The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation

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needed to address the problem of corporate violations of human rights. An effective solution requires international agreement not only on the human rights obligations of corporations, but also on an effective enforcement mechanism. The international community should view the recent ATCA cases against corporations as a call to collective action.

VI. THE INTERNATIONAL JUDICIAL DIALOGUE: WHEN DOMESTIC CONSTITUTIONAL COURTS JOIN THE CONVERSATION

The past few decades have witnessed a tremendous increase in the number of domestic tribunals that look to international and foreign legal sources to inform their interpretations of domestic law. Domestic courts, when ruling on a particular substantive legal issue, can look for guidance not only to bilateral and multinational treaties that relate to the issue, but also to decisions of supranational tribunals that have addressed similar legal questions. Conversely, supranational and foreign tribunals faced with analogous legal issues can refer to domestic courts' decisions.

Justice Claire L'Heureux-Dubé of the Canadian Supreme Court has described the current practice of citing, analyzing, relying on, or distinguishing the decisions of foreign and supranational tribunals as a "dialogue." This Part builds on the terminology of Justice L'Heureux-

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This Part uses the terms "supranational tribunals" and "supranational courts" to refer to courts that do not belong to any particular nation. Recent literature has discussed the relationship between several supranational courts and domestic courts. See COMPLIANCE WITH JUDGMENTS OF INTERNATIONAL COURTS 40–42 (M.K. Bulterman & M. Kuijer eds., 1996) (discussing domestic compliance with the rulings of the International Court of Justice); Slaughter, supra note 1, at 1104–12 (discussing the increasing influence of the European Court of Justice and the European Court of Human Rights); see also WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW 284–94 (2d ed. 1997) (discussing capital punishment rulings of the Inter-American Commission on Human Rights).

4 See Slaughter, supra note 1, at 1105 (examining the "cooperative relationship" between the European Court of Justice and domestic tribunals in Europe); sources cited supra note 3.

5 L’Heureux-Dubé, supra note 2, at 17. Justice L’Heureux-Dubé argues that “until recently” the process was one of “reception”: new constitutional courts often applied the reasoning of older tribunals, particularly British and American courts. Id. at 17–18. Citing cases decided during the 1990s in a broad range of jurisdictions (Australia, Canada, Trinidad and Tobago, and Zimbabwe), Justice L’Heureux-Dubé claims that “[c]urrent trends” demonstrate that courts now engage in “dialogue”: judges look to a “broad spectrum of sources” and “mutually read[] and discuss[] each others' jurisprudence.” Id. at 21. This Part uses the term “dialogue” in a similar fashion to describe the mutual exchange of ideas through published opinions. For a discussion of the role of civil law countries’ courts in this dialogue, see note 66, below.
Dubé and refers to this phenomenon as the "international judicial dialogue" or the "international judicial conversation."

The developments in international criminal law described above, such as the increasing importance of international criminal tribunals, are likely to lead to a more sophisticated judicial conversation in the realm of criminal law. Supranational criminal tribunals may look to domestic law in order to determine proper procedures and appropriate punishments; the decisions of these tribunals may in turn influence the development of domestic criminal law.

A major area of criminal law that has been influenced by the international judicial dialogue is the law of capital punishment. Domestic courts, particularly those that consider constitutional questions, often face issues involving the death penalty. This Part examines the recent historical development of the dialogue among constitutional courts and supranational courts by studying various capital punishment cases. It analyzes these death penalty decisions in order to address a

6 See supra Parts II-III.
7 Courts engage in the international judicial dialogue in both criminal and civil contexts. See L’Heureux-Dubé, supra note 2, at 21–22 (noting courts’ reliance on outside jurisprudence to determine criminal issues that involve the death penalty or to analyze procedural matters such as the right to counsel); Slaughter, supra note 1, at 1112–15 (discussing how the globalization of the economy has forced courts to consider foreign law in rulings that involve domestic corporate law).
8 The trends described in this Development indicate that the international judicial dialogue in the criminal context will become particularly important in the next few years. As international criminal tribunals, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), increase in number and importance, see supra Part II, p. 1980, the decisions of these courts may foster the development of a more sophisticated international judicial conversation on criminal law.
11 The worldwide trend toward abolition of the death penalty is intertwined with the international judicial dialogue of constitutional courts. In some nations, courts have declared the death penalty unconstitutional. See, e.g., State v. Makwanyane, 1995 (3) SALR 391, 451 (CC) (S. Afr.) (holding that the death penalty violates the constitutional prohibition against “inhuman and degrading” punishment). Courts in nations that have eliminated the death penalty must also confront constitutional issues raised by the existence of capital punishment elsewhere, such as the legality of extraditing a fugitive to a nation where he might face a sentence of death. See, e.g., Kindler v. Canada, [1991] 2 S.C.R. 779, 856 (Can.) (holding that the extradition of two fugitives to the United States would not violate the Canadian Charter of Rights and Freedoms). For an informative discussion of the international trend toward abolition, see SCHABAS, supra note 3.
12 This Part uses the term “constitutional court” to refer to any court that engages in constitutional interpretation, even if that court also engages in other types of legal interpretation.
13 The constitutional context is an appropriate area of focus because the development of the international judicial dialogue parallels the rise in “world constitutionalism.” Professor Bruce Ackerman has used the term “world constitutionalism” to describe both the increase in the number of written constitutions since World War II and the increase in the importance of national consti-
larger issue that seems to arise only when constitutional courts engage in the international judicial dialogue: whether domestic constitutional texts must "license" courts' examination of foreign or supranational jurisprudence.\textsuperscript{13} This Part assesses why many constitutional courts do not attempt to justify their participation in the international conversation in terms of a constitutional license.

Section A scrutinizes the interpretive approach taken by several courts that have engaged in the international judicial dialogue in the capital punishment context. This section contends that the courts' willingness to analyze and then either to follow or disregard foreign and supranational precedents suggests that they do not view domestic law as subordinate to international law. Section A concludes that the supposed superiority of international law does not license engagement in the international judicial conversation. Section B examines various reasons that courts might look to outside jurisprudence and argues that none adequately explains why they do not justify their reliance on foreign and supranational precedents in terms of a textual constitutional license. Section B concludes that the courts of other nations — the constitutional traditions of which were formed largely by borrowing from foreign sources — seem to view their domestic charters as having an international character. Section C then analyzes the oft-noted hesitancy of the U.S. Supreme Court to engage in dialogue with its foreign counterparts\textsuperscript{14} and argues that one explanation for the

\textsuperscript{13} See Mark Tushnet, The Possibilities of Comparative Constitutional Law, 108 YALE L.J. 1225, 1231 (1999) (using the word "license" in the context of comparative constitutional law); infra pp. 2062–63.

Court's behavior is its view of the U.S. Constitution as a document with a singularly American character.

This Part proposes that the decision to look to international law when making or interpreting a domestic constitution reflects in part a concept of the constitution as one — but still only one — of many documents embodying the norms of international law. Courts with an internationalist view of their domestic charters do not need an explicit textual license to find that outside precedents, though not always dispositive, are nevertheless pertinent to constitutional interpretation.

A. The Process of Incorporation

The death penalty cases discussed in this section demonstrate that constitutional courts employ a common interpretive process when they engage in the international judicial dialogue. Although these courts canvass relevant foreign and supranational jurisprudence, they also study applicable domestic law and political concerns to evaluate whether the incorporation of outside legal norms will be compatible with the domestic climate. The willingness of these courts to examine and then either to follow or distinguish foreign and supranational authority indicates that these tribunals do not participate in the international judicial dialogue because they believe that the opinion of the international community supersedes domestic law. Instead, these domestic courts engage in the dialogue because they view outside jurisprudence as a helpful resource that indicates how other courts have dealt with similar legal issues.

1. Examining Foreign and Supranational Jurisprudence. — The ways in which two domestic constitutional courts examined the same supranational precedent provides a useful illustration of the interpretive process used by courts that engage in the international judicial dialogue. The Canadian and Jamaican Supreme Courts both analyzed, but treated differently, the decision of the European Court of Human Rights (European Court)\(^\text{15}\) in *Soering v. United Kingdom.*\(^\text{16}\)

In *Soering,* the European Court examined whether the United Kingdom's extradition of a fugitive to face a possible death sentence in Virginia would offend article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European

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\(^\text{15}\) The European Court of Human Rights functions independently of the institutions of the European Union. The 1949 treaty that established the Council of Europe also created this court to enforce the protections embodied in the European Convention for the Protection of Human Rights and Fundamental Freedoms. Stephen Breyer, *Changing Relationships Among European Constitutional Courts,* 21 CARDOZO L. REV. 1045, 1056–57 (2000). The court has jurisdiction over the forty nations that comprise the Council of Europe. *Id.* In recent years, the European Court has become increasingly influential in the development of international human rights norms. Slaughter, *supra* note 1, at 1109–12.

The court noted that capital defendants in Virginia often remained on death row for six to eight years because of the lengthy appeals process. The court found that by subjecting prisoners to "the anguish and mounting tension of . . . the ever-present shadow of death," extradition of a fugitive to face this "death row phenomenon" violated article 3.

The Canadian Supreme Court looked to, but declined to follow, *Soering* when deciding *Kindler v. Canada*, a case that similarly involved the extradition of two fugitives to the United States. Like the European Court in *Soering*, the Canadian court in *Kindler* analyzed relevant international law and maintained that its ruling was "not out of step with the international community." The Canadian court recognized that its decision to permit extradition conflicted with the views of the European Court, but contended that the decision in *Soering* did not reflect a universally accepted norm. Pointing to a decision by the European Commission of Human Rights (European Commission) that allowed the extradition of a fugitive to the United States, the Canadian court argued that the international community was divided on the propriety of extraditing fugitives to face the death penalty. The court found that the legal norm reflected in the European Commission's ruling would accord better with Canada's domestic law.
needs. Thus, even though the Canadian court declined to follow an international norm, it chose to justify its decision in terms of international law.

In contrast to the Canadian Supreme Court, the British Privy Council, sitting as the Jamaican Supreme Court in *Pratt v. Attorney-General for Jamaica*, gave more weight to the European Court’s analysis in *Soering*. *Pratt* involved an appeal brought by two capital defendants who had been on death row for almost fourteen years. The defendants argued that such a long detention spent awaiting death constituted “inhuman or degrading punishment” in violation of section 17(1) of the Jamaican constitution. The Privy Council, describing the delay as “shocking,” commuted the defendants’ sentences to life imprisonment.

In its opinion, the Privy Council surveyed the international scene and noted the division of opinion among domestic and supranational courts regarding the cruelty of long detentions, particularly when the delay resulted from defendants’ discretionary appeals. Persuaded by the reasoning in decisions like *Soering*, the Privy Council found that if a prisoner were able to delay his execution for a period of years, the fault would lie with the inefficient appellate process. The Privy Council examined the domestic situation in Jamaica and sympathized with the nation’s “disturbing murder rate” and “limited financial resources” with which to administer the criminal justice system. The

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26 The court observed that because of Canada’s “long border with the United States,” *id.* at 844, there was a serious concern that if the Canadian government were unable to extradite fugitives, the country “might become a safe haven for criminals... seeking to avoid the death penalty,” *id.* at 853.


28 *Id.* at 33; *see also id.* at 19–27 (describing the chronology of events in the case).

29 *Id.* at 27 (internal quotation marks omitted).

30 *Id.* at 33.

31 *Id.* at 34.

32 *Id.* at 30–31 (comparing decisions such as *Kindler and Richmond v. Lewis*, 948 F.2d 1473 (9th Cir. 1990), both of which held that a long detention on death row was not cruel or unusual, to the Zimbabwean Supreme Court’s decision in *Catholic Commission for Justice and Peace v. Attorney-General*, 1993 (1) ZLR 242 (S) (Zimb.), which found that prisoners could not be faulted for taking advantage of every opportunity to appeal). The Privy Council also noted that one of the defendants in *Pratt* had appealed to the Inter-American Commission on Human Rights and the United Nations Human Rights Committee, *id.* at 21–22, both of which concluded that the sentence should be commuted on humanitarian grounds, *id.* at 23–25.

33 *Id.* at 31–33. The Privy Council compared *Pratt* to *Soering* as though the latter were a clear precedent for the former and stated that the delay in Pratt’s execution was “double the time that the European Court of Human Rights considered would be an infringement of article 3 of the European Convention... and their Lordships can have no doubt that an execution would now be an infringement of section 17(1) of the Jamaican Constitution.” *Id.* at 33.

34 *Id.* (“It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure.”).

35 *Id.* at 34.
Privy Council found, however, that Jamaica’s colonial history, as well as its own rules of criminal procedure, indicated that Jamaica could comply with what the court considered to be the appropriate international standard.\(^\text{36}\)

2. The Increasing Sophistication of the Dialogue. — A comparison of two other decisions, one by the Indian Supreme Court in 1980 and the other by the South African Constitutional Court in 1995, illustrates the growing complexity and sophistication of the international dialogue. The enormous increase in the number of supranational and foreign constitutional courts, along with the increasing availability of written opinions from a broad range of jurisdictions, allowed the South African Constitutional Court to examine many more judicial resources than its counterpart in India.\(^\text{37}\) Yet although the South African Constitutional Court was able to conduct a more expansive and detailed analysis of international law, both courts employed an interpretive approach similar to that used by the Canadian and Jamaican Supreme Courts in the cases discussed above.

The Indian Supreme Court’s decision in Bachan Singh v. Punjab,\(^\text{38}\) which upheld the constitutionality of the death penalty,\(^\text{39}\) illustrates a case typical of those in the early years of the international judicial dialogue. In Bachan Singh, the Indian Supreme Court surveyed foreign practice\(^\text{40}\) and scholarship.\(^\text{41}\) It relied in particular on the jurisprudence of the United States and Great Britain, the only two nations whose law reports were widely available.\(^\text{42}\) Because the Indian court found that many “persons of reason, learning and light” disagreed

\[^{36}\text{Id.}\] The Privy Council recalled that the death penalty had always been carried out swiftly in Britain, \(\text{id.}\) at 17, and scolded that “[d]elay of the character which has occurred in this case had never happened in Jamaica before independence,” \(\text{id.}\) at 19.

\[^{37}\text{Modern technology has increased the accessibility of foreign and supranational decisions. See L’Heureux-Dubé, supra note 2, at 25 (noting that advances in technology, such as the Internet, have helped judges access the decisions of courts in other jurisdictions).}\]

\[^{38}\text{[1980] 2 S.C.J. 475 (India).}\]

\[^{39}\text{Id. at 509.}\]

\[^{40}\text{Id. at 504–06, 509. The court stated that its objective in surveying international practice was to demonstrate that “in spite of the Abolitionist movement, only 18 States . . . have abolished the death penalty for all offenses.” Id. at 506. Listing Russia, the United States, France, Belgium, Malaysia, China, and Japan as nations that retained the death penalty, the Indian court commented that those countries “cannot, by any standard, be called uncivilized nations or immature societies.” Id.}\]

\[^{41}\text{Id. at 497–500, 502–04. The court observed that there had been few scientific studies on crime in India, \(\text{id.}\) at 504, demonstrating one of the practical reasons for its decision to use international and foreign sources, see infra section B.1, pp. 2059–62 (discussing practical reasons for the incorporation of international law).}\]

\[^{42}\text{Bachan Singh, [1980] 2 S.C.J. at 496–97, 501, 513–14, 518–21; see L’Heureux-Dubé, supra note 2, at 20. The Indian court’s reliance on American law may also be a result of the textual similarities between the American and Indian constitutions. See id. at 18.}\]
about the utility of the death penalty, it refused to substitute its opinion for the will of the parliament.\textsuperscript{43}

Even as it discussed international practice and precedent, the Indian Supreme Court maintained that its analysis of international law was consistent with domestic history and tradition.\textsuperscript{44} The court highlighted several portions of the Indian constitution that indicated that the "Constitution-makers" favored retention of the death penalty.\textsuperscript{45} Perhaps most explicitly, the court — even as it relied heavily on American jurisprudence — expressed "grave doubts about the expediency of transplanting western experience in our country."\textsuperscript{46} The court's reference to India's cultural differences with other nations seems to have been a way of justifying its decision not to incorporate some outside legal standards.

Fifteen years later in State v. Makwanyane,\textsuperscript{47} the South African Constitutional Court considered whether capital punishment constituted "cruel, inhuman or degrading treatment or punishment" in violation of section 11(2) of the Interim Constitution of South Africa.\textsuperscript{48} Before holding the death penalty unconstitutional,\textsuperscript{49} the South African court conducted an extensive review of international and foreign legal materials pertaining to capital punishment. The Constitutional Court noted that a provision of the South African Interim Constitution required an analysis of international and foreign materials.\textsuperscript{50} The court

\begin{footnotes}
\item[44] As it surveyed foreign practice with respect to the death penalty, the court emphasized that "conditions . . . in [its] own country" were of particular concern. \textit{Id.} at 505. Citing the \textit{Encyclopedia Britannica} (a reference that perhaps, in and of itself, demonstrates the limited nature of judicial communication in 1980), the court observed that the violent crime rate was rising rapidly throughout the world but immediately discussed crime conditions in India. \textit{See id.}
\item[45] \textit{Id.} at 508. The court pointed, for example, to article 72(1)(c) of the Indian constitution, which gives the president the power to commute a death sentence. \textit{Id.}
\item[46] \textit{Id.} at 514. The court was referring to the U.S. Supreme Court's holding in \textit{Furman v. Georgia}, 408 U.S. 238 (1972), that the unfettered discretion given to judges and juries, which led to the arbitrary application of the death penalty, violated the Eighth Amendment. \textit{Bachan Singh}, [1980] 2 S.C.J. at 513-14.
\item[47] 1995 (3) SALR 391 (CC) (S. Afr.).
\item[48] \textit{Id.} at 403. The Interim Constitution was adopted in 1993 after the completion of the defendants' trial but before the end of the appeals process. \textit{Id.} at 401.
\item[49] The court concluded that the death penalty was a "cruel, inhuman and degrading" punishment, \textit{id.} at 434, and that the government had not made a "clear and convincing case" to justify such an infringement of section 11(2) of the South African Interim Constitution, \textit{id.} at 451.
\item[50] The court quoted section 35(1) of the Interim Constitution:

\begin{quotation}
In interpreting the provisions of this chapter a court of law shall promote the values which underlie an open and democratic society . . . and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this chapter, and may have regard to comparable foreign case law.
\end{quotation}

\textit{Id.} at 413 (internal quotation marks omitted). South Africa's current constitution contains a similar provision. \textit{See S. AFR. CONST.} (Act No. 108, 1996), § 39 (stating that courts, when interpret-
indicated, however, that even absent such a provision, it would have looked to external legal sources because of their "value" in demonstrating how foreign courts had handled similar issues.\(^5\)

The South African Constitutional Court observed that a general trend toward limiting the use of capital punishment had developed "[a]s societies became more enlightened" in the second half of the twentieth century.\(^5\) The court then reviewed the death penalty jurisprudence of several foreign courts and supranational tribunals.\(^5\) Although the South African court found that the death penalty did not violate public international law per se,\(^5\) it noted that the United Nations Committee on Human Rights, the Hungarian Constitutional Court, and three justices of the Canadian Supreme Court\(^5\) had declared the death sentence to be a cruel and unusual punishment.\(^5\) Even courts that had upheld the death penalty, such as the Supreme Courts of the United States and India, had placed restrictions on its implementation.\(^5\) Thus, the bulk of international law, viewed in the context of the worldwide trend toward limiting or abolishing capital punishment, supported the South African court’s decision to invalidate the death penalty.

\(^{51}\) Makwanyane, 1995 (3) SALR at 413; see also infra note 76 (assessing whether the South African court felt it needed a constitutional "license" to conduct an analysis of international law).

\(^{52}\) Id. at 412-13.

\(^{53}\) The South African Constitutional Court evaluated the jurisprudence of the U.S. Supreme Court. Id. at 415-17, 418, 420, 421-23. The South African court also examined the Canadian Supreme Court’s decision in *Kindler v. Canada* and distinguished it from *Makwanyane* on its facts. Id. at 423-24 (noting that *Kindler* involved the validity of the executive’s order of extradition, not the constitutionality of the death penalty in Canada). The South African court also examined the Indian Supreme Court’s ruling in *Bachan Singh*, id. at 426-29, and a decision of the Hungarian Constitutional Court, *id.* at 429-30.

\(^{54}\) The court reviewed rulings of the Human Rights Committee of the United Nations and the European Court of Human Rights. Id. at 425-26, 429. Examining *Soering v. United Kingdom*, the South African court observed that the European Court of Human Rights had been in a "comparable position." Id. at 426. The South African court characterized Great Britain’s dilemma in *Soering* as a choice between extradition of a fugitive to the United States, which allows the death penalty, and extradition to Germany, which had abolished capital punishment and which could hold its citizens liable for acts committed elsewhere. Id. Similarly, the *Makwanyane* court explained (implicitly referencing *Kindler*) that it was choosing between capital punishment and life imprisonment and that it did not face a “choice between freedom and death.” Id.

\(^{55}\) Id. at 414.

\(^{56}\) The Canadian parliament eliminated the death penalty for domestic crimes in 1976, *Kindler v. Canada*, [1991] 2 S.C.R. 779, 851 (Can.), so the Canadian Supreme Court did not have to decide the constitutionality of capital punishment. The South African court noted that three justices in *Kindler* nevertheless argued that the death penalty was inherently cruel and unusual. *Makwanyane*, 1995 (3) SALR at 432.

\(^{57}\) *Makwanyane*, 1995 (3) SALR at 432.

\(^{58}\) Id. at 421, 428.
Like its counterparts in Canada and India, the South African Constitutional Court was careful to ensure that an invalidation of the death penalty would accord with domestic law.\textsuperscript{59} The South African court noted that unlike the constitutions of the United States and India, and unlike the European Convention and the International Covenant on Civil and Political Rights (ICCPR), section 9 of the South African Interim Constitution guaranteed an "unqualified right to life."\textsuperscript{60} The South African court interpreted such important rights broadly in accord with "[t]he very reason for establishing the new legal order," which was to protect the rights of people who have limited control over the political process.\textsuperscript{61} Because the domestic situation did not require retention of the death penalty\textsuperscript{62} — and in fact pointed toward abolition — the Constitutional Court adopted the dominant international view and invalidated the death penalty.\textsuperscript{63}

3. The Absence of Legal Hierarchy. — The decisions discussed above demonstrate that even as the international judicial dialogue has increased in complexity and has begun to include participants from a variety of countries, the interpretive process has remained much the

\textsuperscript{59} The South African court made it clear that supranational and foreign legal sources, even if persuasive, could never be dispositive. See id. at 415 ("In dealing with comparative law we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution.").

\textsuperscript{60} Id. at 429.

\textsuperscript{61} Id. at 431. For this reason, the court declared that prevailing public opinion on capital punishment could not be dispositive. See id. In the midst of its discussion of the U.S. Supreme Court's capital punishment jurisprudence, the South African Constitutional Court acknowledged some bitter truths about its legal system:

[T]he overwhelming majority of those sentenced to death are poor and black. There is an enormous social and cultural divide between those sentenced to death and the Judges before whom they appear, who are presently almost all white and middle class.... The differences... are particularly relevant when the personal circumstances of the accused have to be evaluated for the purposes of deciding upon the sentence.

Id. at 419 n.78. The court also noted that defense counsel was usually "young and inexperienced, frequently of a different race to his or her client, and, if this is the case, usually has to consult through an interpreter." Id. at 419. The court acknowledged that it was impossible to ensure equality in the criminal justice system or to avoid all errors, but asserted that "death is different." Id. at 421. While "[u]njust imprisonment is a great wrong... the killing of an innocent person is irremediable." Id. These statements indicate the court's belief that the faults of the South African criminal justice system required the invalidation of capital punishment.

\textsuperscript{62} The Constitutional Court acknowledged the "high incidence of violent crime in South Africa," id. at 442, but concluded that the death penalty was not the proper method for dealing with the problem, id. at 443. The court argued that the most important factor in deterring crime is the likelihood that criminals will be apprehended and convicted, and observed that "[i]t is that which is presently lacking." Id. The court also found that life imprisonment would be a sufficient deterrent of crime. See id. at 445. The court accorded even "less weight" to the goal of retribution. Id.

\textsuperscript{63} Id. at 451.
same. If these courts believed that international law were superior to domestic law, then they would only have to justify a decision not to follow supranational and foreign law, and it would be easy to understand why none of them seems concerned about demonstrating that it has a constitutional "license" to look to outside legal sources. But none of these courts was willing to adopt an outside legal norm unless it acceded with domestic legal and political traditions. Thus, the interpretive process of these courts indicates that they do not view domestic law as subordinate to international law.

The next section examines possible rationales for courts' decisions to enter the international judicial dialogue. It argues that none of these reasons adequately explains constitutional courts' lack of concern about the existence of a constitutional "license" authorizing their use of outside legal sources.

B. Theoretical Aspects of Incorporation

Constitutional courts that join the international conversation investigate supranational and foreign legal sources when faced with questions of constitutional interpretation. Scholars have identified various practical and political reasons why courts might examine external legal sources. The benefits that courts derive from the international judicial dialogue may explain why domestic courts engage in the conversation despite the inherent difficulties of incorporating legal norms from abroad. These recognized benefits do not explain, however, why domestic courts are not troubled by another issue that arises in the constitutional context: whether the constitutional text "license[s]" a court's reliance on outside legal norms.

By reexamining the cases discussed in section A, this section explores why the courts in those cases did not seem troubled by the issue of constitutional license. Those courts seemed to assume that international and foreign legal sources should inform the meaning of their nations' constitutions. This section argues that many courts join the international judicial conversation with a particular conception of the relationship between international law and their domestic constitutions. Those courts seem to view their domestic constitutions as part of a family of foreign and supranational documents, each of which serves as a source of general legal norms. Thus, the courts seem to find it not only appropriate, but even natural, to examine (and perhaps ultimately to rely on) the interpretations that their foreign and supranational counterparts have given to similar constitutional provisions.

1. Practical and Political Reasons To Join the International Judicial Dialogue. — Just as the framers of a new constitution find it use-
ful to adopt ideas from foreign and supranational documents, new constitutional courts find it beneficial to "borrow" existing doctrine from abroad. The reliance of the Indian Supreme Court and the South African Constitutional Court on foreign scholarship and jurisprudence reflected in part this practical concern.


65 For uses of the term "borrowing" in the context of the international judicial dialogue, see generally Kreimer, supra note 14; and Vörös, supra note 64, at 655–59.

66 The courts of civil law nations, of course, do not cite other judicial rulings, whether from foreign or domestic courts. See MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 135–36 (1981); see also A.N. Viannopoulos, Jurisprudence and Doctrine as Sources of Law in Louisiana and in France, in THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS 69, 72 (Joseph Dainow ed., 1974) (explaining that jurisprudence, or case law, is not recognized in civil law nations as a source of law because "the legislative function is entrusted to the legislature and the people exclusively"); cf. JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 36 (2d ed. 1985) (noting that civil law nations have rejected the doctrine of stare decisis). This refusal to rely on precedent may suggest that courts in civil law countries are unable to participate in the international judicial dialogue. Yet civil law nations do have an important role to play. For example, the German constitution ensures that the decisions of the German Constitutional Court are binding precedent. See Donald P. Kommers, German Constitutionalism: A Prolegomenon, 40 EMORY L.J. 837, 840 (1991). The German Constitutional Court has used this constitutional power to become an important participant in the international judicial dialogue. See Slaughter, supra note 1, at 1107–08. Civil law courts in other parts of Europe may also participate because they must enforce the law of the European Union. See Breyer, supra note 15, at 1059 (noting that French courts, which have not traditionally had the power of judicial review, must invalidate domestic statutes that conflict with European law).

In addition, some scholars in civil law countries such as France argue that although judges do not cite cases, they do in practice rely on the reasoning of past judicial rulings. See MERRYMAN, supra, at 47; Jean Carbonnier, Authorities in Civil Law: France, in THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS, supra, at 91, 97. Judges can usually determine, even absent citations, the prior opinions on which a decision relies. SHAPIRO, supra, at 135. Under this analysis, civil law courts can participate in the international judicial dialogue to some extent. Because, however, one focus of this Part is the interpretive process of the international judicial conversation, it focuses on common law courts that do cite precedent.

67 See Makwanyane, 1995 (3) SALR at 414 (“Comparative ‘bill of rights’ jurisprudence will no doubt be of importance, particularly in the early stages of transition when there is no developed indigenous jurisprudence in this branch of the law on which to draw.”); Bachan Singh v. Punjab, [1980] 2 S.C.J. 475, 504 (India) (indicating that there had been few empirical studies on crime within India’s own borders and turning to international and foreign sources for that information).
This process of borrowing results from more than just the need for legal sources. Many countries have significant political reasons for incorporating outside legal norms. Some countries with unfortunate international reputations join the international judicial dialogue to improve their status in the world community. For example, South Africa, which once permitted apartheid, has relied on the jurisprudence of its Constitutional Court to help demonstrate the nation’s renewed commitment to civil rights.68 Other nations enter the international judicial dialogue to increase their influence over the creation of international norms. A desire for an authoritative role in the formation of international legal rules and standards seems to have motivated the participation of the Canadian Supreme Court69 and some European constitutional courts.70

The South African Constitutional Court’s decision in *Makwanyane* illustrates that participating in the dialogue can help a national court gain international influence. In discussing (and distinguishing) the Indian Supreme Court’s jurisprudence on capital punishment, the South African Constitutional Court compared its overview of international jurisprudence to that of the *Bachan Singh* court.71 The *Makwanyane* court’s analysis suggests that courts that engage in the international judicial conversation help to define the predominant international judicial opinion on a particular legal question. This development has significant implications for courts that decline to engage in the international dialogue. Although the ruling of any national court that deals with a substantive legal issue (such as the propriety of extraditing a fugitive to face the death penalty) may influence other courts that deal with analogous legal questions, only courts that engage in the interna-

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69 L’Heureux-Dubé, *supra* note 2, at 37; see id. at 38 (“In my view, the most useful judgments for courts looking to comparative sources are those that use comparative materials themselves.... Decisions which look only inward... have less relevance...”).

70 Slaughter, *supra* note 1, at 1107–08 (describing the competition for influence between European supranational and national courts).

tional judicial conversation can contribute to the definition of the predominant international judicial norm and shape the development of international law.  

2. The Difficulties of Incorporation: A Possible Need for a Constitutional "License." — Section B.1 suggests why national courts might not be deterred from engaging in the international judicial dialogue by some of the usual difficulties of comparative legal analysis — for example, problems created by differences in language, history, culture, and tradition. The cases discussed in section A illustrate how courts can overcome these difficulties by incorporating only those outside legal standards that accord with domestic political and legal traditions. The benefits of participating in the international judicial conversation do not explain, however, why courts that engage in constitutional interpretation do not attempt to show that their constitutions explicitly permit their reliance on outside legal sources.

Professor Mark Tushnet contends that a constitutional court may need a textual "license" before it can engage in the international judicial dialogue. In light of this argument, it is curious that none of the courts discussed in section A felt compelled to demonstrate that it had

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72 Cf. L'Heureux-Dubé, supra note 2, at 39 (arguing that "considering and comparing judgments from various jurisdictions makes for stronger, more considered decisions, even if the result is the same"). For a discussion of the implications of this development for the U.S. Supreme Court, see note 117, below.

73 See MARY ANN GLENDON, MICHAEL WALLACE GORDON & CHRISTOPHER OSAKWE, COMPARATIVE LEGAL TRADITIONS 4-5 (2d ed. 1994) ("Variations in the political, moral, social and economic values which exist between any two societies make it hard to believe that many legal problems are the same for both except on a technical level."); Kreimer, supra note 14, at 647 (noting problems of translation and arguing that even when nations use the same language, "verbal similarities may be misleading"); Tushnet, supra note 13, at 1265-69 (explaining that the existence of multiple variables in comparative constitutional analysis makes it difficult for nations to learn from each other); cf. Wyman, supra note 14, at 560, 564-65 (noting, though criticizing, the argument that cultural differences with abolitionist nations justify the use of the death penalty in China and in Islamic states).

74 Courts also avoid the problems of comparative law by looking to decisions of courts from nations with similar constitutional texts and legal histories. See L'Heureux-Dubé, supra note 2, at 31-32 (noting the tendency of courts to rely on decisions that interpret similar textual provisions); see also Sujit Choudry, Globalisation in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation, 74 IND. L.J. 819, 871-85 (1999) (arguing that because of the countries' shared historical and legal background, the Canadian Supreme Court could rely on the U.S. Supreme Court's Native American jurisprudence when deciding aboriginal rights cases).

Professor Mary Ann Glendon argues persuasively that even when nations do not borrow legal rules from other nations, they may learn important lessons about domestic culture. See MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 8-9 (1987). For an insightful discussion of some of the difficulties with this use of comparative law, see Tushnet, supra note 13, at 1260-81.

75 Tushnet, supra note 13, at 1231 ("We might say that the Constitution must license the use of comparative material for the courts to be authorized to learn from constitutional experience elsewhere.").
permission to engage in comparative analysis.\textsuperscript{76} Because the concern about a textual license may be based on separation of powers theory,\textsuperscript{77} courts that do not have a strict view of their judicial roles would not be expected to worry about the issue. Yet even courts that claim to practice judicial restraint, such as the Canadian and Indian Supreme Courts,\textsuperscript{78} seem unconcerned whether their constitutions license their examination of foreign and supranational legal sources. In the cases discussed in section A, both of these courts assumed that international law should inform their constitutional interpretation, without recognizing that there might be a need to justify that assumption.

3. An International View of the Domestic Constitution. — The willingness of domestic constitutional courts to look to international law without justifying that interpretive approach suggests that they view their constitutions as components of a larger body of international legal documents. To the constitutional courts of Canada, Jamaica, India, and South Africa, their constitutions are not simply domestic charters that reflect the values of Canadian, Jamaican, Indian, or South African society, but examples of many world documents that

\textsuperscript{76} The South African Constitutional Court did note that a provision in its constitution seemed to require (and thus license) the examination of international and comparative law. \textit{Makwanyane, 1995 (3) SALR at 413; see supra pp. 2056–57.} Yet the court insisted that the provision was not dispositive. \textit{Makwanyane, 1995 (3) SALR at 413} ("The international and foreign authorities are of value because they ... show how Courts of other jurisdictions have dealt with [the] vexed issue [of the death sentence]. For that reason alone, they require our attention."). Other constitutions also provide what is arguably a textual license for international and comparative analysis. See Henckaerts & Van der Jeugt, \textit{supra} note 68, at 504 (observing that article 7 of the Hungarian constitution states that domestic law must adopt international norms).

\textsuperscript{77} See Curtis A. Bradley & Jack L. Goldsmith, \textit{Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 HARV. L. REV.} 815, 861 (1997) ("The federal common law of foreign relations is based on the principle that the federal political branches, and not the courts, are constitutionally authorized and institutionally competent to make foreign relations judgments.").

One of the concerns may be that the judiciary does not have a tremendous amount of guidance regarding how to apply international law, and thus may go beyond the proper judicial function. Cf. H.L.A. Hart, \textit{The Concept of Law} 214 (2d ed. 1994) ([I]nternational law ... [lacks] a unifying rule of recognition specifying 'sources' of law and providing general criteria for the identification of its rules."). The problem may also involve democratic theory: one nation’s courts should not rely on the decisions of judges whom that nation’s citizens did not have even an indirect voice in selecting. Cf. Karen Knop, \textit{Here and There: International Law in Domestic Courts,} 32 N.Y.U. J. INT’L L. & POL. 501, 504 (2000) ("The application of international law is thus fraught with the anxiety of imperialism: how can international law be perceived as legitimate by a community that has not participated equally in its creation or does not see its own reality reflected in international law?").

\textsuperscript{78} While looking to foreign materials, the Indian Supreme Court emphasized its attitude of judicial restraint and its usual reluctance to hold acts of parliament unconstitutional. See Bachan Singh v. Punjab, [1980] 2 S.C.J. 475, 493, 505 (India). The Canadian Supreme Court similarly declared its commitment to judicial restraint in matters of foreign affairs. See Kindler v. Canada, [1991] 2 S.C.R. 779, 849 (Can.) ("In recognition of the various and complex considerations which necessarily enter into the extradition process, ... judicial scrutiny should not be over-exacting.").
reflect general legal norms. Justice Kirby of the Australian Supreme Court explains:

To the full extent that its text permits, Australia's Constitution . . . accommodates itself to international law, including insofar as that law expresses basic rights. The reason for this is that the Constitution not only speaks to the people of Australia . . . . It also speaks to the international community as the basic law of the Australian nation which is a member of that community. 79

Most of the world's constitutions were written, and most of its constitutional courts were created, within the context of the international constitutional dialogue. 80 The Indian constitution (1949), the Jamaican constitution (1962), the Canadian Charter of Rights and Freedoms (1982), and the South African Interim Constitution (1993) were drafted largely by looking to foreign and international experience. 81 Similarly, the constitutional courts, when interpreting the new constitutional provisions, relied on foreign and international precedents. The constitutionalism of these countries developed around an international judicial (and nonjudicial) conversation. Thus, it seems that to be an Indian, Jamaican, Canadian, or South African believer in constitutionalism is to be a believer in international constitutionalism.

C. The American Anomaly

The U.S. Supreme Court has been notably absent from the international judicial dialogue. Even as its opinions are cited by constitutional courts all over the world, 82 the U.S. Supreme Court continues to look inward. Recently, Justice Stephen Breyer's judicial opinions have advocated the use of comparative and international legal sources, 83 but other Justices have endorsed the international judicial dialogue only in

80 See generally Ackerman, supra note 12 (describing the rise in the number of countries with written constitutions and constitutional courts).
81 See L'Heureux-Dubé, supra note 2, at 18–19 (explaining the reliance of the framers of the Indian constitution and the Canadian Charter of Rights and Freedoms on international and foreign sources); see also Pratt v. Attorney-General for Jamaica, [1994] 2 A.C. 1, 18–19 (P.C. 1993) (appeal taken from Jam.) (noting the influence of British tradition on Jamaican law after independence); cf. Tushnet, supra note 13, at 1237 (noting the tendency to look to foreign experience when drafting a national constitution).
82 See, e.g., supra section A.2, pp. 2055–58 (noting the reliance of the Indian Supreme Court and the South African Constitutional Court on decisions of the U.S. Supreme Court). The decisions of the Warren and Burger Courts, and particularly decisions like Brown v. Board of Education, 347 U.S. 483 (1954), and Miranda v. Arizona, 384 U.S. 436 (1966), "have had a large impact on the spirit and development of human rights protections worldwide." L'Heureux-Dubé, supra note 2, at 20. The Rehnquist Court has made less of an international impact. Id. at 30.
83 See Breyer, supra note 15, at 1060; see also Fried, supra note 14, at 818 (noting the significance of the fact that Justice Breyer has brought the debate over the propriety of using outside legal materials from law review articles into the Court's official opinions).
unofficial contexts.\footnote{Several Justices have expressed interest in the international judicial dialogue. See Slaughter, supra note 1, at 1118–19; see also Breyer, supra note 15, at 1045 n.1 (describing his recent trip to Europe to meet with judges of various constitutional courts, and noting that Justices O'Connor, Kennedy, and Ginsburg accompanied him). In a 1989 speech, Chief Justice Rehnquist stated: [N]ow 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. The United States courts, and legal scholarship in our country generally, have been somewhat laggard in relying on comparative law and decisions of other countries. But I predict that with so many thriving constitutional courts in the world today . . . that approach will be changed in the near future. William Rehnquist, Constitutional Courts — Comparative Remarks, in Germany and Its Basic Law: Past, Present, and Future — A German-American Symposium 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993). The Chief Justice has taken a few steps toward engaging the international judicial dialogue (thus far, outside the context of capital punishment). See Raines v. Byrd, 521 U.S. 811, 828 (1997) (Rehnquist, C.J.) ("There would be nothing irrational about a system that granted standing [to legislators] some European constitutional courts operate under one or another variant of such a regime. . . . But it is obviously not the regime that has obtained under our Constitution to date."); Planned Parenthood v. Casey, 505 U.S. 833, 945 n.1 (1992) (Rehnquist, C.J., dissenting) (citing without discussion the West German Constitutional Court’s decision declaring unconstitutional a law that permitted abortion and a Canadian court’s decision invalidating a restriction on abortion).}

This section suggests that the Court’s reluctance to rely on the precedents of foreign and supranational tribunals stems from its belief in the purely American character of the U.S. Constitution.

1. One Justice’s Attempt To Join the International Judicial Dialogue. — The U.S. Supreme Court’s death penalty jurisprudence illustrates some willingness to examine the practices of the international community.\footnote{In Coker v. Georgia, 433 U.S. 584 (1977), when analyzing the validity of capital punishment in rape cases, the Court stated that it was “not irrelevant” that much of the rest of the world had abolished the death penalty in such cases. Id. at 596 n.10. A few years later in Enmund v. Florida, 458 U.S. 782 (1982), which involved the imposition of the death penalty for felony murder, the Court reiterated the view that “international opinion” might be relevant to the determination of the Eighth Amendment’s meaning. Id. at 796 n.22; see Wyman, supra note 14, at 554 (arguing that the Enmund Court “explicitly adopted consideration of international opinion as part of its ‘disproportionality analysis’ concerning capital punishment”).}

In \textit{Thompson v. Oklahoma},\footnote{In \textit{Thompson}, in which the Court declared the death penalty an inappropriate punishment for juveniles below the age of sixteen, \textit{id.} at 838, the plurality conducted a survey, more elaborate than in previous decisions, of international opinion. The Court noted that many countries, including West Germany, France, Portugal, the Netherlands, and the Scandinavian countries, had abolished the death penalty. \textit{Id.} at 831. Other nations, such as Canada, Italy, Spain, and Switzerland, had significantly limited the use of capital punishment. \textit{Id.} Even nations retaining the death penalty, including Great Britain, New Zealand, and the Soviet Union, had prohibited the death penalty in cases involving juveniles. \textit{Id.} at 830–31.} the Court identified the reason that it has looked to international opinion in capital cases:\footnote{487 U.S. 815 (1988).} the Eighth Amendment’s prohibition of “cruel and unusual” punishment is informed by the “evolving standards of decency that mark the
progress of a maturing society."\textsuperscript{88} The practices of foreign countries, particularly Western European democracies, were relevant to the determination of those evolving standards.\textsuperscript{89}

As Justice Breyer has recently suggested in a case involving the "death row phenomenon," the same rationale could support a reliance on foreign and supranational jurisprudence. In \textit{Knight v. Florida},\textsuperscript{90} the Court refused to hear a petitioner's claim that his twenty-five-year detention on death row constituted "cruel and unusual punishment" in violation of the Eighth Amendment.\textsuperscript{91} Justice Breyer, dissenting from the Court's denial of certiorari, conducted a survey of foreign and supranational jurisprudence that in many ways mirrored the interpretive process of the Indian, Jamaican, Canadian, and South African courts.\textsuperscript{92} Justice Breyer argued that the U.S. Supreme Court should consider the decisions of the British Privy Council in \textit{Pratt v. Attorney-General for Jamaica} and the European Court of Human Rights in \textit{Soering v. United Kingdom}, both of which supported the petitioners' claims that their detentions were cruel and unusual.\textsuperscript{93} Although Justice Breyer acknowledged that the Canadian Supreme Court had reached a contrary conclusion in \textit{Kindler v. Canada}, he distinguished that decision on its facts.\textsuperscript{94}

Justice Breyer, like his foreign judicial counterparts, was careful to demonstrate that granting the defendant's petition on the merits would accord with American traditions. He stressed that his opinion relied primarily on rulings from jurisdictions with similar legal back-

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\textsuperscript{88} \textit{Id.} at 821 (quoting \textit{Trop v. Dulles}, 356 U.S. 86, 101 (1958)). In \textit{Trop v. Dulles}, the Court barred the use of denationalization to punish a serviceman who had deserted his company during World War II. \textit{Trop}, 356 U.S. at 102. In discussing its "evolving standards" analysis, the Court indicated that international opinion and practice were relevant to determining those evolving standards. \textit{Id.} at 101; \textit{see id.} at 102–03 ("The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime. ... [A] United Nations' survey ... reveals that only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion.").

\textsuperscript{89} \textit{Thompson}, 487 U.S. at 830–31.

\textsuperscript{90} 528 U.S. 990 (1999).

\textsuperscript{91} \textit{Id.} at 994 (Breyer, J., dissenting from denial of certiorari) (noting the length of detention). In a companion case to \textit{Knight}, the defendant protested a delay of nineteen years. \textit{Id.} at 993.

\textsuperscript{92} \textit{See id.} at 995–96.

\textsuperscript{93} \textit{Id.} Justice Breyer also referred to similar limitations that the Indian and Zimbabwean Supreme Courts put on the length of death row detention. \textit{Id.} The year before, in another case involving the death row phenomenon, Justice Breyer had similarly referred to the European Court of Human Rights's decision in \textit{Soering} as well as another decision of the British Privy Council. \textit{See Elledge v. Florida}, 525 U.S. 944, 944 (1998).

\textsuperscript{94} \textit{Knight}, 528 U.S. at 996 (Breyer, J., dissenting from denial of certiorari). Justice Breyer observed that the delays involved in \textit{Knight} and its companion case were much longer than the delay in \textit{Kindler}. \textit{Id.} Noting that the Canadian Supreme Court was divided 4–3 in \textit{Kindler}, Justice Breyer wondered if the court would have reached the same substantive conclusion if faced with a case involving delays of nineteen and twenty-five years. \textit{Id.}
grounds. Justice Breyer pointed out that judges of the courts to which he referred, like a majority of the members of the U.S. Supreme Court, "accept or assume the lawfulness of the death penalty." He also drew support from legal systems that, like that of the United States, are rooted in the common law tradition of the United Kingdom.

Justice Breyer stressed that he did not consider foreign or supranational jurisprudence to be binding. His analysis indicates, however, that he viewed such materials as helpful tools for the interpretation of the U.S. Constitution. The next section examines why other Justices do not seem to share Justice Breyer's enthusiasm for the international judicial conversation.

2. The Court's Reluctance To Join the International Judicial Dialogue. — Stanford v. Kentucky, which involved the constitutionality of imposing the death penalty on juveniles, may shed light on the Court's reluctance to analyze foreign and supranational jurisprudence. In an opinion by Justice Antonin Scalia, an ardent opponent of the use of outside jurisprudence, the Court, while acknowledging the "evolving standards" analysis in its Eighth Amendment jurisprudence, declared that "it is American conceptions of decency that are dispositive." Justice Scalia explained:

While "[t]he practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well," they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.

95 Id. at 997–98.
96 Id. at 995.
97 See id. at 997. Citing Thompson, Enmund, Coker, and Trop, Justice Breyer noted that the U.S. Supreme Court had previously "found particularly instructive opinions of former Commonwealth nations insofar as those opinions reflect a legal tradition that also underlies our own Eighth Amendment." Id. Justice Breyer also emphasized that holding long detentions unconstitutional would not conflict with various treaty provisions inserted at the behest of the U.S. Senate to exempt the United States from certain limitations on capital punishment. Id. at 996–97.
98 Id. at 996 (emphasizing that "we are interpreting a "Constitution for the United States of America" (quoting Thompson v. Oklahoma, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting))).
100 See Kreimer, supra note 14, at 649; Tushnet, supra note 13, at 1281.
101 Stanford, 492 U.S. at 369.
102 Id. at 369 n.1. The dissent strongly disputed this claim. Id. at 389 (Brennan, J., dissenting) ("Our cases recognize that objective indicators of contemporary standards of decency in the form of legislation in other countries is [sic] also of relevance to Eighth Amendment analysis.").
Justice Scalia seems to be saying that before the Court may even mention the practices of other nations, it must satisfy the "prerequisite" of showing that a similar American practice exists. He appears to believe that before looking abroad the Court must establish that American experience already mandates its decision, thereby demonstrating that comment on foreign or supranational practice is unnecessary to a holding of the Court.  

The Court's previous capital punishment cases support the claim that the Court must first establish a basis for its decisions in American practice and precedent. In *Thompson v. Oklahoma*, the Court again stated that the proper mode of analysis in Eighth Amendment cases is to look first to the opinions of state legislatures and then to the practices of sentencing juries, both of which are important "indicators of contemporary standards of decency." Although the *Thompson* Court later noted the relevance of international opinion, it did so only after conducting a long and detailed survey of American opposition to the execution of those below the age of sixteen. According to the majority in *Stanford*, Justice Scalia's "prerequisite" could not be satisfied because there was no American consensus on the execution of sixteen-
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and seventeen-year-olds. Thus, any international viewpoint was irrelevant.

Perhaps Justice Scalia's reasoning in Stanford could be understood as an attempt to avoid the substance of international legal opinion, which almost universally opposes the imposition of the death penalty on minors. Yet such an interpretation would be overly simplistic. As the analysis in section A indicates, the majority in Stanford could have arrived at its result without avoiding foreign and supranational jurisprudence. The Court could have surveyed international views on the juvenile death penalty but then explained that domestic conditions (specifically, the fact that many states continue to impose the death penalty on minors) were such that it could not follow the international trend.

Perhaps the Stanford Court's insistence on first establishing an American tradition is better understood in relation to the Court's view of the U.S. Constitution. As section B shows, the drafters of many constitutions relied on supranational and foreign legal sources during the drafting process. Similarly, newly formed constitutional courts, when interpreting their constitutional texts, have taken advantage of the existing precedents of supranational courts and foreign courts such as the U.S. Supreme Court. The constitutional traditions of these nations, therefore, seem to have developed around an international judicial (and nonjudicial) dialogue.

The constitutional history of the United States is quite different. For over two hundred years, the nation has developed and nurtured a

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109 See Stanford v. Kentucky, 492 U.S. 361, 380 (1989). Justice Scalia observed that of the thirty-seven states that then authorized capital punishment, twenty-two states imposed it on sixteen-year-olds. Id. at 370. Justice Scalia concluded that the apparent reluctance of juries to impose the death penalty on young people did not constitute a sufficient basis to invalidate numerous state laws. Id. at 373-74.

110 Justice Thomas, concurring in the denial of certiorari in Knight, used a similar rationale for rejecting international opinion. He commented that "were there any . . . support [for the petitioners' claim] in our own jurisprudence, it would be unnecessary for proponents of the claim to rely on the European Court of Human Rights . . . or the Privy Council." Knight v. Florida, 528 U.S. 990, 990 (1999) (Thomas, J., concurring in denial of certiorari).


112 The Court could have used reasoning analogous to that of the Indian Supreme Court in Bachan Singh, which relied on the text of the Indian constitution and on the apparent views of its framers to explain the inapplicability of outside precedent. See supra p. 2056. The cases discussed in section A, pp. 2052-59, above, demonstrate that it is possible to recognize an international legal view without adopting it.

113 See sources cited supra note 64.

114 See L'Heureux-Dubé, supra note 2, at 20 (noting that because the only law reports available in the early days of the international judicial dialogue were those of British and American courts, young constitutional courts were in large part limited to the precedents of those jurisdictions).
domestic constitutional tradition.\textsuperscript{115} Perhaps that is one reason that the U.S. Supreme Court resists the international judicial dialogue. To cite foreign jurisdictions, to examine and distinguish their cases as precedents, is to admit that the U.S. Constitution is but one (even if an important one) of many instruments that define general legal norms. As the Australian justice quoted in section B indicated,\textsuperscript{116} to join the international dialogue is to concede that the rest of the world’s constitutions and other international documents “speak to,” and thereby help determine the content of, domestic constitutions.\textsuperscript{117}

Perhaps the above analysis helps to explain why Justice Scalia emphasized the order of the Court’s analysis. If the Court were first to establish the basis for a decision by examining American practices, then any reference to foreign or supranational rulings would merely reaffirm the propriety of American legal norms. Yet if the Court were first to examine foreign or supranational decisions, even if it were to

\textsuperscript{115} See generally Michael Kammen, A Machine That Would Go of Itself: The Constitution in American Culture (1994) (cataloguing the cultural and popular aspects of American constitutionalism). Kammen observes that in the mid-nineteenth century, Daniel Webster remarked that the U.S. Constitution “is all that gives us a NATIONAL character.” Id. at 94 (internal citations omitted). In 1981, Senator Lowell P. Weicker of Connecticut similarly remarked: “[Constitutionalism is] what holds us all together.” Id. at 398; cf. Kreimer, supra note 14, at 648 (“A constitution may ‘constitute’ the commitments that define a national identity.... [T]hese commitments can embody the civil religion of the nation.”).

\textsuperscript{116} See supra p. 2064.

\textsuperscript{117} Professor Vicki Jackson identifies other potential reasons for the Court’s resistance to joining the international judicial conversation. Vicki C. Jackson, Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on “Proportionality,” Rights and Federalism, 1 U. Pa. J. Const. L. 583, 592–99 (1999) (observing that American courts’ resistance may be related to the inadequate teaching of foreign law in American law schools and the current Supreme Court’s focus on interpreting the Constitution in accord with the views of the American Framers). The Court’s reticence may also stem from the fact that some of the reasons that other courts join the international judicial dialogue do not apply to the U.S. Supreme Court. For example, a court may fear that abstaining from the international judicial conversation will decrease its international influence. This concern does not yet apply to the U.S. Supreme Court, however, as many foreign constitutional courts cite the Court’s rulings despite its unwillingness to join the dialogue. But see L’Heureux-Dubé, supra note 2, at 30, 37–38 (noting that foreign courts cite decisions of the Rehnquist Court less often than they do those of its predecessors, the Warren and Burger Courts, and speculating that this decline in influence may be related to the Rehnquist Court’s failure to engage in the international dialogue).

Yet even if other constitutional courts continue to examine the U.S. Supreme Court’s jurisprudence, the Court’s isolationism is likely to limit its international influence. As section B discusses, the South African Constitutional Court in \textit{Makwananyane} looked to the Indian Supreme Court’s decision in \textit{Bachan Singh}, not only for its substantive analysis of the death penalty, but also for its examination of international opinion. See supra pp. 2061–62. The South African court’s focus on the Indian court’s examination of outside legal norms suggests that courts may be developing legal rules for identifying predominant international judicial norms. To the extent that the U.S. Supreme Court chooses not to engage in international and comparative analysis, it will be unable to influence the debate over what constitutes the international norm in a particular area of law. If the U.S. Supreme Court later decides to join the international dialogue, it may face the prospect of incorporating substantive international norms that it did not help to create.
distinguish them by pointing to a conflicting American practice, the act of analyzing outside precedents would itself indicate that taking account of the views of the international community is appropriate to the interpretation of the U.S. Constitution. Under this view, by taking part in the international judicial conversation, the Justices would strip the U.S. Constitution of its purely American character.

D. Conclusion

Over the last twenty years, the international judicial dialogue has evolved from a simple conversation (in which courts relied primarily on the published reports of the United States and Britain) to a complex dialogue involving citations to courts throughout the world. Joining this increasingly sophisticated dialogue provides a constitutional court with an opportunity to influence the development of international law. Conversely, as Canadian Supreme Court Justice L’Heureux-Dubé has argued, not joining the dialogue may limit a court’s capacity to shape international debate.118

The Canadian Supreme Court’s recent ruling in United States v. Burns,119 which involved the extradition of two fugitives to face possible capital sentences in the United States,120 supports Justice L’Heureux-Dubé’s claim. In Burns, the Canadian Supreme Court reaffirmed its holding in Kindler v. Canada that the Canadian constitution does, in some cases, permit the extradition of fugitives to face the death penalty.121 However, the court’s survey of the abolitionist tendencies in international and domestic opinion in the years since Kindler convinced it that current constitutional principles required that the Canadian government meet a higher burden — perhaps by demonstrating necessity — to justify the extradition of a fugitive without requesting assurances from the recipient nation that it would not seek the death penalty.122 Citing in particular the British Privy Council’s decision in Pratt v. Attorney-General for Jamaica and Justice Breyer’s

118 L’Heureux-Dubé, supra note 2, at 37; see supra note 69.
120 The United States sought the extradition of two fugitives for two murders committed in the state of Washington. Id. ¶¶ 11-13.
121 Id. ¶ 67 (“[W]e affirm that the ‘balancing process’ set out in Kindler . . . is the correct approach . . . .”). The court was careful to stress that Kindler does not “provide[] a blanket approval to extraditions to face the death penalty.” Id. ¶ 64.
122 Id. ¶ 131. Notably, the court observed that the U.N. Security Council had chosen to exclude the death penalty from the possible punishments of the ICTY and the ICTR “despite the heinous nature of the crimes alleged against the accused individuals.” Id. ¶ 88; see also supra note 7 (noting the potential for the new international criminal tribunals to increase the complexity and sophistication of the international judicial dialogue). The court found that domestic opinion in Canada had, since Kindler, turned decidedly against the death penalty. Burns, 2001 SCC 7, ¶¶ 85, 96-104.
dissenting opinion in *Knight v. Florida*, the court found that the international view of the “death row phenomenon” accompanying capital cases counseled against extradition without assurances in cases that were likely to involve a long detention.\(^{123}\)

The Canadian court’s citation in *Burns* to Justice Breyer’s dissent, rather than to any other recent U.S. state or federal court decision regarding the death row phenomenon,\(^{124}\) suggests that Justice Breyer’s willingness to look to outside jurisprudence renders his opinions more influential in foreign and supranational jurisdictions. Conversely, the U.S. Supreme Court’s failure to engage in the international judicial dialogue may cause other nations to be less willing to rely on its rulings. The cases discussed in this Part illustrate how the dialogue among domestic and supranational courts has contributed to the formation of legal norms for death penalty cases, and it seems likely that the international judicial conversation will similarly influence the development of other international norms. Cases such as *Burns* raise the question whether the U.S. Supreme Court’s reluctance to engage in dialogue with its foreign counterparts will reduce its ability to shape the conversation about legal norms.

Many constitutional courts have been eager to engage in the international judicial dialogue and to take advantage of the opportunity to influence the development of international law, but the U.S. Supreme Court has remained reticent. If taking part in the dialogue allows a court to influence the development of international law, it may seem surprising that the U.S. Supreme Court would be so reluctant to join the conversation. But perhaps the willingness (or unwillingness) of constitutional courts to look to foreign or supranational jurisprudence is explained in part by the way that particular courts view their domestic constitutions. The U.S. Supreme Court seems to regard the

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\(^{123}\) *Burns*, 2001 SCC 7, ¶ 120-122. The Canadian Supreme Court cited Justice Breyer’s dissent in *Elledge v. Florida*. Id. ¶ 122. The Canadian court also cited the South African Constitutional Court’s decision in *Makwanyane* to support its assertion that the “balancing process” in *Kindler* did not include a consideration of public opinion. Id. ¶ 67.

\(^{124}\) See *Knight v. Florida*, 528 U.S. 990, 990–91 (1999) (citing federal and state court rulings that rejected appeals based on the death row phenomenon); see also Recent Case, 114 HARV. L. REV. 648 (2000) (discussing an Illinois Supreme Court decision holding that the death row phenomenon is not cruel and unusual). The South African Constitutional Court’s decision in *Makwanyane* as well as the Indian Supreme Court’s ruling in *Bachan Singh* suggest that it is unusual for foreign courts to cite American state supreme court decisions. See State v. *Makwanyane*, 1995 (3) SALR 391, 421 n.82 (CC) (S. Afr.) (citing a decision of the Supreme Judicial Court of Massachusetts); id. at 416 n.92 (citing a decision of the California Supreme Court); id. at 421 n.84 (citing a decision of the U.S. Court of Appeals for the Ninth Circuit); Bachan Singh v. Punjab, [1980] 2 S.C.J. 475, 518–20 (India) (mentioning decisions of the Florida and Georgia state supreme courts); see also supra note 32 (observing that the British Privy Council cited a decision of the Ninth Circuit). The only other citation in *Burns* to American jurisprudence was a reference to a dissenting opinion by Justice Frankfurter in *Solesbee v. Balkcom*, 339 U.S. 9 (1950). *Burns*, 2001 SCC 7, ¶ 122.
U.S. Constitution as a document with a uniquely American character, and thus, a document that should not be informed by outside jurisprudence. Courts that have joined the international judicial dialogue, by contrast, seem to perceive their constitutions as documents that “speak to,” and listen to, the entire international community.