In Defense of Transjudicialism

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In Defense of Transjudicialism

I. INTRODUCTION

If there was any doubt that the Rehnquist Court would be cowed by a GOP-led congressional attack in 2004 on the judiciary's power to cite foreign law, it was quashed with *Roper v. Simmons*. The Court, with the exception of Chief Justice Rehnquist and Justices Scalia and Thomas, unequivocally recognized the judicial propriety of observing foreign and international law in rendering its opinion on the juvenile death penalty. In doing so, the Court continued a long tradition of citing foreign law dating back to the Declaration of Independence. Despite historical support for such references, Republicans lost no time in renewing their challenge to the practice of using foreign law via the “Constitution Restoration Act of 2005” (hereinafter the “Act”).

This Act is a metaphor for a host of ancient fears, from counter-majoritarianism to xenophobia. But even with newcomer Chief Justice Roberts and the retirement of Justice O'Connor, a plurality would likely continue such references to foreign law. Coined “transjudicialism” by Justice O’Connor, this brand of judicial

   In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of an foreign state or international organization or agency, other than English constitutional and common law up to the time of the adoption of the Constitution of the United States.
   Id.
openness to foreign legal trends has only been narrowly applied by this Court. Not only should this dispel any apprehension for loss of sovereignty, but such appreciation for "evolving standards of decency" could also help the United States avoid becoming what some fear we are already: a "global pariah."

This comment will examine how the Court used international law in Roper, followed by a similar analysis of Atkins, Lawrence, and Bollinger, the three cases that brought on the 2004 congressional firestorm. A brief historical survey of references by the Court to international law will show that such interpretive tools are far from new or illegitimate. Then, the Capitol Hill's reaction and Justice Scalia's dissent in Roper will explain the objections to the Court's usage of foreign sources. But an examination of the international perspective that follows will shed light on the justice, even necessity, of our Supreme Court recognizing international customary law and employing constitutional comparativism. Finally, a defense to Justice Scalia's objections and Congress's anxieties will be articulated. Like the debate between scientism and romanticism, it is "much ado about nothing," and in the end, "the judgment of the Court" is inescapable.

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14. LOYD W. MATSON, THE BROKEN IMAGE — MAN, SCIENCE AND SOCIETY (Anchor Books 1966) (1964). "When man is the subject, the proper understanding of science leads unmistakably to the science of understanding." Id. at 247.


16. BICKEL, supra note 6, at 236 (quoting J. Frankfurter's opinion in Sweezy v. New Hampshire, 354 U.S. 234, 255, 266-67 (1957)).

To be sure, this a conclusion based on a judicial judgment in balancing two contending principles — the right of a citizen to political privacy, as protected by the Fourteenth Amendment, and the right of the State to self-protection. And striking the balance implies the exercise of judgment. This is the inescapable judicial task in giving substantive content, legally enforced to the Due Process Clause, and it is a task ultimately committed to this Court. It must not be an
II. *Roper v. Simmons*: Interpreting the Eighth Amendment in Light of Maturing Values of Civilized Society

The Court granted certiorari to reconsider whether capital punishment of a juvenile, who had been over fifteen but less than eighteen years of age when the crime was committed, violated the Eighth and Fourteenth Amendments.\(^1\) The facts in this case were tragic and inflammatory, but the Court found that the death penalty in such a case is barred by the Constitution as being "cruel and unusual punishment."\(^18\) At seventeen, the defendant Simmons conspired with two friends to burglarize the home of the female victim. Part of the plan was to tie her up and throw her off a bridge, causing her to either suffocate beneath a full face of duct tape or drown helplessly in the water. During the commission of this heinous act, Simmons had the audacity to assure his conspirators that they could "get away with it" because they were minors.\(^19\)

After establishing the constitutional precepts of the Eighth Amendment, Justice Kennedy acknowledged that the Court was about to overturn a prior holding based on a change in the "evolving standards of decency that mark the progress of a maturing society."\(^20\) Emphasizing that the Constitution must be read with regard to "history, tradition, and precedent,"\(^21\) he affirmed that the legitimacy of taking into consideration changing mores was established with the 1958 case, *Trop v. Dulles*.\(^22\) In *Trop*, the message was quite clear: "The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of

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exercise of whim or will. It must be an overriding judgment founded on something much deeper and more justifiable than personal preference. As far as it lies within human limitations, it must be an impersonal judgment. It must rest on fundamental presuppositions rooted in history to which widespread acceptance may fairly be attributed. Such a judgment must be arrived at in a spirit of humility when it counters the judgment of the State's highest court. But, in the end, judgment cannot be escaped — the judgment of this Court.

*Id.* (Frankfurter, J., concurring).


18. U.S. CONST. amend. VIII. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*


20. *Id.* at 1190 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)).


a maturing society." Justice Kennedy further noted that the Court had similarly changed its stance on capital punishment for offenders under sixteen in the 1988 case, Thompson v. Oklahoma. In that case, the Court ruled that the execution of such offenders "would offend civilized standards of decency" held "by other nations that share our Anglo-American heritage, and by the leading members of the Western European community."

Adopting the reasoning of the very case they were over-turning, the Court argued that the national consensus of Stanford v. Kentucky in favor of executing juveniles no longer existed. Implicit in referencing a "national consensus" is the application of a temporal value to jurisprudence. This point was not lost on Justice Kennedy. Thus, the Court said, if a national consensus was important in Stanford, it is again important in Roper, and this consensus has now changed. Similarly, the Court pointed to the reasoning of Penry v. Lynaugh, decided on the same day as Stanford. There was no national consensus against executing the mentally retarded, the Court held in Penry, and thus such practice could not be held as cruel and unusual. The salient point was, however, that the Court countenanced a national consensus at all.

The significance of the concept of national consensus and its corollary that opinion can change with the times becomes apparent when the Court makes reference to international law. The Court found it significant that other nations, individually and collectively, have a consensus similar to its opinion on the unconstitutionality of executing minors. After citing other reasons why juvenile capital punishment violates the Eighth Amendment, the Court directed its attention globally, stating that "[o]ur 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." The Court was quick to add, however, that "[t]his reality does not become

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25. Thompson, 487 U.S. at 830.
30. Roper, 125 S. Ct. at 1194-98.
31. Id. at 1198.
controlling, for the task of interpreting the Eighth Amendment remains our responsibility.32

Justice Kennedy continued by reciting a litany of cases in which the Court had previously referenced "laws of other countries,"33 and then outlined international covenants pertinent to this case. The first example was Article 37 of the United Nations Convention on the Rights of the Child,34 which, the Court noted, had been ratified by every country in the world except the United States and Somalia.35 The Court pointed out that "[p]arallel prohibitions are contained in other significant international covenants,"36 citing international treaties and conventions supporting the ban against such executions. Illustrating that the United States "stands alone in a world that has turned its face against the juvenile death penalty,"37 the Court emphasized that only seven countries other than the United States have carried out such executions since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. "Since then," Justice Kennedy noted, "each of these countries has either abolished punishment for juveniles or made public disavowal of the practice."38

The Court stressed in particular that the United Kingdom had abolished capital punishment for juveniles even earlier than other nations, underlining the fact that the Amendment in question had origins in English law: "The United Kingdom's experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment's own origins. The Amendment was modeled on a parallel provision in the English Declaration of Rights of 1689 . . . ."39 Justice Kennedy also found support for the Court's opinion in the Brief for Human Rights Committee of the Bar of England and Wales et al., couched in the introductory statement that "[i]t is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty."40

32. Id.
33. Id. (A survey of such cases will follow later in this Comment).
35. Roper, 125 S. Ct. at 1199.
36. Id.
37. Id.
38. Id.
39. Id.
40. Roper, 125 S. Ct. at 1200.
fensively: "The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."\(^{41}\)

Anticipating another congressional onslaught of criticism for citing foreign law, the opinion ended with an extravagant justification:

Over time, from one generation to the next, the Constitution has come to earn the high respect and even, as Madison dared to hope, the veneration of the American people. See The Federalist No. 49, p 314 (C. Rossiter ed. 1961). The document sets forth, and rests upon, innovative principles original to the American experience, such as federalism; a proven balance in political mechanisms through separation of powers; specific guarantees for the accused in criminal cases; and broad provisions to secure individual freedom and preserve human dignity. These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity. Not the least of the reasons we honor the Constitution, then, is because we know it to be our own. It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.\(^{42}\)

Justice O'Connor dissented only in that she did not recognize that a national consensus exists against the juvenile death penalty,\(^{43}\) not in the affirmative value of foreign law. In fact, she took pains to support her brethren in the use of such sources of law:

I disagree with Justice Scalia's contention that foreign and international law have no place in our Eighth Amendment jurisprudence. 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

\(^{41}\) Id.

\(^{42}\) Id.

\(^{43}\) Id. at 1206 (O'Connor, J., dissenting).
the Court has long held, draws its meaning directly from the maturing value 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. The instant case presents no such domestic consensus, however, and the recent emergence of an otherwise global consensus does not alter that basic fact.44

III. ATKINS, LAWRENCE, AND BOLLINGER: JUDICIAL LIGHTNING RODS

Atkins,45 decided in 2002, and Lawrence,46 decided in 2003, drew the attention of several Senators such that a bill forerunner to the current "Constitution Restoration Act" was introduced.47 Grutter v. Bollinger was similarly lionized.48 Aside from the holdings themselves, it is worth examining the language that caused such uproar, and the scope to which it was applied. In Atkins, it is so brief and innocuous that to find fault with it is absurd.

Justice Stevens wrote the opinion in Atkins that, like Roper, involved Eighth Amendment interpretation with regard to the death penalty (of the mentally retarded). The Supreme Court of Virginia

44. Id. at 1215-16 (internal citations omitted).
47. S. 2323 108th Cong. § 201 (Interpretation of the Constitution (2004)).
had declined to commute the death sentence "merely because of his [Atkins'] IQ score."\textsuperscript{49} Invoking the \textit{Trop} language of "evolving standards,"\textsuperscript{50} Stevens approached the issue of international standards\textsuperscript{51} with the initial argument that decisions, in order to be just, must be rendered ever mindful of the temporal setting of the case.\textsuperscript{52} In searching for a national consensus against executing the mentally retarded,\textsuperscript{53} he explained the next step in the Court's reasoning by stating the following: "Guided by our approach in these cases, we shall first review the judgment of legislatures that have addressed the suitability of imposing the death penalty on the mentally retarded and then consider reasons for agreeing or disagreeing with their judgment."\textsuperscript{54} Included in this 'next step' is reference, \textit{in a footnote}, to "diverse religious communities in the United States, reflecting Christian, Jewish, Muslim, and Buddhist traditions" and "the world community" in general.\textsuperscript{55}

A year later, Justice Kennedy penned the opinion in \textit{Lawrence}, where the issue was whether Texas sodomy laws violated equal protection and the due process clause of the Fourteenth Amendment,\textsuperscript{56} and whether \textit{Bowers v. Hardwick}\textsuperscript{57} should then be overruled. Arguing that the reasoning in \textit{Bowers} was flawed, the Court discussed at length whether the alleged international consensus against sodomy actually existed at the time \textit{Bowers} was decided.\textsuperscript{58} It is ironic to observe that Chief Justice Burger, concurring in \textit{Bowers}, freely discussed international law as a reason

\begin{itemize}
\item \textsuperscript{49} Atkins v. Commonwealth, 534 S.E.2d 312, 321 (2000), \textit{quoted in Atkins}, 536 U.S. at 310.
\item \textsuperscript{50} \textit{Trop}, 356 U.S. at 101.
\item \textsuperscript{51} \textit{Atkins}, 536 U.S. at 316 n.21.
\item \textsuperscript{52} \textit{Id.} at 311. "A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail." \textit{Id.}
\item \textsuperscript{53} \textit{Id.} at 313.
\item \textsuperscript{54} \textit{Id.}
\item \textsuperscript{55} \textit{Id.} at 316 n.21. The reference is quoted in its entirety below:
   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 of.
\item \textit{Id.}
\item \textsuperscript{56} \textit{Lawrence v. Texas}, 539 U.S. 558 (2003).
\item \textsuperscript{57} 478 U.S. 186 (1986).
\item \textsuperscript{58} \textit{Lawrence}, 539 U.S. at 572-73.
\end{itemize}
against protecting sodomy, with Justice Rehnquist joining in the majority opinion without reservation.\textsuperscript{59}

The difference between \textit{Lawrence} and \textit{Atkins} as to the quantity and scope of reference to international law is striking.\textsuperscript{60} In \textit{Lawrence}, British law and decisional law from the European Court of Human Rights were referenced, as was the law of "other nations."\textsuperscript{61} Could this be Justice Kennedy's volley back to Justice Scalia's overblown objection in \textit{Atkins}?\textsuperscript{62} In any case, Justice Kennedy confined his implication of international law to a simple rebuttal to Justice Burger's concurrence in \textit{Bowers}. His only point with regard to \textit{Bowers} and foreign sources was that it was flawed in its unspecified usage of international law. He called attention to "[t]he sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards" and countered with similar international evidence in contradiction.\textsuperscript{63} Again, no one in \textit{Bowers} took issue with Burger's concurrence invoking international law. There were disagreements in the opinion as to the value of the particular law, but not to the invocation itself.\textsuperscript{64} Not until \textit{Atkins} was such comparativism considered unusual.

Before illustrating that proposition, a brief assessment of \textit{Grutter v. Bollinger} is required to complete the trio of cases decried by the GOP.\textsuperscript{65} At issue were the University of Michigan Law School's admissions policies, designed to achieve ethnic and racial diversity. In finding that the school's practices did not infringe on the Fourteenth Amendment's Equal Protection clause, Justice Ginsburg concurred with Justice O'Connor. Justice Ginsburg cited

\begin{itemize}
\item[60.] \textit{Lawrence}, 539 U.S. at 572-73, 576.
\item[61.] \textit{Id}.
\item[62.] \textit{Atkins}, 536 U.S. at 347-48. Scalia states:
\begin{quote}
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 professionals 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.
\end{quote}
\item[63.] \textit{Id}. (internal citations and footnotes omitted). (Author's note: if our opinion polls are equally irrelevant, where is the value to the Court of the "notions of justice . . . of our people"?).
\item[64.] \textit{Bowers}, 478 U.S. at 194 n.5, 211-12.
\item[65.] 539 U.S. 306 (2003).
\end{itemize}
provisions of the International Convention on the Elimination of all Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women as evidence that the holding was in accordance with "the international understanding of the office of affirmative action." 66

The pattern that seems to emerge is that these decisions are socially liberal in nature. Since the language used does not imply that the Court is bound by international decisions or law, but is only looking outward to view what the rest of the world is doing, one must wonder if the real issue is not the invocation of international law, but the decision itself, which is (infuriatingly) supported by international norms.

IV. AN OVERVIEW OF THE COURT'S HISTORICAL USAGE OF INTERNATIONAL LAW

An excellent starting point for a scholarly study of precedent in the use of international law for constitutional reasoning are the Briefs of Amici Curiae to Roper. 67 Amnesty International's (et. al.) Amici Curiae Brief frames the issue by quoting the Court's eloquence in 1884:

The constitution of the United States was ordained, it is true by the descendents of Englishmen, who inherited the traditions of the 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. . . . There is nothing in Magna Carta,


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.\footnote{Brief for Amnesty International as Amici Curiae, supra note 67, at 21 (quoting Hurtado v. California, 110 U.S. 516, 531 (1884)).}

Thus, in recognizing that our Constitution originated from foreign sources, the Court at that time freed itself to look beyond our borders for wisdom, recognizing change and “evolving standards of decency.”

In making its point, Amnesty International’s Amici Curiae Brief further elaborates on the genesis of the phrase, “cruel and unusual punishment,” noting that it originated from the English Declaration of Rights of 1689 and the Magna Carta.\footnote{Id. at 22.} However, the most beautiful phrasing in support of the Court’s duty to be aware of systems outside its own comes from \textit{Weems v. United States} in 1910:

\begin{quote}
Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is particularly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, “designed to approach immortality as nearly as human institutions can approach it.” The future is their care, and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be.\footnote{Id. at 22-23 (quoting Weems v. United States, 217 U.S. 349, 373 (1910)).}
\end{quote}

In considering the judicial power to consider foreign law, it is worth noting that the Court has jurisdiction over matters arising under treaties.\footnote{U.S. CONST. art. III, § 2. See also Brief for Amnesty International as Amici Curiae at 20.} By corollary, the Court must therefore be aware
of *jus cogens*, mandatory norms of international law. By definition, norms change and evolve with society. Should the Court only apply current thinking to international cases, while depriving domestic matters of their most enlightened reasoning? This point is enunciated by Jules Lobel:

Absent an International consensus that a given principle is so fundamental as to allow no derogation, the political branches my act free of judicial restraint. When such a fundamental norm is implicated, however, both the international and domestic legal orders would generally require domestic court review of the actions of the political branches. In such a situation, the proper role of the courts is to determine and to apply common international standards . . . . Where fundamental norms limit the discretion of the political branches, there should be a strong presumption of judicial reviewability.

It is beyond the scope of this Comment to give more than a cursory glance at the commonly cited cases wherein the Court relied, to varying extents, upon international law. Beginning chronologically, in *Henfield's Case* of 1793, Thomas Jefferson defines the laws of the United States as “1st All treaties made under the authority of the United States; 2d. *The laws of nations*. 3dly. *The Constitution, and statutes of the United States.*”

In another very early case, the Court drew on international definitions of piracy: “What the law of nations on this subject is, may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of na-

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72. *jus cogens*: “A mandatory norm of general international law from which no two or more nations may exempt themselves or release one another.” BLACK'S LAW DICTIONARY 864 (7th ed. 1999).


74. Norm: “A model or standard accepted (voluntarily or involuntarily) by society or other large group, against which society judges someone or something . . . .” BLACK'S LAW DICTIONARY 1083 (7th ed. 1999).


76. 11 F. Cas. 1099, 1101 (1793) (emphasis added). See also 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, 1313-14 (2004) (author Larsen argues that the way international law was used does not support the thesis that early courts relied on international law).
The landmark case, *Pennoyer v. Neff*, contains many references to English decisional law, important as "expressions of the opinion of eminent jurists." Similarly, the Court in *Kilbourn v. Thompson* looked to English history and decisional law at length. Although it was an international claim for debts originating in France, the Court made full use of English law in *Hilton v. Guyot*.

In a more decidedly domestic case, references were made to English, Irish, Scottish, Phillipino, and Canadian law in *Culombe v. Connecticut*. *Coker v. Georgia*, another Eighth Amendment capital punishment case, is often cited by those who support the use of foreign sources. The Court said, "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.

*Enmund v. Florida* followed, pertaining to the same issue, (death penalty), and the Court again referenced international law: "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." Other decisions followed, most notably being, (excluding those discussed originally), *Foster v. Florida*. In denying certiorari, Justice Thomas responded to Justice Breyer's statement that a number of countries, including Jamaica, have found cruelty in undue delay between sentencing and execution. Noting, (somewhat callously), that the "[p]etitioner

78. 95 U.S. 714, 725 (1878). See also Wu, supra note 45.
79. 103 U.S. 168, 183-89 (1881) (false imprisonment).
80. 159 U.S. 113 (1895). See also Bianchi, supra note 13, at 754 n.11.
82. 433 U.S. 584 (1977) (death penalty for rape).
87. *Foster*, 537 U.S. at 991.
could long ago have ended his 'anxieties and uncertainties,' by submitting to what the people of Florida have deemed him to deserve: execution,"\textsuperscript{88} Justice Thomas reveals his disregard for foreign law: "While Congress, as a legislature, may wish to consider the actions of other nations on any issue it likes, this Court's Eighth Amendment jurisprudence should not impose foreign moods, fads or fashions on Americans."\textsuperscript{89}

V. FOREIGN MOODS, FADS AND FASHIONS: MEANINGLESS DICTA? JUSTICE SCALIA AND THE CONGRESSIONAL RESPONSE

As seen above, detractors to such foreign references can be somewhat harsh in their rhetoric. Justice Scalia's dissent in \textit{Lawrence} is an infamous example. "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.'\textsuperscript{90} This, like the usage of foreign law in Supreme Court decisions, is nothing new. Patrick Henry, arguing for a Bill of Rights, said:

What has distinguished our ancestors? — That they would not admit torturers, or cruel and barbarous punishment. But [in the absence of a Bill of Rights] Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany — of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain . . . . We are then lost and undone.\textsuperscript{91}

Centuries later, Congress echoes the same fears. This test is from Congressman Feeney's web page:

Congressmen Feeney and Goodlatte have authored the \textit{Reaffirming American Independence Resolution} instructing the federal courts to remember that their role is in-

\textsuperscript{88} Id.
\textsuperscript{89} Id. at 990 n.*. \textit{See also} Bianchi, \textit{supra} note 13, at 773.
\textsuperscript{90} \textit{Lawrence}, 539 U.S. at 598 (Scalia, J., dissenting, paraphrasing Thomas, J.).
interpreting US law, not importing foreign laws — a clear violation of the separation of powers.

America’s sovereignty and the integrity of our legal process are threatened by a jurisprudence predicated upon laws and judicial decisions alien to our Constitution and our system of self-government. The American people have not consented to being ruled by foreign powers or tribunals . . . . This resolution affirms the sense of Congress that judicial decisions should not be based on any foreign laws, court decisions, or pronouncements by foreign governments unless they are expressly approved by Congress. 92

And this from Representative Ted Poe:

Are our Supreme Court justices . . . citing foreign courts arbitrarily . . . only opinions that are harmonious with their own social agendas? . . . What if a judge suddenly decided that — in keeping with some foreign law — we should begin cutting off the hands of common thieves? That dog just wouldn’t hunt here in America . . . .

. . . .

Having been down in the mud, blood, and beer with real people, I have witnessed the Constitution’s impact on the lives of Americans. I submit that looking to foreign court decisions is as relevant as using the writings of Reader’s Digest, a Sears and Roebuck catalog, a horoscope, my grandmother’s recipe for the common cold . . . . 93

And finally, this from the floor of the Senate, Senator John Cornyn, who was shocked, shocked, that the Court would be cognizant of “evolving standards of decency.”


What I want to focus on now is the reasoning that Justice Anthony Kennedy . . . used to reach that conclusion [in *Roper v. Simmons*].

First, Justice Kennedy adopted a test for determining whether this death penalty conviction was constitutional. The test — this ought to give you some indication of the problems we have with the Supreme Court as a policy-maker with no fixed standards or objective standards by which to determine its decisions to make its judgments. The Court embraced a test that it had adopted earlier referring to the “evolving standards of decency that mark the progress of a maturing society.” Let me repeat that. The test they used was the “evolving standards of decency that mark the progress of a maturing society.”

The transcript for the March 25, 2004 hearing on the “Appropriate Role of Foreign Judgments in the Interpretation of American Law” further illuminates the fears associated with this issue:

This model in which you can have judges dialoguing with each other and changing their national laws is something which they find very appealing in Europe because that is what the EU is. It’s basically linked-up judges who have established a whole new Constitution on top of the national Constitutions . . . [D]own the road you’re going to have questions about what can we do in our anti-terror efforts. I don’t think we want to take construction from European judges who have a very different view of this, because their whole view of terror is it’s something that happens to other people and keep it away from us.

Clearly there exists the counter-majoritarian fear that the separation of powers will be violated:

Finally, I would like to challenge all of the witnesses today . . . [in saying that] creating new law based on what foreign countries are doing . . . violates at times articles

96. *Id.* at 26-27 (Statement of Jeremy Rabkin, Professor of Government, Cornell University).
[sic] I of the Constitution, because it usurps our legislative authority; violates article II, because it prohibits a presidential veto of new law; violates article III — violates article IV with respect to guaranteeing a republican form of government, because nobody is permitted to vote for the justices that are making this law by referencing foreign law; violates article V, the treaty provisions, because we end up at times basically ratifying agreements with other countries even though neither the legislature nor the President was involved in this new treaty; and, finally, violates article VI, the supremacy clause.  

And if all that were not enough, current law school education was brought into the fray:

And another thing that I am concerned about is the activism that's being taught within our law schools today, the young people that believe that it is their job to go out and amend this Constitution by every opportunity of litigation they have, and that kind of activism in the end tears this Constitution asunder . . .

Turning from lay opinion to the judicial dissents, an examination must be made of their demurrer. With each dissent, the rhetoric became more heated, reaching its crescendo in Roper. Thus, this comment will focus on Justice Scalia's dissent in that case alone, in which Chief Justice Rehnquist and Justice Thomas joined.

In overturning Stanford, Justice Scalia questioned why no "national consensus" was found a "mere" fifteen years ago against executing juveniles. Skeptical that a national consensus was actually discovered by the majority, he concluded that "[t]he Court thus proclaims itself sole arbiter of our Nation's moral standards — and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures." Ratcheting up the rhetoric, he states the obvious: "Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Con-

97. Id. at 78 (Statement of Rep. Feeney). See also Bianchi, supra note 13, at 775, discussing the "counter-majoritarian difficulty."
98. Id. at 21 (Statement of Rep. Steve King, Iowa).
99. Roper, 125 S. Ct. at 1217 (Scalia, J., dissenting).
100. Id.
stitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.”

Such language was red meat to the conservative GOP.

Justice Scalia disagreed with even the concept of a “national consensus,” and if one did in fact exist, whether it should in any way influence the judgment of the Court. However, he reluctantly acknowledged that precedent required him to consider a “national consensus.” He found insufficient indicia in that 47% of the states were in support of the majority’s holding. With no valid consensus, then, the Court was prescribing what the moral consensus should be, not just identifying it. In addition, he found fault with the “picking and choosing” that the Court did with scientific and sociological studies: “[The Court] never explains why those particular studies are methodologically sound; none was ever entered into evidence or tested in an adversarial proceeding.” He continued: “In other words, all the Court has done today . . . is to look over the heads of the crowd and pick out its friends.”

While at once arguing that elected representatives are better equipped to make decisions, but a national consensus should have no influence, Justice Scalia wasted no time in an implied criticism of the Court for ignoring the “true” consensus in favor of the vagaries of foreign law: “Though the views of our own citizens are essentially irrelevant to the Court’s decision today, the views of other countries and the so-called international community take center stage.” By using the majority’s international evidence to

101. Id.
102. Id. at 1217-18.
104. Roper, 125 S. Ct. at 1218 (Scalia, J., dissenting).
105. Id. at 1222.
106. Id. Scalia believed:
Given the nuances of scientific methodology and conflicting views, courts . . . are ill equipped to determine which view of science is the right one. Legislatures “are better qualified to weigh and ‘evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.”

Id. at 1223 (quoting McCleskey v. Kemp, 481 U.S. 279, 319 (1987)).
107. Roper, 125 S. Ct. at 1223 (Scalia, J., dissenting).
108. Id.
his advantage, Justice Scalia indicts them for violating the separation of powers.¹⁰⁹ He does this by passing over the international consensus, and stressing that there was evidently no national consensus as evidenced by the fact that the United States had not ratified a particular treaty cited by the Court.

Then, not content with casting doubt on a national consensus, Justice Scalia proceeded to impugn the international consensus, suggesting that not all countries with laws against the juvenile death penalty actually enforce them.¹¹⁰ Further, he allowed that some or most of these self-same countries have other laws on their books that our Constitution will not countenance.¹¹¹ Examples include a lack of an exclusionary rule,¹¹² separation between church and state,¹¹³ and no abortion on demand.¹¹⁴

In overcoming the "elephant in the living room," the fact that our Court has often referred to English jurisprudence, Justice Scalia assigned special license: as long as the interpretation belonged to past, historical tradition, the reference was legitimate.¹¹⁵ Anything modern carried the taint of the European Union.¹¹⁶ One could say that Justice Scalia was himself guilty of "picking and choosing" at this point. He ironically concluded, "To invoke alien

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¹⁰⁹. Id. at 1226. Scalia wrote:
The Court begins by noting that "Article 37 of the United Nations Convention on the Rights of the Child, entered into force Sept. 2, 1990, which every country in the world has ratified save for the United States and Somalia contains an express prohibition on capital punishment for crimes committed by juveniles under 18." . . . I cannot see how this evidence favors, rather than refutes, its position. That the Senate and the President — those actors our Constitution empowers to enter into treaties, have declined to join and ratify treaties prohibiting execution of under-18 offenders can only suggest that our country has either not reached a national consensus on the question, or has reached a consensus contrary to what the Court announces.

¹¹⁰. Id. at 1226.
¹¹¹. Id.
¹¹². Roper, 125 S. Ct. at 1226 (Scalia, J., dissenting).
¹¹³. Id. at 1227.
¹¹⁴. Id.
¹¹⁵. Id. at 1227-28. Scalia asserted:
The Court has, however — I think wrongly-long rejected a purely originalist approach to our Eighth Amendment . . . . It is beyond comprehension why we should look . . . to a country that has developed, in the centuries since the Revolutionary War-and with increasing speed since the United Kingdom's recent submission to the jurisprudence of European courts dominated by Continental jurists-a legal political, and social culture quite different from our own.

¹¹⁶. Id. at 1228.
law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.”

Finally, Justice Scalia argued that foreign sources were being used “not to underscore our ‘fidelity’ to the Constitution,” but “to set aside the centuries-old American practice . . . of letting a jury of 12 citizens decide whether, in the particular case, youth should be the basis for withholding the death penalty,” successfully affirming “the Justices’ own notion of how the world ought to be . . . .”

He considered the lower court’s disregard of the Supreme Court’s precedent in Stanford was analogous to what the Court was doing here:

To allow lower courts to behave as we do, “updating” the Eighth Amendment as needed, destroys stability and makes our case law an unreliable basis for the designing of laws by citizens and their representatives, and for action by public officials. The result will be to crown arbitrariness with chaos.

VI. THE INTERNATIONAL PERSPECTIVE

Sometimes it is just inconvenient to be a super-anything; super-model, super-star, or super-power. Whatever one does, it does not go unnoticed. The same applies to the activities of our Supreme Court. While the Bush Administration is busy trying to “export democracy” around the world while simultaneously shielding itself from “foreign fads,” the sanctimoniousness of its actions are observed abroad. Bianchi summarizes the current perception:

The different nature of international law and its potentially pervasive effects on domestic law are frequently a cause for US courts to reject its proper implementation. At the base of this attitude, which seems to be the prevailing one at the moment, lies the perception that the fundamental postulates of the domestic legal order, as enshrined in the Constitution, cannot be altered by a

117. *Roper*, 125 S. Ct. at 1228 (Scalia, J., dissenting). (For an interesting discussion of a rare departure from Justice Scalia’s usual stance, see Bianchi, supra note 13, at 768, discussing Hartford Fire Insurance v. California, 113 S. Ct. 2891, 2921 (1993) (Justice Scalia advocates applying international law as opposed to U.S. law)).


119. *Id.* at 1230.

120. See generally Bianchi, supra note 13.
body of law which does not exclusively emanate from the national societal body.\textsuperscript{121}

The fact that the United States is a "dualist," viewing domestic and international law as two separate bodies of jurisprudence,\textsuperscript{122} is cause for disquiet in the rest of the world. This is especially true with regard to human rights.\textsuperscript{123} Access to American courts via the Alien Tort Claims Act, (ATCA)\textsuperscript{124} is highly desirable, but Bianchi fears such access will become meaningless:

The recent doctrinal shift towards relegating customary international law into the margins of the legal system by denying its status as federal common law attests to the inward-looking attitude of the US legal system at this time and to its diffidence \textit{vis-à-vis} external sources of law-making. Should courts sanction this scholarly attitude, the US legal system may become almost impermeable to that 'law of nations' which the framers and the early Justices considered as part of the law of the land and looked up to as the common legacy of civilization.\textsuperscript{125}

A related issue is the non-self executing nature of some of our treaties.\textsuperscript{126} Echoing the counter-majoritarian fears of Congress, the \textit{assumption} that a treaty is non-self executing, (where the treaty is silent in this regard), further isolates us diplomatically:

Recently, an attempt has been made to revise the doctrine of non-self-execution, primarily on the basis of his-

\textsuperscript{121} Bianchi, \textit{supra} note 13, at 751.

The two principal theories are known as \textit{monism} and \textit{dualism}. According to monism, international law and State law are concomitant aspects of the one system — law in general; according to dualism, they represent two entirely distinct legal systems, international law having an \textit{intrinsically} different character from State law.

\textit{Id.}

\textsuperscript{123} \textit{Roper}, 125 S. Ct. at 757. \textit{See also} Filartiga v. Peña Irala, 630 F.2d 876 (2d Cir. 1980) (holding “that reference to international law had to be interpreted as the law stands today and not as it was in 1789 at the time of enactment.” Bianchi, \textit{supra} note 13, at 757).


\textsuperscript{125} Bianchi, \textit{supra} note 13, at 757, 778-79.

\textsuperscript{126} \textit{See} RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 111 (1990). \textit{See also} Bianchi, \textit{supra} note 13, at 760.
torical arguments, to the effect of maintaining that
"courts should obey the presumption that when the text
of a treaty is silent, courts ought to assume that it is non-
self-executing." The argument, besides its alleged histori-
cal underpinnings, is grounded on the "deep structural
imperatives" of the Constitution, particularly separation
of power concerns. This theory has been attacked on sev-
eral grounds and its ultimate impact on US practices is
yet to be tested. What the theory stands for, however,
can easily be accommodated within the framework of a
nationalist jurisprudence which traces the debate on self-
execution to the narrow boundaries of the constitutional
interpretation discourse, disregarding almost entirely
contemporary international policy considerations.\textsuperscript{127}

A particularly inflammatory example was the Fourth Circuit's
decision that the Geneva Convention is non-self-executing. The
end result, (at that level), barred petitioners, accused of being "en-
emy combatants," from our domestic courts.\textsuperscript{128} The question then
becomes, is Justice Scalia's brand of one-way street jurisprudence
even sustainable in this age of globalization?

\textbf{VII. DEFENDING TRANSJUDICIALISM}

Some would have the public believe that applying international
law to constitutional issues is a relatively new phenomenon, con-
trary to all evidence, \textit{ante}.\textsuperscript{129} Rather, recent reference to interna-
tional law is more a reflection not of change in our jurisprudence,
but of change in the world around us. This is a world of constant
communication, thanks to innovations like the Internet, twenty-


128. Bianchi, supra note 13, at 764. \textit{See also} Hamdi v. Rumsfeld, 316 F.3d. 450 (4th Cir. 2003) (The court held that there was no procedural right to habeas corpus) (\textit{vacated by} Hamdi v. Rumsfeld, 542 U.S. 507, \textit{remanded} by Handi v. Rumsfeld, 378 F.3d 426 (4th Cir. 2004)).

129. Joan L. Larsen, \textit{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, 1284 (2004) ("Lawrence may have added a spark to a quieter revolution — a revolution in constitutional interpretation that has been stirring, largely unnoticed, for years. The revolution \ldots{} is the Court's recent, and unex-
plained, embrace of comparative and international law norms as aids to domestic constitu-
tional interpretation.")
four hour news networks, and cellular phones. We are at a crossroads where we must decide whether or not to share mutually in the jurisprudential wisdom around the globe, just as we are beginning to share everything else.\textsuperscript{130} I believe this can be achieved within the framework of a Constitution of unquestionable endurance. Justice O'Connor's "transjudicialism" mirrors a process that is evolving and enlarging daily, and the rest of the world expects us to participate. But "perception is everything," according to an old maxim, and though some might find the fears surrounding any reliance on foreign law irrational, such fears must be dealt with.\textsuperscript{131}

First, there is the ancient fear of the unknown, of change in general, especially change that comes from without. The congressional hearing described above communicated fears that precedent will be ignored, and the Court will unexpectedly render decisions based on some heretofore-unknown law. Worse, the law, imported wholesale in a nightmare scenario, could come from a country not entirely approved of by "the people."

As indicated above, reliance on foreign law is not new, and if past performance is the strongest indicator of future conduct, we have nothing to fear from this or any future court. And given that the recent usage of foreign law has only been as a reference to international consensus, the reliance has been quite limited indeed. In fact, "reliance" is probably too strong a word to describe what the Court has done with international law.

The judicial branch was designed in such a way as to prevent quick changes of any kind. It is beyond the scope of this paper to give a treatise on this aspect, but any constitutional scholar would agree that decades pass easily between a dissenting opinion and its eventual placement in the mainstream of jurisprudence. Borrowing a metaphor from the realm of classical music, the progress of judicial thinking since our founding resembles more of a "fugue"
than the coda's sudden clash of cymbals.\textsuperscript{132} \textit{Stare decisis} has seen to that.\textsuperscript{133}

Contrary to Justice Scalia's view, some scholars see a great advantage to "comparative constitutionalism."\textsuperscript{124} Tushnet argues that in analyzing the experiences of other countries, we can gain insight into the proper interpretation of our own Constitution:

The expressivist approach to comparative constitutional law takes as its premise that comparative inquiry may help us see our own practices in a new light and might lead courts using non-comparative methods to results they would not have reached had they not consulted the comparative material. The license for analysis is not at all distinctive to comparative approaches. Rather, it is that judges of wide learning whether in comparative constitutional law, in the classics of literature, in economics, or in many other fields may see things about our society that judges with a narrower vision miss . . . . In this aspect, comparative constitutional law operates in the way that general liberal education does. To the extent that we think that judges are licensed to rely on what they take from great works of literature as they interpret the Constitution, we should think that they are licensed to rely on comparative constitutional law as well.\textsuperscript{135}

Tushnet also makes the point that judges engage in comparativism in any state issue where there is no case law on point, and this kind of analysis could become common with regard to national issues:

A few decades hence, constitutional lawyers may find it as natural to invoke constitutional experience elsewhere

\textsuperscript{132} Fugue: "a composition in which a theme is introduced by one part, repeated by other parts, and subjected to complex development." \textsc{Funk and Wagnalls Standard Dictionary} 296 (2nd ed. 1993). Coda: "(music) a final passage." \textsc{Webster's New World Dictionary} 120 (Pocket ed. 1975).\textsuperscript{133} \textit{Stare Decisis}: "Latin, to stand by things decided; the doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation." \textsc{Black's Law Dictionary} 1414 (7th ed. 1999).\textsuperscript{134} Mark Tushnet, \textit{The Possibilities of Comparative Constitutional Law}, 108 \textsc{Yale L.J.} 1225 (1999) (The bibliography notes that "this article is an outgrowth of work done in conjunction with the development of Vicki C. Jackson & Mark Tushnet, \textit{Comparative Constitutional Law: Cases and Materials} (1999).") (Prof. Jackson testified at the Hearing on H.R. 568, \textit{supra} note 15).\textsuperscript{135} \textit{Id.} at 1236-37.
in support of their arguments for interpretations of the U.S. Constitution as today's lawyers arguing a tort case in New York find it natural to invoke developments in Michigan or California tort law to support their arguments for what New York law should be.\footnote{136}{Id. at 1306. Prof. Jackson makes this point at the Hearing on H.R. 568, supra note 15.}

It is telling that a scholar squarely against the Court using international law for the original reasons recited above, i.e., the fear of unexpected results, etc., offers only tepid advice in the form of "limiting techniques," as opposed to impeachment, (as suggested by the Republican Congress).\footnote{137}{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, 1322-26 (2004).}

For example, Larsen suggests limiting the "world community" to "civilized counties," or "English-speaking peoples," or some other pre-ordained grouping.\footnote{138}{Id. at 1322-23 (pre-ordained, presumably, by the Court).} Recognizing problems inherent in such an approach, she acknowledges that this would constitute "picking and choosing," criticized by Justice Scalia in \textit{Roper}.\footnote{139}{Id. at 1323.}

Her other suggestion is to have a policy of "one-way ratcheting," invoking international law "only to expand, rather than limit, protections of individual rights under domestic law,"\footnote{140}{Id. at 1325 (quoting Prof. Strossen's proposal).} Since the decisions under fire recently do just that, it is unlikely that this approach would be favored by the GOP. However, she concludes that, because there is no current justification "that satisfies . . . it seems we are better off to abandon this particular use of foreign and international law."\footnote{141}{Id. at 1327.}

One might ask, who is not being satisfied? As Friedman asserts, counter-majoritarian criticism arises only when decisions are seen as "more mutable and politically motivated."\footnote{142}{Barry Friedman, The History of the Countermajoritarian Difficulty, part one: The Road to Judicial Supremacy, 73 N.Y.U.L. REV. 333, 351 (1998). See also Mauro, supra note 15.}

Another argument offered against the use of international law is the double-edged sword of "importing foreign laws;"\footnote{143}{Statement of Congressman Feeney, supra note 92.} i.e., loss of sovereignty via loss of the non-execution of treaties, and violation of the separation of powers. However, it must be said in rebuttal
that the Court is only filling an interpretive role. That is not to say that ramifications of their decisions do not flow to the populace and take their place as a statute would, but there is a significant brake inherent in the framework: the other branches of government have the option to employ the various checks and balances, (beyond the scope of this paper) at their disposal, inherent in the Constitution. This, combined with *stare decisis*, makes it quite unlikely that laws would ever be effectively imported wholesale from another country.

It is important to note that the Senate resolution to limit the Supreme Court's interpretation threatens far greater damage to the separation of powers.¹⁴⁴ Prof. Jackson warned the subcommittee on the Constitution:

> Efforts by the political branches to prescribe what precedents and authorities can and cannot be considered by the Court in interpreting the Constitution in cases properly before it would be inconsistent with our separation of powers system. It could be seen both here and elsewhere as an attack on the independence of the courts in performing their core adjudicatory activities. Around the world, the most widely emulated institution established by the U.S. Constitution has been the provision for independent courts to engage in judicial review of the constitutionality of the acts of other branches and levels of government. Congress should be loath even to attempt to intrude on this judicial function, with respect to a practice that dates back to the founding, and at a time when the United States is deeply engaged in promoting democratic constitutionalism in countries around the world, including provision for independent courts to provide enforcement of constitutional guarantees.¹⁴⁵

Finally, the last great fear seems to be the subjectivity of the Court in rendering decisions based on a perceived, unscientifically measured national and international consensus. Described as "picking and choosing," or selectively bolstering personal opinions with international law, almost every decision the Court makes could be criticized in much the same way. Short of programming a

¹⁴⁵. *Hearing on H.R. 568, 40*. 
computer with constitutional parameters, what choice is there? Justice Scalia seems to dislike any option but the legislature’s when it comes to decisions involving social issues. A “national consensus” does not impress him, even if he could devise mathematical proof of its existence. Similarly, opinion polls hold even less regard. Since someone must make these difficult rulings, who better than the most respected Jurists in the world? And if one fears wholesale importation of another country’s laws, where would we be without the inherent selectivity of the Court? Justice Frankfurter’s eulogy with regard to the “judgment of the Court” rings as true today as when he first delivered it.  

In the end, if the issue is really a socio-political one, Justice Scalia’s arguments that foreign law would have potential adverse consequences with regard to the exclusionary rule, separation of church and state, and abortion, appear to be red herrings. He knows as well as anyone that it is extremely doubtful the Court would adopt reasoning at extreme odds with current American opinion or constitutional jurisprudence. As Wu opines, “Is someone as intellectually stubborn as Sandra Day O’Connor [or anyone else on the Bench] realistically in danger of corruption by foreign influence? Pas question.” Unfortunately, these red herrings do what they are intended to do: raise the hackles of the constitutionally-uninitiated, creating needless consternation that basic rights will be lost. The ultimate threat is that our law will stagnate in its limited pool of jurisprudence, creating a kind of wall of China about ourselves. Meanwhile, the rest of the world will enjoy the economic and social progress of constitutional hybrids, which can only be created through international intercourse.

Darlene S. Wood

147. Wu, supra note 45.