Court considered such sources in striking down a Texas statute that criminalized sodomy or "deviate sexual intercourse" between adults of the same sex.<sup>673</sup> In so holding, the majority of the Court, in an opinion by Justice Kennedy, overruled *Bowers v. Hardwick*,<sup>674</sup> a seventeen-year-old decision on the same issue, and gave substantial consideration to decisions of the European Court of Human Rights.<sup>675</sup> Justice Kennedy stated that almost five years before the *Bowers* decision, the European Court of Human Rights had held in *Dudgeon v. United Kingdom*<sup>676</sup> that laws forbidding consensual homosexual conduct were invalid under the European Convention on Human Rights.<sup>677</sup> The majority also declared that the European decision in *Dudgeon* had been followed in more recent years.<sup>678</sup> Justice Kennedy described the impact of this adherence as follows:

To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom*. Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmen-

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672. 539 U.S. 558 (2003).

673. *Id.* at 563.

674. 478 U.S. 186 (1986). The *Lawrence* Court not only overruled *Bowers*, it also criticized the case as being wrong when it was originally decided, stating "*Bowers* was not correct when it was decided, and it is not correct today." *Lawrence*, 539 U.S. at 578.

675. *Lawrence*, 539 U.S. at 562, 573, 578.

676. 45 Eur. Ct. H.R. ¶ 52 (1981).

677. *Lawrence*, 539 U.S. at 573 (citing *Dudgeon*, 45 Eur. Ct. H.R. ¶ 52).

678. *Id.* at 576.

tal interest in circumscribing personal choice is somehow more legitimate or urgent.<sup>679</sup>

The Court also noted that the British Parliament had received recommendations to repeal laws punishing homosexual conduct in 1957 and enacted those recommendations ten years later.<sup>680</sup>

Justice Scalia, in a biting dissent joined by Chief Justice Rehnquist and Justice Thomas, squarely took issue with the majority's reliance on foreign sources of law and practice, arguing that "[c]onstitutional entitlements do not spring into existence ... because *foreign nations* decriminalize conduct."<sup>681</sup> He further criticized the majority's consideration of these foreign sources, adding that the "Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since 'this Court ... should not impose foreign moods, fads, or fashions on Americans."<sup>682</sup>

Thus, three key modern social issue cases of the last thirty-five years—*Roe v. Wade*, *Washington v. Glucksberg*, and *Lawrence v. Texas*—refer to and rely upon foreign sources of law just as six of the nine Justices did in *Dred Scott* and as the Court did in *Reynolds* during the nineteenth century. All of these decisions have been bitterly controversial, and we agree with Justice Scalia that efforts

679. *Id.* at 576-77 (citations omitted).

680. *Id.* at 572-73.

681. *Id.* at 586, 598 (Scalia, J., dissenting).

682. *Id.* at 598 (quoting *Foster v. Florida*, 537 U.S. 990, 990 n.\* (2002) (Thomas, J., concurring in denial of certiorari)). In his keynote address to the American Society of International Law, Justice Scalia again took issue with the Court's selective citation to foreign law, pointing out the large number of nations that prohibit sodomy. Justice Scalia stated as follows:

In *Lawrence*, the Court cited European law to strike down sodomy laws. But of course Europe is not representative: Zero out of fifty countries in Europe prohibit sodomy (not necessarily because of the democratic preference of fifty countries but because of the uniformity imposed by the European Court of Human Rights). But thirty-three out of fifty-one countries in Africa (65 percent) prohibit it; eight out of forty-three countries in the Americas (19 percent) now prohibit it; twenty-seven out of forty-seven Asian Pacific countries (57 percent) prohibit it; and eleven out of fourteen countries in the Middle East (79 percent) prohibit it. Thus, the rest of the world aside from Europe is almost evenly split (seventy-nine prohibit, seventy-six do not). Moreover, nine countries that prohibit sodomy authorize the death penalty for it.

Scalia, *supra* note 7, in 98 AM. SOC'Y INT'L L. PROC. 305, 309.

to impose foreign morals on the American people in the guise of interpreting the Constitution and elaborating on substantive due process rights are both illegitimate and unwise.

#### *D. Opinions of Justice Breyer*

Justice Breyer, as is widely known, has argued vigorously for reference to foreign sources of law both in his opinions and public speeches. Justice Breyer has argued in favor of using foreign law to provide “points of comparison,” and he has claimed that the “comparativist” view he and several other Justices hold will “carry the day.”<sup>683</sup> In his recent debate with Justice Scalia at American University, Justice Breyer stated that what he believed to be at issue in the debate over the use of foreign sources of law is the “extent to which you might learn from other places facts that would help you apply the Constitution of the United States.”<sup>684</sup> He argued that, in the modern world, “where experiences are becoming more and more similar,” foreign sources of law can provide “something to learn about how to interpret this document.”<sup>685</sup> This section will examine two notable opinions in which Justice Breyer made considerable reference to foreign sources of law.<sup>686</sup>

##### *1. Printz v. United States*

Perhaps former Harvard professor and current Justice Stephen Breyer’s biggest foray into reliance upon foreign sources of law came

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683. Justice Stephen Breyer, Keynote Address Before the American Society of International Law (Apr. 2003), in 97 AM. SOC’Y INT’L L. PROC. 265, 266 (2003).

684. Scalia & Breyer Discussion, *supra* note 11.

685. *Id.*

686. Justice Breyer has cited foreign law in additional opinions not comprehensively addressed in detail in this Article. In his concurrence in *Nixon v. Shrink Missouri Government PAC*, Justice Breyer pointed out that the balancing of interests approach employed by the Court in complex First Amendment cases “is consistent with that of other constitutional courts facing similarly complex constitutional problems” and then cited decisions of the European Commission of Human Rights and the Canadian Supreme Court. 528 U.S. 377, 403 (2000). In his dissent in *Miller v. Albright*, Justice Breyer noted foreign laws regarding the acquisition of citizenship through parentage. 523 U.S. 420, 477 (1997). Justice Breyer pointed out that “Roman citizenship was acquired principally by parentage” and cited a comparative study of nationality which discussed “citizenship laws throughout the world and not[ed] the ‘widespread extent of the rule of *jus sanguinis*.’” *Id.*

in his dissent in the 1997 case of *Printz v. United States*.<sup>687</sup> This decision illustrates well the tension on the Rehnquist Court surrounding the consideration and use of foreign laws and practices in constitutional interpretation. At issue in *Printz* was the constitutionality of interim provisions of the Brady Handgun Violence Prevention Act (Brady Act),<sup>688</sup> which, in part, commanded state and local law enforcement officers to conduct background checks on prospective handgun purchasers.<sup>689</sup> The majority, in an opinion delivered by Justice Scalia, held that the interim provisions were unconstitutional because the “[f]ederal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”<sup>690</sup>

Justice Breyer joined Justice Stevens’s dissenting opinion,<sup>691</sup> but also wrote separately to point to the experiences of other nations as “empirical confirmation” of why and how the creation and expansion of a federal gun-law bureaucracy could better promote both state sovereignty and individual liberty.<sup>692</sup> In making this argument, Breyer was advancing a similar claim to that made in the majority opinions in the *Legal Tender Cases* and the *Selective Draft Law Cases*. Justice Breyer added:

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687. 521 U.S. 898, 976 (1997) (Breyer, J., dissenting).

688. Pub. L. No. 103-159, 107 Stat. 1536 (1993). The Brady Act amended the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified in scattered sections of 18 U.S.C. and 26 U.S.C.), which established a federal scheme governing the distribution of firearms. *Printz*, 521 U.S. at 902.

689. *Printz*, 521 U.S. at 902. The petitioners objected to “being pressed into federal service” and argued that the Brady Act’s compelling of state officers to execute federal laws was unconstitutional. *Id.* at 905.

690. *Id.* at 935. Chief Justice Rehnquist joined the opinion as well as Justices Kennedy, O’Connor, and Thomas. *Id.* at 900.

691. *Id.* at 939 (Stevens, J., dissenting). In dissent, Justice Stevens argued that the provisions were constitutional, as Congress “may impose affirmative obligations on executive and judicial officers of state and local governments as well as ordinary citizens.” *Id.* Justices Souter, Ginsburg, and Breyer joined in the dissenting opinion. *Id.*

692. *Id.* at 977 (Breyer, J., dissenting) (responding to a question posed by Justice Stevens in dissent: “Why, or how, would what the majority sees as a constitutional alternative—the creation of a new federal gun-law bureaucracy, or the expansion of an existing federal bureaucracy—better promote either state sovereignty or individual liberty?”). Justice Stevens joined Justice Breyer’s dissenting opinion. *Id.* at 976.

[T]he United States is not the only nation that seeks to reconcile the practical need for a central authority with the democratic virtues of more local control. At least some other countries, facing the same basic problem, have found that local control is better maintained through application of a principle that is the direct opposite of the principle the majority derives from the silence of our Constitution. The federal systems of Switzerland, Germany, and the European Union, for example, all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central “federal” body. They do so in part because they believe that such a system interferes less, not more, with the independent authority of the “state,” member nation, or other subsidiary government, and helps to safeguard individual liberty as well.

Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem—in this case the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent governmental entity.<sup>693</sup>

Justice Breyer drew from this evidence of foreign constitutional law and stated that, “[a]s comparative experience suggests, there is no need to interpret the Constitution as containing an absolute principle—prohibiting the assignment of virtually any federal duty to any state official.”<sup>694</sup>

Justice Scalia’s opinion made note of the majority’s strong disagreement with Justice Breyer’s comparative reference to foreign legal systems. Justice Scalia wrote in a footnote:

Justice Breyer’s dissent would have us consider the benefits that other countries, and the European Union, believe they have derived from federal systems that are different from ours. We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.... The fact is that our federalism

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693. *Id.* at 976-77 (citations omitted).

694. *Id.* at 977.



is not Europe's. It is "the unique contribution of the Framers to political science and political theory."<sup>695</sup>

Justices Breyer and Scalia clearly crossed swords in *Printz* and, although Justice Scalia's was the majority opinion in that case, Justice Breyer was soon to win over two key allies, Justices Kennedy and O'Connor. Justice Breyer's *Printz* dissent thus foreshadowed what was to be a highly effective campaign in favor of references to foreign law by the Court.

## 2. *Knight v. Florida*

Justice Breyer also famously referred to foreign law in his dissent from the denial of certiorari in *Knight v. Florida*,<sup>696</sup> a case that would have required the Court to consider whether it was unconstitutional, under the Eighth Amendment's prohibition on cruel and unusual punishment, to execute prisoners who had spent nearly twenty years on death row.<sup>697</sup> In his opinion, Justice Breyer looked to foreign law on the issue, not as binding authority, but as "useful" because foreign courts had "considered roughly comparable questions under roughly comparable legal standards."<sup>698</sup> Justice Breyer first stated that a "growing number of courts outside the United States—courts that accept or assume the lawfulness of the death penalty—have held that lengthy delay in administering a lawful death penalty renders ultimate execution inhuman, degrading, or unusually cruel."<sup>699</sup> He then discussed several foreign court decisions, including a decision of the Privy Council of the United Kingdom, which held that the execution of two prisoners held for fourteen years after sentencing was forbidden by Jamaica's Constitution unless the delay was entirely the fault of the accused, and a decision of the Supreme Court of India, which held that an appellate court must take into account the issue of delay when deciding whether to impose a death penalty.<sup>700</sup> Justice Breyer also

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695. *Id.* at 921 n.11 (majority opinion) (citations omitted) (quoting *United States v. Lopez*, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring)).

696. 528 U.S. 990, 997-98 (1999) (Breyer, J., dissenting from denial of certiorari).

697. *Id.* at 993.

698. *Id.* at 997-98.

699. *Id.* at 995.

700. *Id.* at 995-96.

noted that the European Court of Human Rights found that the European Convention on Human Rights forbids the six-to-eight-year delays that often accompany death sentences.<sup>701</sup>

Perhaps the most astounding part of Justice Breyer's dissent was his discussion of the holding of the Supreme Court of Zimbabwe that "delays of five and six years were 'inordinate' and constituted 'torture or ... inhuman or degrading punishment or other such treatment.'"<sup>702</sup> This reference to Zimbabwe is one that Justice Breyer later expressed some hesitation about in his debate with Justice Scalia. He stated that he considered the citation to be a "tactical error" as Zimbabwe is, as he belatedly recognized, certainly "not the human rights capital of the world."<sup>703</sup>

Justice Breyer did point out that "[n]ot all foreign authority reaches the same conclusion" as those cases he first addressed.<sup>704</sup> He also admitted that foreign authority was not binding, but argued that the "Court has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances."<sup>705</sup> Justice Breyer stated that the "[w]illingness to consider foreign judicial views in comparable cases is not surprising in a Nation that from its birth has given a 'decent respect to the opinions of mankind.'"<sup>706</sup>

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701. *Id.* at 996.

702. *Id.* (citing Catholic Comm'n for Justice & Peace in *Zimb. v. Attorney-General*, [1993] 1 *Zimb. L. R.* 242, 251, 282 (S)).

703. Scalia & Breyer Discussion, *supra* note 11.

704. *Knight*, 528 U.S. at 996. Justice Breyer noted that the Supreme Court of Canada had held that Canadian constitutional standards did not bar extradition to the United States and that the United Nations Human Rights Committee had written that a ten-year delay in imposing the death penalty did not necessarily violate the standards of the Universal Declaration of Human Rights. *Id.* However, Justice Breyer qualified both of these opinions by stating that "one cannot be certain what position those bodies would take in respect to delays of 19 and 24 years." *Id.* It should also be pointed out that two majority opinions of the Court do actually mention the Universal Declaration of Human Rights. See *Zemel v. Rusk*, 381 U.S. 1, 4, 13 n.13 (1965); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 161 n.16 (1963).

705. *Knight*, 528 U.S. at 996-97.

706. *Id.* at 997.

## V. THEMES IN THE SUPREME COURT'S USE OF FOREIGN SOURCES OF LAW THROUGHOUT HISTORY

An overview of the Supreme Court's actual practice in referring to foreign sources of law reveals several common themes that have emerged over the past 216 years. We see five thematic categories as being particularly significant given the Court's practice we have described. First, the Supreme Court has often referred to foreign law for guidance in cases that arguably involve the Court in a determination of reasonableness.<sup>707</sup> Second, and closely related to the first category, are cases where the Supreme Court turns to foreign law to aid in making sense of an ambiguous phrase.<sup>708</sup> Third, we find it striking that so many of the Court's historical references to foreign law are made in criminal law cases more generally. Fourth, we think the Court often cites foreign law to provide logical reinforcement for its decisions. These are cases where the Court refers to foreign law to place the United States in the context of international practice as a way of demonstrating that the laws of our nation or the decisions of the Court are in fact logical and are supported by foreign legal practice. The Court's references to foreign sources of law in these cases are similar to Blackstone's references to Roman law to prove that the English common law embodied a logical structure.<sup>709</sup> Fifth, we think the Supreme Court has referred to foreign sources of law to provide empirical support for assertions that are made about the likely consequences of legal reforms that are being advocated for the United States. We think this explains most of the references to foreign sources of law in the cases dealing with legalizing assisted suicide<sup>710</sup>

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707. See Calabresi, *supra* note 36 and accompanying text. The initial determination of whether reasonableness is an appropriate inquiry should be set aside for purposes of this Article. In many cases in this category, the Court, or an individual Justice, has already determined, or assumed, that the reasonableness of the statute or constitutional construction is a relevant inquiry.

708. In a way, this is a subcategory of the first, as defining ambiguous phrases, such as "cruel and unusual," or determining exactly what body of law is encompassed by the phrase "law of nations" is, at least in part, based upon a determination of reasonableness. This would be most strikingly apparent if the ambiguous phrase before the Court is a determination of what exactly constitutes an "unreasonable search and seizure" under the Fourth Amendment.

709. See, e.g., Lobban, *supra* note 69.

710. In *Washington v. Glucksburg*, 521 U.S. 702 (1997), the primary example of the Court's use of foreign law for this purpose, Chief Justice Rehnquist looked to the laws of the

or abortion.<sup>711</sup> Finally, we would note that there are at least some kinds of cases where the Supreme Court has *not* often referred to foreign sources of law. These include cases where the decision of the Court depends primarily on an interpretation of the original meaning of the Constitution, or where the decision depends upon our country's own distinctive structure of government and unique form of federalism.<sup>712</sup>

### A. Cases Requiring a Determination of Reasonableness

#### 1. Substantive Due Process Cases

One context in which the Supreme Court has referred to foreign sources of law has been in cases in which the Court thought—rightly or wrongly—that it was faced with the problem of determining whether a particular law was “reasonable”<sup>713</sup> under one of the Due Process Clauses. For example, the Court clearly thought such determinations of the reasonableness of state exercises of the police power were within its cognizance during the *Lochner*-era. “Reasonableness” review with reference to foreign sources of law might have seemed appropriate to the *Lochner* Court, either as to the substance of laws, as in *Lochner* itself, or as to the reasonable-

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Netherlands and that country's experiences with assisted suicide as evidence of the consequences of legalizing the practice. *Id.* at 734.

711. As previously mentioned, the Court in *Roe v. Wade*, 410 U.S. 113 (1973), looked to the experiences of several other countries to support the assertion that modern medical advances had led to low abortion mortality rates. *Id.* at 149 & n.44.

712. There are historical cases in the preceding research that present exceptions to this general analysis, such as the case of *O'Malley v. Woodrough*, 307 U.S. 277 (1939), involving the taxing of judicial salaries. However, the bulk of the Court's citation to foreign law does fall within one or more of the previously mentioned categories. It is perhaps the notion that certain areas are more amenable to foreign legal references than others, including the idea that cases within this category are not appropriate for inclusion of foreign sources of law, which led to the intense reaction against Justice Breyer's citation of the practices of the federal systems of Switzerland, Germany, and the European Union in *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997). See *infra* Part V.F.

713. Calabresi, *supra* note 36, at 1104 (2004) (stating that one “context in which foreign court judgments might be relevant is when one is interpreting provisions of the U.S. Constitution that provide open-ended considerations of ‘reasonableness’”). In this Article, considerations of reasonableness are divided into two categories, those evaluating overall reasonableness considerations and those presenting the problem of interpreting ambiguous phrases or legal principles.

ness of state rules of criminal procedure, as in *Hurtado v. California*<sup>714</sup> and *Palko v. Connecticut*.<sup>715</sup> Today, the Supreme Court has mostly fore sworn reasonableness review under the Due Process Clauses, as the Court has evaluated the substance of governmental exercises of the police power under a rational basis test and, as to state rules of criminal procedure, it has incorporated the substance of the Bill of Rights against the states. Thus, today's Supreme Court does not, for the most part, interpret the Due Process Clauses as imposing a requirement of reasonableness on government. The two striking exceptions, however, where the Court did, in essence, impose a reasonableness requirement on the states are *Roe v. Wade*<sup>716</sup> and *Lawrence v. Texas*,<sup>717</sup> in which the Court did find state exercises of the police power to be unreasonable. It is noteworthy that in both of these cases the Court referred to foreign law.<sup>718</sup>

The first example of Supreme Court Justices referring to foreign law for evidence of the reasonableness of an interpretation of American law was in the *Dred Scott* case. Here, the issue was whether a slave who had sojourned with his master in free territory and then returned to his native slave dominion remained a slave. Several of the Justices in *Dred Scott* referred to foreign legal practices to try to answer the question posed by the case as a matter of American law.<sup>719</sup> We see *Dred Scott* as an example of members of the Court trying to justify the reasonableness of their construction of U.S. law by appealing to foreign law. Another nineteenth century example of Supreme Court reasonableness review can be found similarly, in *Reynolds v. United States*.<sup>720</sup> There, the Court attempted to show that the federal statute prohibiting polygamy was not an outlandish or unreasonable statute by placing it in the context of foreign legal practice.<sup>721</sup> The Court observed that "[p]olygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was

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714. 110 U.S. 516 (1884).

715. 302 U.S. 319 (1937).

716. See 410 U.S. 113 (1973).

717. See 539 U.S. 558 (2003).

718. See *id.* at 576-77; *Roe*, 410 U.S. at 137-38.

719. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); see also discussion *supra* Part II.A.1.

720. 98 U.S. 145 (1878); see also discussion *supra* Part II.A.2.

721. *Reynolds*, 98 U.S. at 164.

almost exclusively a feature of the life of Asiatic and of African people."<sup>722</sup> From this, the Court concluded that facially neutral laws that banned polygamy did not infringe on the rights of Mormons to the free exercise of their religion but were valid exercises of the police power.<sup>723</sup>

In the twentieth century, Justice Harlan's dissent in *Lochner v. New York* used foreign law as evidence of the reasonableness of a state exercise of the police power.<sup>724</sup> Placing the New York statute restricting labor to ten hours a day in context of the average daily working hours of laborers in other countries, Justice Harlan responded to the majority's assertion that the New York statute restricting the hours of labor to ten hours per day was without reasonable ground.<sup>725</sup> By comparing New York's ten-hour restriction to average working days from around the world, Justice Harlan sought to show the reasonableness of New York's law, as it was not extreme or exceptional but rather occupied "a middle ground in respect of the hours of labor."<sup>726</sup>

A few years later, the Court in *Muller v. Oregon*<sup>727</sup> looked again to foreign law for evidence of the reasonableness of a state statute. Determining that it was, in fact, reasonable to restrict the working hours of women, but not men, due to differences between the sexes,<sup>728</sup> the Court noted foreign (European) laws as "significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil."<sup>729</sup> This is then another example of a Supreme Court opinion referring to foreign law as evidence of the reasonableness of an American state's exercise of its police power.

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722. *Id.*

723. *Id.* at 166-68.

724. 198 U.S. 45, 71 (1905) (Harlan, J., dissenting); see discussion *supra* Part III.B.1.

725. See *Lochner*, 198 U.S. at 57. Justice Peckham, writing for the majority of the Court, stated that there was "no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker." *Id.*

726. *Id.* at 71-72 (Harlan, J., dissenting).

727. 208 U.S. 412 (1908); see discussion *supra* Part III.B.2.

728. *Muller*, 208 U.S. at 419-20 n.1; see also discussion *supra* Part III.B.2.

729. *Muller*, 208 U.S. at 420. The Court considered the legislation of the states and reports from the United States as significant to this effect, as well. *Id.* at 419-20 n.1.

Lastly, and most recently in *Lawrence v. Texas*,<sup>730</sup> we think the Court conducted a review of the reasonableness of Texas's morals law banning gay sodomy.<sup>731</sup> The Court looked to foreign sources of law to weigh the reasonableness of Texas's exercise of its police power, and without finding a fundamental right of gays or anyone else to engage in sodomy, the Court struck down Texas's exercise of its police power as being inherently unreasonable.<sup>732</sup> The Court's reliance on foreign law in *Lawrence* was a surefire indication that it was not asking whether a constitutional right was deeply rooted in American history or tradition but rather whether American practices were "reasonable" in light of foreign practice on the same issue.

From *Dred Scott* to *Muller v. Oregon* to *Lawrence*, therefore, a majority of the Supreme Court has repeatedly looked to foreign law in substantive due process cases for evidence as to whether an American exercise of the police power was or was not reasonable. It is a misconstruction of the Fourteenth Amendment to read it as imposing a reasonableness requirement on the states.<sup>733</sup> However, were reasonableness a proper inquiry in the case of substantive due process, there are, as we have pointed out, several significant historical examples of the Court employing foreign law as a guide to reasonableness.

## *2. Criminal Law Cases Involving a Reasonableness Requirement*

In addition to substantive due process cases, there are also a number of criminal law and procedural due process cases where the Court assesses the reasonableness of state laws and codes of criminal procedure. This practice started in *Hurtado v. California*,<sup>734</sup> when the Court found that the requirement of indictment by a grand jury was not a necessary element of a civilized nation's code of criminal procedure.<sup>735</sup> The Court in *Hurtado* referred to the absence of a requirement of grand jury indictment in civil law coun-

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730. 539 U.S. 558 (2003).

731. Calabresi, *supra* note 36, at 1107-18.

732. See *Lawrence*, 539 U.S. at 578; see also discussion *supra* Part IV.C.3.

733. See Calabresi, *supra* note 36, at 1107-15.

734. 110 U.S. 516 (1884); see also discussion *supra* Part II.C.2.

735. *Hurtado*, 110 U.S. at 538.

tries, and concluded that such a requirement was not essential to a civilized system of criminal procedure.<sup>736</sup> The Court reached a similar conclusion in *Palko v. Connecticut*,<sup>737</sup> where it held that the Fifth Amendment right against self-incrimination was also not necessarily a part of a reasonable system of criminal procedure because it, too, was a right that was not recognized by civil law countries on the European continent.<sup>738</sup> In both *Hurtado* and *Palko*, then, the Court found that a reasonable code of criminal procedure need not include all of the procedural protections of the Federal Bill of Rights, based, at least in part, upon a consideration of what other, foreign nations included in their own codes.

The Court conducted the same analysis more recently in *Wolf v. Colorado*.<sup>739</sup> Justice Frankfurter's opinion referred to foreign law as an indicator of reasonableness in addressing the question of whether the federal exclusionary rule of *Weeks v. United States* would apply in a state criminal trial. Justice Frankfurter stated that as "*matter of inherent reason*, one would suppose this to be an issue as to which men with complete devotion to the protection of the right of privacy might give different answers."<sup>740</sup> The Court then looked at the entire "English-speaking world" for evidence that the federal exclusionary rule was not "an essential ingredient of the right"<sup>741</sup> to be free from arbitrary intrusion by the police.<sup>742</sup> The Court specifically pointed to the fact that out of ten "jurisdictions within the United Kingdom and the British Commonwealth of Nations which had passed on the question, none had held that evidence obtained by illegal search and seizure was inadmissible."<sup>743</sup> Thus, just as *Hurtado* and *Palko* looked to the civil law world for confirmation of the reasonableness of the states' rules of criminal procedure,<sup>744</sup> so too did Justice Frankfurter, in *Wolf*, look to other

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736. *Id.*

737. 302 U.S. 319 (1937); see also discussion *supra* Part III.D.1.

738. *Palko*, 302 U.S. at 326-28.

739. *Wolf v. Colorado*, 338 U.S. 25 (1949); see discussion *supra* Part IV.A.2.

740. *Id.* at 28-29 (emphasis added).

741. *Id.* at 29.

742. *Id.*

743. *Id.* at 30. The Court included an entire table, Table J, citing to case law in of each of the ten jurisdictions that held that evidence obtained by illegal search and seizure was not inadmissible. *Id.* at 39. Of course, the Court also considered the similar judgment made by many states as relevant to the issue. *Id.* at 29, 34-38.

744. *Id.* at 30.



common law jurisdictions to figure out whether the exclusionary rule was necessary to protect against "unreasonable searches and seizures."<sup>745</sup> *Wolf* is thus further support for the notion that the Court tends to consult foreign sources of law when it thinks that American constitutional law calls for an assessment of the reasonableness of a state practice.

Finally, it should be mentioned that foreign law also played a role in the Court's questionable decision in *Miranda v. Arizona*<sup>746</sup> that requiring the interrogational safeguard of a *Miranda* warning was in fact not an unreasonable burden to place on law enforcement officials.<sup>747</sup> The Court looked to the laws of England, Scotland, India, and Ceylon for evidence of the existence of such a requirement and discussed the experiences of those foreign jurisdictions as support for its holding.<sup>748</sup> Of course, the Court's lengthy examination of foreign laws to reach the conclusion that there was no apparent "detrimental effect on criminal law enforcement in these jurisdictions"<sup>749</sup> was in some sense a factual inquiry, it provided factual evidence as to the consequences of a legal rule. But the foreign laws relied upon in *Miranda* also provided support for the Court's finding that the burden of the warning requirement on law enforcement would not be so unreasonable as to outweigh the benefits of the warning's protective function. In much the same way that Justice Harlan looked to empirical evidence from foreign nations in his dissent in *Lochner* to show the reasonableness of the New York baker statute, the *Miranda* Court looked to both the existence and consequences of foreign laws, as evidence of the reasonableness of the rule laid down by the Court requiring interrogational *Miranda* warnings. We thus, again see reliance on foreign sources of law in one of the cases where the Supreme Court was examining reasonableness, as well as notoriously engaging in policymaking.

Additional evidence of the Court looking to foreign sources of law in criminal cases for evidence of reasonableness can be found in Justice Frankfurter's consideration of the "notions of justice of

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745. *See id.*

746. *See* 384 U.S. 436, 486-90 (1966).

747. *See* discussion *supra* Part IV.B.2.

748. *Miranda*, 384 U.S. at 486-90.

749. *Id.* at 489.

English-speaking peoples"<sup>750</sup> in due process cases, such as in his majority opinion in *Rochin v. California*,<sup>751</sup> and in his concurring opinion in *Adamson v. California*.<sup>752</sup> Frankfurter referred to the legal judgments and values of foreign nations in these cases to weigh the reasonableness of state laws. By looking to the "notions of justice of English-speaking peoples," Justice Frankfurter tried to show that he was not simply applying his own personal beliefs as to the issues raised by the cases, but that he was applying the general legal rules of English-speaking peoples everywhere. Thus, Frankfurter stated that the "judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment."<sup>753</sup>

### 3. Assessments of Reasonableness in Eighth Amendment Cases

A third context in which the Supreme Court has most often consulted foreign sources of law to evaluate the reasonableness of American legal practices is in determining whether American criminal law punishments violate the Eighth Amendment's ban on "cruel and unusual punishments."<sup>754</sup> In this criminal law context, Justice Scalia has argued vehemently, although in our view unpersuasively, that the Eighth Amendment does not, as an original matter, require that punishments be proportionate to the crime for which they are imposed.<sup>755</sup> We think that the Eighth Amendment does specifically

750. *Adamson v. California*, 332 U.S. 46, 67 (1947) (Frankfurter, J., concurring).

751. 342 U.S. 165, 169 (1952). In the case, Justice Frankfurter wrote:

Regard for the requirements of the Due Process Clause inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even towards those charged with the most heinous offenses.

*Id.*

752. *Adamson*, 332 U.S. at 67-68 (Frankfurter, J., concurring). Justice Frankfurter said that under the Fourteenth Amendment the Court had the duty of determining if the proceedings before the Court offended "those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." *Id.*; see also discussion *supra* Part IV.A.1.

753. *Adamson*, 332 U.S. at 68.

754. U.S. CONST. amend. VIII.

755. Calabresi, *supra* note 36, at 1126-27. Professor Calabresi has previously sketched out

enact a proportionality rule, that its use of the word “unusual” is essentially a synonym for the word “unreasonable” in the Fourth Amendment, and that it thus constitutes a textual invitation to jurists to consider the practice of all civilized nations in assessing the validity of a punishment. We thus view the citation of foreign sources of law in the Eighth Amendment as a means of considering the reasonableness of criminal law punishments and are supportive of the Supreme Court’s practice of referring to these sources of law in Eighth Amendment cases since *Trop v. Dulles*.<sup>756</sup> This view is based, in part, on the fact that the clause at issue in these cases is “worded at a high level of abstraction and w[as] arguably intended, as an original matter, to have some evolving content.”<sup>757</sup>

In *Trop*, the Court used foreign sources—including a United Nations survey of law—to determine the evolving standards of decency that should be used to evaluate which punishments are unconstitutionally cruel and unusual under the Eighth Amendment.<sup>758</sup> The fact that so many other nations refused to impose the punishment helped guide the Court in determining that divestiture of citizenship was disproportionate, unreasonable, and, therefore, a cruel and unusual punishment.<sup>759</sup> It is very important to point out again that *Trop* is the first instance we have found in the Supreme Court’s history in which the Court turned to foreign sources of law in the course of a decision that struck down, rather than upheld, an existing statute.

Since *Trop*, the Court’s Eighth Amendment jurisprudence has been replete with references to foreign law. *Coker v. Georgia*,<sup>760</sup>

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the argument as to why the text of the Eighth Amendment (unlike the text of the Fourteenth) seems as a matter of its plain meaning to contemplate a proportionality rule for all criminal sanctions. *Id.* at 1125-30. The Eighth Amendment specifically enacts a proportionality rule when it bans “excessive” bail or fines in criminal cases. *Atkins v. Virginia*, 536 U.S. 304, 311 (2002). The Amendment then goes on to ban “cruel and unusual punishments” more generally, and we think that that ban is best read as doing for deprivations of life and liberty what the ban on “excessive” bail and fines does for deprivations of property. Calabresi, *supra* note 36, at 1126.

756. See discussion *supra* Part IV.B.1.

757. Calabresi, *supra* note 36, at 1104.

758. *Trop v. Dulles*, 356 U.S. 86, 101-03 (1958).

759. See *id.* at 102-03. The Court in *Trop* stated that it “had little occasion to give precise content to the Eighth Amendment.” *Id.* at 100.

760. 433 U.S. 584 (1977). In *Coker*, the Court determined that international practices regarding the death penalty for rape were relevant to its “evolving standards” analysis. *Id.*

*Enmund v. Florida*,<sup>761</sup> *Thompson v. Oklahoma*,<sup>762</sup> and *Atkins v. Virginia*<sup>763</sup> are noteworthy examples of this trend.<sup>764</sup> Recently, *Roper v. Simmons* referred in-depth to foreign law in striking down the juvenile death penalty.<sup>765</sup> The Court focused more on the determination of a “national consensus,” rather than “evolving standards of decency”; however, it still discussed foreign law based on the *Trop* precedent.<sup>766</sup> The majority considered the laws and practices of foreign nations as well as international covenants and found it “proper” to “acknowledge the overwhelming weight of international opinion against the juvenile death penalty.”<sup>767</sup> Justice O’Connor also concurred in the legitimacy of the Court’s reliance on foreign law in Eighth Amendment cases even though she disagreed with the Court that the juvenile death penalty was unconstitutional. With so many of the nine justices committed to looking at foreign law in Eighth Amendment cases,<sup>768</sup> the question is no longer whether but how the Court will rely upon foreign law in these cases in the future. We are

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at 596 n.10.

761. 458 U.S. 782 (1982). In *Enmund*, the Court noted that “the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe.” *Id.* at 796-97 n.22 (citation omitted).

762. 487 U.S. 815 (1988). The Court in *Thompson* evaluated the Eighth Amendment’s “civilized standards of decency” in part by looking at prohibition of the execution of minors by the Soviet Union and nations of Western Europe. *Id.* at 830-31. In addition, both the plurality and Justice O’Connor’s concurrence found it significant that three major international human rights treaties explicitly prohibited juvenile death penalties. *Id.* at 815 n.34, 851.

763. 536 U.S. 304 (2002). The *Atkins* Court, in finding the execution of mentally retarded offenders unconstitutional, noted that such a practice was “overwhelmingly disapproved” by the “world community.” *Id.* at 316-17 n.21.

764. Other examples are not hard to find, however. In *Patterson v. Texas*, Justices Stevens, Ginsburg, and Breyer dissented from denial of certiorari in a case challenging Texas’s execution of a juvenile offender, noting that “the issue has been the subject of further debate and discussion both in this country and in other civilized nations,” which had produced an “apparent consensus ... among the States and in the international community against the execution of a capital sentence imposed on a juvenile offender.” 536 U.S. 984, 984 (2002) (Stevens, J., dissenting). Justice Breyer dissented to the denial of certiorari in *Foster v. Florida*, which involved the issue of whether prolonged incarceration on death row constituted cruel and unusual punishment, noting that courts “of other nations have found that delays of 15 years or less can render capital punishment degrading, shocking, or cruel” and citing foreign case law. 537 U.S. 990, 992 (2002) (Breyer, J., dissenting).

765. 125 S. Ct. 1183, 1198-2000 (2005).

766. *Id.*

767. *Id.* at 1200.

768. *Id.* at 1215 (O’Connor, J., dissenting).

inclined to believe that it is legitimate in a few contexts for the Court to look to foreign law, but that does not mean that the Court ought to cite foreign law in substantive due process cases. Where the plain text of the Constitution actually does impose a reasonableness requirement—as it does, in our view, in the Fourth and Eighth Amendments—we think it is appropriate for the Court to look to but not slavishly follow foreign law. But, where the constitutional text protects unenumerated rights only to the extent that they are deeply rooted in American history or tradition—as does section one of the Fourteenth Amendment and the substantive due process cases that rely on it—the Court ought not to look to foreign law for guidance. In taking this position, we follow Justice O'Connor's dissent in *Roper* and take a middle ground position that is more faithful to the text of the Constitution than are the more absolutist positions maintained by Justices Kennedy, Breyer, and Scalia.

*B. Cases Requiring the Interpretation of Ambiguous Phrases or Where the Law on the Issue at Hand Is Ambiguous or Contradictory*

If the first big category of cases where the Supreme Court relies on foreign sources of law are those in which the reasonableness of a law is drawn into question, the second large category of such cases are those where an ambiguous legal term must be interpreted and applied. We think this category explains the Court's practice in cases where it had to determine either the "law of nations" or a rule of admiralty law on a particular issue. Historically, the meaning of the phrase "the law of nations" is steeped with ambiguity, which has led the Court to rely on foreign law to determine precisely the contours and governing principles of that phrase.

Two excellent examples of this practice are seen in cases dealing with constitutional questions. First is Justice Story's lengthy reference to foreign law and legal writing on the definition of the crime of piracy in *United States v. Smith*.<sup>769</sup> Writing for the majority, Justice Story chose to look at foreign law to understand the meaning of the law of nations' definition of the crime of piracy. Justice Story stated that a workable definition might "be ascertained by consult-

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769. 18 U.S. (5 Wheat.) 153, 157 (1820); see also discussion *supra* Part I.D.1.

ing the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognising and enforcing that law."<sup>770</sup> Even though American law provided no clear definition of the crime of piracy, Justice Story found it acceptable because foreign law made it crystal clear that piracy was essentially robbery upon the high seas.<sup>771</sup> Thus, the Court referred to foreign law to clarify the ambiguous definition of the crime of piracy in the statute whose constitutionality was actually before the Court. Second, in *Brown v. United States*<sup>772</sup> both Chief Justice Marshall and Justice Story, in their respective majority and dissenting opinions, turned to the opinions of foreign jurists for guidance on the laws of war and their implications for the seizure of enemy property.<sup>773</sup> Justice Story also took into account the practices of other nations, including France and England, in reaching his conclusion that the Court had jurisdiction over matters of prize.<sup>774</sup> The laws of war were, like the law of nations, ambiguous in their scope and meaning and were not directly defined under the Constitution or federal law. This lack of definition led the Court to go outside the bounds of American law and to refer to foreign sources of law in order to give concrete meaning to the law of war.<sup>775</sup>

Other examples of the Court referring to foreign law to resolve an ambiguity in the meaning of the law of nations are not difficult to find. In *The Rapid*, Justice Johnson looked to the teachings of the civil law as well as the practice of "enlightened ... commercial nations" to guide him in ascertaining a doctrine of prize law, another part of the law of nations.<sup>776</sup> And in the famous case of *The Antelope*, Chief Justice Marshall looked to the practices of both Europe and

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770. *Smith*, 18 U.S. (5 Wheat.) at 160-61. Recall that Justice Livingston took issue with this decision, arguing that it was the duty of Congress to define the important terms in its statutes. *Id.* at 182-83 (Livingston, J., dissenting).

771. *Id.* at 159-62.

772. 12 U.S. (8 Cranch) 110 (1814).

773. *Id.* at 131-35, 139-45; see also discussion *supra* Part I.C.3.

774. *Brown*, 12 U.S. (8 Cranch) at 137-38.

775. It should be reiterated that, in 1875, the Court held that it lacked jurisdiction to review issues of "the general laws of war, as recognized by the law of nations," where they had not been modified or suspended by the "constitution, laws, treaties, or executive proclamations, of the United States." *New York Life Ins. Co. v. Hendren*, 92 U.S. 286, 286-87 (1875).

776. *The Rapid*, 12 U.S. (8 Cranch) 155, 162 (1814); see also *supra* Part I.E.1.

America to determine the validity of the slave trade under the law of nations.<sup>777</sup>

Another set of cases where the early Supreme Court looked to foreign sources of law for guidance includes those cases where the legal principles that should govern the dispute are unclear or in controversy. In *Rose v. Himley*, the Court addressed whether it could “examine the jurisdiction of a foreign tribunal.”<sup>778</sup> Because this was a question of “serious difficulty,”<sup>779</sup> upon which there did not appear to be any particular federal law or precedent, Chief Justice Marshall considered the position taken by the courts of England on the matter.<sup>780</sup> He looked at several contemporaneous English cases that supported the right of English courts to examine the jurisdiction of foreign tribunals to guide the Court in determining the proper legal rule to dictate the outcome of the case.<sup>781</sup> After examination of the foreign cases, Chief Justice Marshall stated that the Court considered the law of England to be aligned with “the uniform practice of civilized nations” and thus adopted the law of England “as the true principle which ought to govern in this case.”<sup>782</sup> It could certainly be argued that it was unnecessary for Chief Justice Marshall to consider foreign law in this case. Early on in his opinion, Chief Justice Marshall stated the principle that the Court thought resolved the case, which was that “the capacity of the court to act upon the thing condemned, arising from its being within, or without their jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence.”<sup>783</sup> Even though the Court could have reached an outcome simply based upon the above principle, the Court found it necessary to pass “from principle to authority”<sup>784</sup> by addressing several decisions English courts rendered well after American independence.

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777. *The Antelope*, 23 U.S. (10 Wheat.) 66, 121-22 (1825); see also *supra* Part I.C.4.

778. *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 268 (1808) (emphasis omitted). The issue in *Rose* was the French condemnation of a cargo of coffee. *Id.*; see also *supra* Part I.C.2.

779. *Rose*, 8 U.S. (4 Cranch) at 269.

780. *Id.* at 270-71.

781. *Id.*

782. *Id.* at 271.

783. *Id.* at 269.

784. *Id.* at 269-70.

Justice Story also looked to foreign sources of law when the American case law on an issue was in conflict and not readily reconcilable. Thus, in *Columbian Insurance Co. of Alexandria v. Ashby*, Justice Story found that American law presented “conflicting adjudications” on the topic of the general average.<sup>785</sup> It was, therefore, the duty of the Court to examine and weigh opposing views on the general average, including those of foreign nations and jurists, to determine the “true principle which ought to govern” the Court.<sup>786</sup> The Court in *Ashby* thus turned to foreign law in a case where there were no immediately clear-cut legal rules to apply.

Thus, cases where the meaning of an American term of art, like “the law of nations” or “admiralty law,” is ambiguous and foreign law can help lend meaning to the term compose a second group of cases where the Court historically looked to foreign law over the last two centuries. In these cases, unlike in *Lawrence*, reference to foreign law as it was understood in 1789, could conceivably help to limit the range of judicial discretion. Reference to the meaning of international law, as it is understood today, however, would likely lead to the opposite result of unbridled judicial activism because the scope of the phrase “the law of nations” had a much narrower meaning in 1789 than does the phrase “international law” today.

### C. Criminal Law Cases

We have already seen that the open-ended nature of phrases such as the Eighth Amendment’s ban on “cruel and unusual punishments” has led the Supreme Court to refer to foreign law most often in cases arising in a criminal law context. Most of these criminal law cases have already been discussed in other contexts, but it is worth emphasizing the fact that a highly disproportionate number of the cases discussed in this Article involved criminal law issues.

Beyond the Eighth Amendment cases, many other criminal cases also referred to foreign law—most recently, *Lawrence v. Texas*, which it should be recalled, involved a statute criminalizing homo-

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785. *Columbian Ins. Co. of Alexandria v. Ashby*, 38 U.S. (13 Pet.) 331, 337 (1839).

786. *Id.*; see also discussion *supra* Part I.D.2.



sexual sodomy.<sup>787</sup> *Reynolds v. United States*, another so-called “morals” case, involved a criminal statute prohibiting polygamy, and also led the Court to refer to foreign law.<sup>788</sup> *United States v. Smith* fits into this category because it involved defining the crime of piracy.<sup>789</sup> In addressing the relative importance of criminal indictment by grand jury in *Hurtado v. California*, the Court noted that it could draw “inspiration from every fountain of justice.”<sup>790</sup> The Court referred to foreign sources of law in the case of the forcible kidnapping of a criminal defendant in *Ker v. Illinois*.<sup>791</sup> More recently, *Miranda v. Arizona*<sup>792</sup> made numerous references to the laws and practices of foreign nations, including England, Scotland, India, and Ceylon.<sup>793</sup> The Court’s consideration of foreign law in *Miranda* led Justice O’Connor to include similar foreign references in her concurring opinion in *New York v. Quarles*.<sup>794</sup>

The increasing use of foreign law in criminal law cases over time may be partially a product of the shrinking world in which we live, one in which globalization affects not only our economy, but also our perceptions of crime and the laws regulating it. The modern development of bodies such as the International Criminal Court has led to greater American awareness of foreign opinion regarding certain crimes and punishments, as well as the implications of the way a nation defines and punishes crime for its relationships with the broader world. Recent international agreements, such as the United Nations Convention on the Rights of the Child,<sup>795</sup> have brought to light differences in the way nations punish specific crimes, such as those committed by juveniles. This, in turn, has highlighted the fact that, in certain areas, the punitive practices of the United States may not be all that well aligned with those of the rest of the world.<sup>796</sup> Just as Chief Justice Marshall wrote that the Court should

787. 539 U.S. 558, 563, 576 (2003).

788. 98 U.S. 145, 164-66 (1878).

789. 18 U.S. (5 Wheat.) 153, 160-62 (1820); see also discussion *supra* Part I.D.1.

790. 110 U.S. 516, 530-31 (1884); see also discussion *supra* Part II.C.2.

791. 119 U.S. 436, 444 (1886); see also discussion *supra* Part II.C.4.

792. 384 U.S. 436 (1966).

793. *Miranda*, 384 U.S. at 486-90; see *supra* Part IV.B.2.

794. *New York v. Quarles*, 467 U.S. 649, 672-73 (1984) (O’Connor, J., concurring).

795. G.A. Res. 44/25, U.N. Doc. A/Res/44/25 (Dec. 12, 1990).

796. In striking down the juvenile death penalty as unconstitutional in *Roper v. Simmons*, the majority stressed that the “United States now stands alone in a world that has turned its face against the juvenile death penalty.” 125 S. Ct. 1183, 1199 (2005). Other Justices, such

not lightly admit to a construction of the Constitution “which would give to a declaration of war an effect in this country it does not possess elsewhere,”<sup>797</sup> today’s Court may feel something of a similar pull to avoid construing the Constitution, especially the Eighth Amendment, in such a way that the United States would be very much out of line with the rest of the civilized world in its criminal law sanctions. The Court may thus look to foreign law in criminal cases to avoid friction with the rest of the world and to give credence to the principle, which developed from the *Charming Betsy* Canon,<sup>798</sup> that wherever fairly possible the laws of the United States are “to be construed so as not to conflict with international law or with an international agreement of the United States.”<sup>799</sup> Technically, there is no conflict between American allowance of the juvenile death penalty and foreign condemnation of it, but it is certainly the case that construing the ambiguous Eighth Amendment to outlaw that penalty reduces conflict between American and foreign law.

#### *D. Logical Reinforcement Cases*

A fourth group of cases where the Supreme Court has for 216 years looked to foreign law might be called “logical reinforcement” cases. These cases are those in which the Court looks to foreign law and practice to demonstrate that its decisions are logical and supported by reason. For example, the Court made clear that its use of foreign law in developing its Eighth Amendment jurisprudence served to supply additional support for its own conclusions when it stated in *Roper v. Simmons* that the opinion of the world community provided “*respected and significant confirmation for our own conclusions.*”<sup>800</sup> However, the use of such sources in this manner is not a new development. Reliance on foreign law to provide logical rein-

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as Justice Scalia, would likely respond that such misalignment should not matter to the Supreme Court, as it is charged with interpreting the United States Constitution and thus the practices of other nations are irrelevant. See *Roper v. Simmons*, 125 S. Ct. 1183, 1226-29 (Scalia, J., dissenting).

797. *Brown v. United States*, 12 U.S. (8 Cranch) 110, 125 (1814).

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

799. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987); see Bodansky, *supra* note 22, at 427.

800. *Roper*, 125 S. Ct. at 1200 (emphasis added).

forcement for the Court's decision has taken place throughout its 216-year history.

The origin of such a use of foreign law harkens back to the early years of the Court and is exemplified by the writings of Justice Joseph Story. Justice Story believed that the approval of an American rule of law by respected foreign jurists and scholars was a very important recommendation of that law.<sup>801</sup> Accordingly, he often referred to the views of foreign legal scholars and to the legal principles of foreign nations in his opinions. In *Columbian Insurance Co. of Alexandria v. Ashby*,<sup>802</sup> Justice Story disagreed with the view put forth by Emerigon, a leading French authority on commercial law at that time, that in order to require shared liability for a ship that had been voluntarily ran ashore to protect the ship and its cargo the ship must be "got afloat again."<sup>803</sup> Justice Story did not simply state his and the Court's own disagreement with the opinion of Emerigon. Rather, he pointed out that Valin, another foreign jurist, also did not support the view of Emerigon, nor did the Roman law.<sup>804</sup> By calling attention to these foreign sources of law as also disagreeing with Emerigon, Story more powerfully demonstrated that his disagreement with Emerigon's principle was logical and justified.<sup>805</sup>

Other Marshall Court opinions also referred to foreign sources of law to provide logical reinforcement for the Court's rulings. In *Brown v. United States*, Chief Justice Marshall held that a seizure of British property was improper and laid down the rule that "tangi-

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801. Helmholz, *supra* note 66, at 1681-82 (citing *Peele v. Merchants' Ins. Co.*, 19 F. Cas. 98, 102 (C.C.D. Mass. 1822) (No. 10,905)).

802. 38 U.S. (13 Pet.) 331 (1839).

803. *Id.* at 340; *see also supra* Part I.D.2.

804. *Id.* at 340-42.

805. Chief Justice Marshall also referred to foreign sources of law to provide logical reinforcement of the Supreme Court's decisions. In ruling that the books of a merchant were admissible evidence in *M'Coul v. Lekamp's Administratrix*, Marshall summarily stated that the specific commercial books at issue in the case were admissible evidence. *M'Coul v. Lekamp's Admx*, 15 U.S. (2 Wheat.) 111, 117 (1817); *see also supra* note 125. In a footnote, however, Marshall provided further support for his ruling by referring to the laws of other nations regarding the admissibility of such evidence. *M'Coul*, 15 U.S. (2 Wheat.) at 117-18 n.a. Chief Justice Marshall stated that, "by the codes of the nations of the European continent," it was certain that the books of merchants and traders were admissible evidence against those with whom they dealt. *Id.* He further noted that this rule was supported by the specific practice of France, and cited directly to the French *Code de Commerce* and the writings of the French jurist Pothier. *Id.* Pointing to other nations gave Chief Justice Marshall support for the soundness of the Court's ruling in *M'Coul* sustaining the admission of merchant books.

ble property belonging to an enemy and found in the country at the commencement of war, ought not to be immediately confiscated.”<sup>806</sup> In support, Marshall stated that this decree was correct not only as to current American law, but that it was also “the opinion of all who have written on the *jus belli*, that war gives the right to confiscate, but does not itself confiscate the property of the enemy.”<sup>807</sup> By referring to the opinions of foreign jurists and scholars whose views supported the rule laid down by the Court in *Brown*, Marshall provided confirmation that the rule he announced was well reasoned, was based upon logical principles, and was not an erroneous decision of the Court.<sup>808</sup>

Similarly, in the 1886 case of *Ker v. Illinois*<sup>809</sup> the Court found no restriction in the “Constitution, or laws, or treaties, of the United States” against the forcible kidnapping of a defendant in another country (and his transfer to the United States) that would permit a defendant to resist trial in a State court.<sup>810</sup> Justice Miller referred to “authorities of the highest respectability” for support of the Court’s view, citing two English cases, decided in 1829 and 1858, as standing for the same proposition.<sup>811</sup> Referring to these English cases, then, was a means by which the Court could show that not only did it believe its decision and rationale to be logical, but that other learned and respectable judges in a foreign nation had reached the same decision. The Court also used the practices and laws of foreign nations as reinforcement for the proposition that

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806. *Brown v. United States*, 12 U.S. (8 Cranch) 110, 125 (1814); see also *supra* Part I.C.3.

807. *Brown*, 12 U.S. (8 Cranch) at 125. The Court had considered the writings of several famous foreign jurists and writers. See *supra* note 109 and accompanying text.

808. Chief Justice Marshall’s lengthy discussion of the practices of European nations regarding Native Americans during the discovery and colonization of the American continent in *Johnson v. M’Intosh* provides yet another example of the use of foreign sources for logical reinforcement. See *supra* note 157. The references to the practices of European nations can be seen as an attempt by the Court to provide additional justification and validation for its decision that Indian tribes held no valid title to American lands, at least as against the United States government. During the same time period, the opinion of Justice Johnson in *The Rapid*, 12 U.S. (8 Cranch) 155 (1814), is another example of Supreme Court reliance on foreign sources of law as support for the decision of the Court. See *supra* Part I.E.1. Justice Johnson stated that his decision in *The Rapid* did “not rest upon abstract reason,” but rather was “supported by the practice of the most enlightened (perhaps we may say of all) commercial nations.” *The Rapid*, 12 U.S. (8 Cranch) at 162.

809. 119 U.S. 436, 444 (1886).

810. *Id.*

811. *Id.*

compelled military service is not repugnant to a free government to support its decision in the *Selective Draft Law Cases* that a congressional statute enacting a compulsory military draft was constitutional.<sup>812</sup>

The increasing willingness of the Supreme Court at the start of the twentieth century to consider Brandeis briefs, which often included citations of the laws of other nations, provides another example of references to foreign law as logical reinforcement for the Court's decisions. *Muller v. Oregon* exemplifies this reinforcement because the Court turned to social science evidence, including laws and data from foreign nations, to provide logical reinforcement for its decision.<sup>813</sup> One commentator has argued that when the Court turns to social science data, as it did in *Muller*, it does so not because the information is necessary to reach a decision, "but because a decision which took this data into account would be better—more defensible as a matter of public policy, and responsive to the growing public expectation that decisions by all branches of government would reflect the growing body of social science knowledge as well as logical reasoning."<sup>814</sup> The same desire to support its decisions sometimes seems to drive the Court to refer to foreign law as a way of better defending a decision by showing the outcome that has also been reached by other jurists in foreign countries.

Finally, citing foreign law as providing logical reinforcement for the validity of the Court's rulings also seems to be partially behind the current Court's reference to foreign law in many recent Eighth Amendment cruel and unusual punishment cases. For example, in *Atkins v. Virginia*,<sup>815</sup> when the Rehnquist Court, in a majority opinion written by Justice Stevens, ruled that the execution of mentally retarded individuals was cruel and unusual punishment in violation of the Eighth Amendment, the Court referred to the overwhelming disapproval of the "world community" of execution of retarded murderers to support its conclusion that "there is a consensus [against the execution of the mentally retarded] among those who have addressed the issue."<sup>816</sup> Referring to the worldwide support

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812. 245 U.S. 366, 378 (1918); see also *supra* Part III.D.4.

813. 208 U.S. 412, 419-20 n.1 (1908).

814. Davis, *supra* note 384, at 423.

815. 536 U.S. 304 (2002).

816. *Id.* at 316 n.21.

for the Court's decision was an attempt to draw upon the legitimacy of the laws of foreign nations as reinforcement and additional corroboration for the proposition that executing mentally retarded offenders is truly cruel and unusual and is an unacceptable form of punishment.

*E. Use of Foreign Sources of Law To Provide Empirical Support for the Court's Factual Assertions*

The Supreme Court has also often looked to foreign law to provide empirical support for its factual assertions. As Justice Breyer has explained, the Court sometimes looks to foreign law because the experiences of other nations may "cast an empirical light on the consequences of different solutions to a common legal problem."<sup>817</sup> *Washington v. Glucksberg* provides a primary example of the Court's use of foreign law to provide empirical support to determine the effect a particular legal rule or decision might have if it were adopted in the United States.<sup>818</sup> In *Glucksberg*, the Supreme Court famously looked to the Dutch experience with assisted suicide to help answer the question whether a Washington State law banning physician-assisted suicide was rationally related to a legitimate state interest.<sup>819</sup> One of the reasons Washington State had put forth for banning physician-assisted suicide was its fear that permitting the practice might start the state "down the path to voluntary and perhaps even involuntary euthanasia," a practice to which the state was strongly opposed.<sup>820</sup> In order to determine if this fear was a rational one, the Court in *Glucksberg* looked to the experiences of the Netherlands, which had chosen to legalize physician-assisted suicide and voluntary euthanasia in certain circumstances, and was "the only place where experience with physician-assisted suicide and euthanasia has yielded empirical evidence."<sup>821</sup> The Court looked at data from a Dutch government study which revealed that, despite various reporting requirements, the practice of euthanasia in the Netherlands had not been limited to only "competent, terminally ill

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817. *United States v. Printz*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

818. See 521 U.S. 702, 734 (1997); see also *supra* Part IV.C.2.

819. *Glucksberg*, 521 U.S. at 734.

820. *Id.* at 732.

821. *Id.* at 785 (Souter, J., concurring).

adults who are enduring physical suffering, and that regulation of the practice may not have prevented abuses in cases involving vulnerable persons, including severely disabled neonates and elderly persons suffering from dementia."<sup>822</sup> Using the Dutch experience for empirical evidence of the real world consequences of legalizing physician-assisted suicide, the Court provided a factual basis for finding that Washington State's ban on assisted suicide was not irrational, but rather rationally related to the governmental interest in preventing euthanasia.

*Roe v. Wade* provides another example of the Court looking to the practices of foreign nations for empirical evidence of the consequences of reaching a certain legal result.<sup>823</sup> In *Roe*, the Court looked to the experiences of countries that had legalized abortion for empirical evidence to rebut the argument that abortion, as a medical procedure, "was a hazardous one for the woman."<sup>824</sup> Looking at summaries of empirical evidence from nations such as England, Wales, Japan, Czechoslovakia, and Hungary, the *Roe* Court found that, in nations where abortion was legal, mortality rates for women having early abortions were as low as the rates for normal childbirth.<sup>825</sup> Considering these facts, the Court stated that "any interest of the State in protecting the women from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared."<sup>826</sup>

Finally, the Court's reliance on foreign laws and practice in *Miranda v. Arizona* is another instance in which the Court looked outside of the United States for empirical evidence of the consequences of adopting a proposed rule.<sup>827</sup> Empirical evidence tending to show that requiring *Miranda* warnings in custodial interrogations would not be too burdensome for law enforcement was an important tool for the *Miranda* Court in demonstrating that such a requirement was in fact reasonable. The Court looked to the laws of England, Scotland, India, and Ceylon, as their experience suggested "that the danger to law enforcement in curbs on interrogation is

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822. *Id.* at 734.

823. See 410 U.S. 113, 148-49 & n.44 (1973); see also discussion *supra* Part IV.C.1.

824. *Roe*, 410 U.S. at 148-49 & n.44.

825. *Id.* at 149.

826. *Id.*

827. 384 U.S. 436 (1966); see *supra* Part IV.B.2.

overplayed.”<sup>828</sup> One commentator has argued that this assessment of the practice in foreign countries was, for the Court, “a way of ascertaining whether its own new restrictions would have an adverse impact on criminal law enforcement.”<sup>829</sup>

*F. Areas Where Reference to Foreign Sources of Law Typically Does Not Occur*

In addition to discussing the five contexts above in which the Supreme Court has referred to foreign sources of law over the last 216 years, we should also address the many contexts in which the Court has *not* made such references. It may be noteworthy that the Court generally has *not* cited or relied on the cases of either the European Court of Human Rights or of other countries’ constitutional courts, as obligatory sources of American law.<sup>830</sup> Instead, the Court has usually looked to foreign sources of law mostly in order to learn from the experiences of other nations, as Justices Breyer and Ginsburg have both argued is proper. There are some areas of the law where the Supreme Court has been especially likely to cite foreign sources of law, and there are other areas of law where citation to foreign sources almost never occurs.<sup>831</sup> For example, the Court has historically been quite unwilling to rely on foreign sources of law in cases in which the decision of the Court depends primarily on an interpretation of an original meaning of relatively unambiguous and non-evolving constitutional text. Thus, the Court has been reluctant to refer to foreign sources of law when it is trying to explicate the United States’ distinctive structure of government and form of federalism, although foreign law was cited in the *Legal Tender Cases* and the *Selective Draft Law Cases*. Many clauses of the Constitution—for example, the Contracts Clause and the Vesting Clauses of Articles II and III—have not proved to be as amenable to borrowing from foreign court decisions or legal rules as the ambiguous and developing Eighth Amendment has proved to be. And, while

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828. *Miranda*, 384 U.S. at 486.

829. Wollin, *supra* note 550, at 863.

830. See Tim Wu, *Foreign Exchange: Should the Supreme Court Care What Other Countries Think?*, SLATE, Apr. 9, 2004, <http://slate.msn.com/id/2098559/>.

831. See Ginsburg, *supra* note 15 and accompanying text; Scalia & Breyer Discussion, *supra* note 11 and accompanying text.



a textbook on issues of criminal law might be satiated with cases referring to foreign sources of law, a legal textbook on the jurisdiction of the federal courts or on the federal government's separation of powers would be quite lacking in such references.<sup>832</sup>

This historical unwillingness of the Supreme Court to look to foreign sources of law in structural constitutional cases may help explain why the majority in *Printz v. United States*<sup>833</sup> rejected as irrelevant Justice Breyer's references to the federal systems of Switzerland, Germany, and the European Union. Justice Breyer argued in *Printz* that "there is no need to interpret the Constitution as containing an absolute principle—forbidding the assignment of virtually any federal duty to any state official,"<sup>834</sup> but Justices Kennedy and O'Connor, who are quite willing to invoke foreign sources of law in the Eighth Amendment context, proved to be quite unwilling to refer to it in this federalism case.<sup>835</sup>

The *Printz* example may help to show why the Court rarely cites foreign sources of law in structural constitutional cases. American constitutional structures of federalism and separation of powers are in some respects unique to this country's constitutional history. Those structures reflect intricate compromises made over two centuries, and the meaning of the relevant constitutional texts is rarely revealed by examining foreign practices with respect to structural constitutional rules. Thus, federalism and separation of powers

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832. However, the previously discussed case of *Rose v. Himely* does address the power of the federal courts to review the jurisdiction of foreign courts, so citation of foreign sources of law has not been *entirely* absent in this area of the law, just far less prevalent. See *supra* Part I.C.2.

833. 521 U.S. 898 (1997).

834. *Id.* at 977 (Breyer, J., dissenting).

835. Chief Justice Rehnquist along with Justices O'Connor, Kennedy, and Thomas joined in Justice Scalia's majority opinion in *Printz*, which stated the foreign references in Justice Breyer's dissent were "inappropriate to the task of interpreting a constitution." *Id.* at 921 n.11. Justice Breyer's reference to foreign practices in *Printz* can be rejected as illegitimate not only because it is not relevant to the question of whether the U.S. Constitution gives Congress the power to commandeer state executives, but also because Breyer failed to take into account significant differences that exist between the American and European versions of federalism. Calabresi, *supra* note 36, at 1105-06. Specifically, Justice Breyer overlooked the fact that state entities in Germany, Switzerland, and the European Union have powerful political checks on national legislative action, which no longer exist in the United States in the wake of the ratification of the Seventeenth Amendment. Justice Breyer was thus guilty in his *Printz* dissent of comparing apples and oranges when he sought to compare American and European federal systems.

cases, unlike Eighth Amendment cases, do not seem to involve a constitutional text which invites direct reference to foreign sources of law. We dare say that most clauses in the U.S. Constitution are in this respect more like the structural constitutional provisions than they are like the Eighth or the Fourth Amendments. It is the rare American constitutional clause that will invite a reasonableness assessment. The only clause we can think of in the structural constitutional area which might invite such an assessment is the Necessary and Proper Clause, and even there, unique historical compromises on federalism and separation of powers issues make reference to foreign sources of law quite risky as part of any effort to determine whether laws are truly necessary or not. Again, though, even here it must be noted that the Court did rely on foreign sources of law in the *Legal Tender Cases* and the *Selective Draft Law Cases*, both of which were big federalism decisions.

CONCLUSION: WHAT DO TWO CENTURIES OF PRACTICE TELL US  
THAT IS RELEVANT TO THE CURRENT DEBATE OVER RELIANCE ON  
FOREIGN SOURCES OF LAW?

The Supreme Court's recent opinions in *Roper* and *Lawrence* might suggest that reference to foreign sources of law by the Court is a wholly new development. This Article proves that that is simply not the case. References to foreign sources of law have not been aberrational over the past 216 years. Instead, they have been somewhat commonplace. Thus, the *Lawrence* and *Roper* Court's reference to foreign sources of law reflects an old tradition of such references which can be found in many nineteenth century Supreme Court opinions, including opinions written by such historical titans as Chief Justice Marshall and Justice Story.

Nevertheless, we do think the pace of the Court's reliance on foreign sources of law has picked up in the last sixty-five years, especially since the issuance of the plurality opinion in *Trop v. Dulles*. Moreover, many of the cases in which the Court or individual justices have relied on foreign law are among the most problematic in the Court's history. We think the historical evidence largely supports Justice Scalia's claim that foreign sources of law generally are not and should not be relevant to the interpretation of the U.S. Constitution. Rather, those sources of law are only relevant when

the Supreme Court takes on a policy-driven writing of a new U.S. Constitution, which it is deriving in part from controversial foreign sources of law. Especially in controversial social issue cases, like *Lawrence*, we think the Court should not impose secular European values on the American citizenry in the guise of constitutional interpretation. We are somewhat more sympathetic, however, to the Court's reliance on foreign sources of law in its Eighth Amendment jurisprudence because at least there we think an argument can be made that the Constitution really does ask judges for a modern-day assessment of what punishments are reasonable and proportionate. We would, therefore, join Justice O'Connor in approving of the Court's reference to foreign sources of law in the *Roper* juvenile death penalty case and would have joined her dissent in that case.<sup>836</sup>

This Article does not purport to answer definitively the normative question of whether the Supreme Court should, as a general rule, refer to foreign sources of law in its opinions. Rather, this Article has sought to provide additional information regarding the Court's actual practice over the last 216 years in referring to foreign law. We think the evidence we have just discussed shows that neither Justice Breyer, who seemingly wants to refer to foreign sources of law in all but the most domestic of cases, nor Justice Scalia, who finds such sources wholly irrelevant to constitutional adjudication, are entirely correct in capturing the Court's actual practice over the last two centuries. As an original matter, there is little support for the use of foreign sources of law in constitutional cases, as two of the earliest cases invoking such sources, *Schooner Charming Betsy* and *United States v. Smith*, were decided in 1804 and 1820, respectively, more than fifteen years after the founding of our nation. Considering the entire 216-year history of the Court, however, there does seem to be evidence of a tradition of employing foreign law in all sorts of cases, including constitutional ones, albeit a tradition that is only hazily foreshadowed by the opinions of the early Court and that developed a real foothold only in the era after the *Dred Scott* decision. Traditionally, the Court has not hesitated to rely on foreign law in at least some cases, such as those involving the criminal

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836. Although we would look at foreign law in *Roper*, we would not give it dispositive weight in a situation where the states are divided as to a controversial social policy of executing juvenile murderers.

law or controversial social issues. At the same time, there are many important areas where the Justices almost never look to foreign law, such as ones involving our structural Constitution.

Six Justices on the Rehnquist Court signed on to the conclusion in *Roper* that the Court may, at least on some occasions, rely upon foreign sources of law. We submit, therefore, that such reliance is not likely to wane anytime soon, even with two new appointments, and that the real question for the future is not whether but when the Court will cite foreign sources of law. This is especially true since reliance upon such sources of law has a self-validating and snowballing aspect to it, wherein the more significant and widespread the Court's use of foreign sources now, the greater the body of precedent the Court will have to cite for using foreign sources of law in the future.

If the Court wants to be faithful to the best aspects of its two centuries of practice in relying on foreign sources of law, it will only rely upon those sources in domestic cases where: (1) the reasonableness of an American law or practice is drawn into question; (2) there is an issue of construing a vague or ambiguous provision of American constitutional law; (3) the case involves the criminal law; (4) the sources reinforce the logic and support for a position already arrived at on other grounds; and (5) the Court is looking for empirical evidence in foreign practice of the likely consequences of adopting a proposed rule. Given the historical evidence we have uncovered, we would support the Court's continued consideration of foreign sources of law in deciding Eighth Amendment cases but *not* in cases involving substantive due process claims. Because the Court has had a rather sorry history of considering foreign law in cases such as *Dred Scott* and *Roe*, we believe the Court ought not to have relied on foreign law in *Lawrence*, and that it ought not to rely on such sources in most cases in the future.