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Foreign and International Law in Constitutional Gay Rights Litigation: What Claims, What Use and Whose Law?

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FOREIGN AND INTERNATIONAL LAW IN CONSTITUTIONAL GAY RIGHTS LITIGATION: WHAT CLAIMS, WHAT USE, AND WHOSE LAW?

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I. INTRODUCTION

The use of foreign law in American constitutional adjudication has come to the fore in several recent Supreme Court cases.[1] Among the most controversial of these cases is *Lawrence v. Texas*.[2] *Lawrence*, which struck down Texas' sodomy law, relied heavily on foreign legislative and judicial decisions in its eloquent defense of same-sex intimacy as a species of liberty.[3] Its tone and use of foreign law has captured the imagination of gay rights advocates self-consciously globalizing their fight for greater freedom and equality.[4] Those very same characteristics have alarmed opponents of constitutional gay rights claims, who see in *Lawrence* both an attack on traditional American cultural values and an abdication of American constitutionalism in favor of a vaguely elitist/European/supranational tyranny.[5]

Still, the notoriety of *Lawrence*'s use of foreign law might seem perplexing, given that the Supreme Court has been using foreign law and citing foreign nations' judicial opinions for a long time.[6] Thus, an article considering the use of foreign and international law in gay rights litigation might do well to start by examining the

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1. *See* Roper v. Simmons, 125 S. Ct. 1183 (2005); Lawrence v. Texas, 539 U.S. 558 (2003); Atkins v. Virginia, 536 U.S. 304 (2002); Printz v. United States, 521 U.S. 898 (1997).

2. 539 U.S. 558 (2003).

3. *Lawrence*, 539 U.S. at 573-76 (citing Sexual Offenses Act, 1967, c.60, § 1 (Eng.); P.G. & J.H. v. United Kingdom, Eur. Ct. H.R. (2001); Modinos v. Cyprus, 259 Eur. Ct. H.R. (1993); Norris v. Ireland, 142 Eur. Ct. H.R. (1988); Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (1981)).

4. The movement for equal marriage rights for same-sex couples is especially pertinent here in the United States, as marriage-rights advocates have consistently celebrated foreign judicial and legislative decisions to allow same-sex marriage. *See supra* note 3 and accompanying text. But the globalized push for gay rights extends beyond marriage to include family protections more generally, protection for intimate conduct, coverage in employment discrimination laws, and the right to serve in militaries.

5. *See, e.g.*, Greg Franke, *Renegade Judges Undermine Constitution*, HUMAN EVENTS, Sept. 13, 2004 (reviewing PHYLLIS SCHLAFLY, SUPREMACISTS: THE TYRANNY OF JUDGES AND HOW TO STOP IT (2004) and citing, among other troubling constitutional trends, "one world globalism"), http://www.humaneventsonline.com/article.php?id=5066.

6. *See, e.g.*, *Roper*, 125 S. Ct. at 1198-99 (2005) (citing examples of the Supreme Court citing foreign legal authority when determining the meaning of the Eighth Amendment's prohibition on cruel and unusual punishment); *see also* Brief for Mary Robinson et al. as Amici Curiae Supporting Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 164151.

reasons for the strong reaction to *Lawrence*'s use of foreign law.[7] *Lawrence* was a controversial opinion, both in the result it reached and in the means it used. It dealt with a question implicating one of the main battlegrounds in the current culture wars. The opinion itself was aggressive, in that it explicitly went out of its way to rely on a broader and more value-laden grounding—substantive due process, rather than equal protection[8]—to reach its result, even though that meant overruling a relatively recent precedent.[9] At the same time, *Lawrence* is remarkably vague. Most readers are by now familiar with opacity of its legal analysis. Notwithstanding Justice Kennedy's lyricism about the content of due process liberty and his deep understanding of what it means to gay men and lesbians to have their sexual intimacy criminalized,[10] *Lawrence* remains an enigma in terms of the legal rule it lays down.

These characteristics might lead critics to look especially askance at *Lawrence*'s invocation of foreign law. An aggressive, vaguely reasoned but highly value-laden opinion on a controversial subject implicating culture and morality only becomes more problematic, the thought might go, when it does not even rely on domestic legal sources to determine the meaning of the governing law.[11] Opponents of gay rights might be especially alarmed when that foreign law—whether it serves as legal precedent or merely a model for policy—pushes American law beyond where it would otherwise go.

Beyond these characteristics, the subtext of a globalized gay rights movement surely affected the reaction to *Lawrence*'s use of foreign law. Given the steadily increasing momentum behind gay rights in foreign nations,[12] opponents of that movement in the United States must be alarmed by the Court's embrace of rights-

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7. *See* discussion *infra* notes 8-36 and accompanying text.

8. *See Lawrence*, 539 U.S. at 574-75.

9. Perhaps to add insult to injury, *Lawrence* was written by one of the authors of the joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which is perhaps most notable for its homage to stare decisis. *See* 505 U.S. 833, 854-69 (1992) (arguing that stare decisis required a refusal to overturn Roe v. Wade, 410 U.S. 113 (1973)).

10. *Lawrence*, 539 U.S. at 596-97.

11. Of course, in *Lawrence* Justice Kennedy was careful to explain how *Bowers v. Hardwick* had been wrong on its own terms, given its narrow conceptualization of the right at issue and its misreading of American history, and had also been undermined by subsequent domestic precedent. *See id.* at 566-77 (citing Bowers v. Hardwick, 478 U.S. 186 (1986)).

12. *See infra* notes 252, 254, and 260 and accompanying text.

protective foreign law partly because that embrace legitimizes recourse to foreign nations' gay rights policies. If *Lawrence* used foreign law to find a constitutional right to same-sex intimacy, the argument might go, then perhaps that same Court, or Congress, or the states, will look to foreign statutes and judicial decisions when deciding whether to recognize other rights, including rights to marry, to serve in the military, to be free of employment discrimination, or to adopt or retain parental custody.

This cursory introduction to the issue highlights several factors that should be considered when determining the appropriateness of borrowing foreign law in American constitutional litigation. First is the nature of the constitutional claim.[13] *Lawrence* was a case about individual rights. Indeed, it is the very paradigm of such a case, as individuals sought to obtain constitutional protection from the State entering their home and branding them criminals based on their performance of the most intimate of conduct.[14] The universality of the individual freedom that Justice Kennedy identified in *Lawrence*[15] seems at first glance clearly relevant to the question whether foreign law should play a role in adjudicating that claim. Therefore, one factor to consider when determining the appropriateness of foreign law borrowing in a case such as *Lawrence* is whether the individual-rights nature of the issue universalizes the issue, making foreign law an appropriate source of meaning when interpreting the Constitution.

But the simple fact that a constitutional provision is amenable to foreign borrowing does not make the affirmative argument in favor of such borrowing. Indeed, as suggested by the response to the court's use of foreign law in cases such as *Lawrence* and *Roper*, such borrowing remains controversial among judges,[16] scholars,[17] and more general commentators.[18] It may be, though, that foreign law can play a role more modest than actually supplying or even influencing the rule of decision in American constitutional cases. In particular, foreign law can provide empirical evidence relevant to American constitutional analysis or provide decisional aids that

13. *See infra* Parts III.A-B.

14. *See Lawrence*, 539 U.S. at 562-63.

15. *See id.* at 562.

16. *See, e.g.*, Roper v. Simmons, 125 S. Ct. 1183, 1217 (Scalia, J., dissenting).

17. *See, e.g.*, John McGinnis, *The Limits of International Law in Protecting Dignity*, 27 HARV. J.L. & PUB. POL'Y 137 (2003).

18. Kenneth Anderson, *Foreign Law and the U.S. Constitution*, POL'Y REV., June 2005, *available at* http://www.policyreview.org/jun05/anderson.html.

help American courts approximate the rule required by the Constitution.

As the author has argued elsewhere, American courts adjudicating constitutional claims often find it quite difficult to discern what the Constitution would actually require in a particular case.[19] Most notably, courts' decisions to apply rational basis review in most equal protection cases reflects an acknowledgement of their inability to discern precisely when government action fails the constitutional requirement that government classify only in pursuit of the public interest. In such cases, sub-constitutional decisional aids, such as estimations of a party's ability to influence the political process, assist courts in reaching results that approximate the constitutional rule.[20] Foreign law, by providing examples of other legal systems' conclusions about similar issues, may well provide yet another decisional aid assisting American courts attempting to apply the American constitutional rule. Under this theory, foreign law does not influence the actual meaning of the American constitutional provision, but rather assists courts in their search for the unique meaning of that provision.

Foreign law may play a more fundamental role in constitutional adjudication.[21] If the given constitutional right can be understood as incorporating a universal norm, then foreign law could well play a role in informing the actual meaning of the constitutional provision, rather than simply serving as a decisional aid that occupies only sub-constitutional status. *Lawrence* stands as a prime example of just such a possibility. Even more than in a case such as *Roper v. Simmons*,[22] which simply used foreign law as "confirmatory" of the court's independent analysis of the Eighth Amendment,[23] Justice Kennedy in *Lawrence* relied heavily on how foreign courts and legislatures had treated sexual intimacy.[24] In conjunction with this reliance on foreign law, Justice Kennedy defined the right at issue in *Lawrence* as one involving "liberty," rather than the more standard doctrinal approach of asking whether the interest at stake was a fundamental "privacy" interest.[25]

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19. *See* William D. Araiza, *The Section 5 Power and the Rational Basis Standard of Equal Protection*, 79 TUL. L. REV. 519, 528-42 (2005).
20. *Id.*
21. *See infra* Part III.A-B.
22. 125 S. Ct. 1183 (2005).
23. *See id.* at 1198.
24. Lawrence v. Texas, 539 U.S. 558, 571-78 (2003).
25. *Id.* at 564-65.

This doctrinal shift matters for our purposes because it opens the door to a much broader use of foreign law in defining the content of substantive due process, given the global meaningfulness of liberty, in contrast to the relatively more parochial significance of privacy, as that term is understood in American constitutional doctrine.

This Article examines these three issues about the borrowing of foreign and international law to adjudicate claims under the Constitution. First, it examines whether a meaningful distinction can be drawn between structural provisions and individual-rights provisions.[26] It has been argued that structural provisions are the unique result of particular historical, political and social conditions, and thus unamenable to interpretation based on analogous provisions in foreign law.[27] By contrast, as suggested above, individual-rights claims might be thought of as more inherently universal.[28] The first part of the Article considers whether structural provisions can be distinguished in such a way.[29] It suggests that they cannot.[30]

The Article then moves on to consider individual rights claims.[31] It considers the usefulness of foreign law as a decisional aid to American courts attempting to approximate the rule established in the Constitution.[32] Foreign law can provide empirical evidence of the sort relevant to the application of the constitutional rule. For example, it can provide evidence of the weightiness of a state's interests in impairing a constitutional value and the public need for such an impairment. It can also provide part of the social context against which American courts make decisions about the fairness of a given classification or the respect to be accorded particular private conduct.[33]

The Article then examines whether foreign law can play more than merely a supporting role in constitutional adjudication.[34] Moving from equal protection, which provides the examples for much of the preceding analysis, the Article considers substantive

26. *See infra* Parts II-III.
27. *See infra* Part II.
28. *See infra* Part III.
29. *See infra* Part II.
30. *See infra* Part II.
31. *See infra* Part III.
32. *See infra* Part III.A.
33. *See infra* Parts III.B.1-2.
34. *See infra* Parts III.B-C.

due process, and in particular, Justice Kennedy's understanding of substantive due process in *Lawrence*.[35] It suggests that Justice Kennedy's understanding of substantive due process may effectively have globalized that provision into a general guarantee of liberty.[36] If this is true, then foreign law could become substantially more relevant to constitutional adjudication than it has been in the past. In particular, it could be highly relevant to gay rights claims in areas ranging from marriage and parenthood discrimination to military service.

The Article then considers the possible uses of international, as opposed to foreign, law.[37] Following the basic analytical method applied earlier to foreign law, it first considers whether treaty norms ratified by the Senate can serve not simply as law themselves, but as inputs into judicial analysis of domestic constitutional provisions.[38] Because the U.S. Senate has added non-self-executing statements to its ratification of many human rights treaties, it may be important to find such a use for such treaty norms in order for treaty law to play a role in protecting Americans' human rights.[39] Under *Lawrence*'s analysis of substantive due process, such norms can in fact play a useful role in domestic constitutional doctrine, by reflecting social and moral judgments about the value to be accorded such conduct.

The Article then moves to non-controlling international law, such as treaties to which the United States is not a party and customary international law to which the United States has objected persistently enough to gain an exemption.[40] In *Roper v. Simmons* the Court arguably used both of these sorts of law to "confirm" its conclusion that the Eighth Amendment prohibited the execution of inmates who were juveniles when they committed their crimes.[41] The Article examines the Court's analysis in *Roper* to determine how Eighth Amendment jurisprudence in particular is amenable to such legal sources.[42] It argues that Eighth Amendment doctrine's focus on offender culpability and social consensus render it amenable to foreign and international law

35. *See infra* Parts III.C.1-2.
36. *See infra* Parts III.C.1-2.
37. *See infra* Part IV.
38. *See infra* Part IV.A.
39. *See infra* Part IV.A.
40. *See infra* Part IV.B.
41. *See* 125 S. Ct. 1183, 1198-1200 (2005).
42. *See infra* Part IV.B.

conclusions regarding the appropriateness of particular types of punishments for particular classes of offenders.

The Article then considers whether similar analysis would apply to due process and equal protection claims.[43] It argues that the foundation of these rights in social judgments and the globalization of those judgments deriving from the rise of transnational social institutions renders these claims equally amenable to influence from international and transnational sources. While the current state of those social judgments is not uniformly favorable to gay rights claims, the increased favor with which global society views those claims makes international law borrowing more attractive to gay rights litigators, in addition to more doctrinally justifiable.

Throughout, this Article attempts to fit foreign and international law within the framework of domestic constitutional doctrine, rather than simply overlaying it without any nuance. With the Court more accepting of the idea of foreign and international law borrowing, the need for such a nuanced, contextualized approach to the question becomes correspondingly more pressing.

II. ARE STRUCTURAL PROVISIONS UNIQUELY RESISTANT TO FOREIGN BORROWING?

Structural provisions are marked by several characteristics. Most notably, such provisions are not adopted because of any intrinsic worth they possess. They are instrumental, at least in liberal societies based on popular sovereignty and organized for the benefit of citizens rather than the state itself.

This characteristic of structural arrangements has indeterminate consequences for the appropriateness of borrowing foreign law. On the one hand, because such arrangements are justified not by their intrinsic worth but instead by their success in accomplishing some other goal, the experience of other nations would seem quite relevant in determining the appropriate arrangements for American government. Justice Breyer's dissent in *Printz v. United States* reflects this attitude.[44] In his opinion, Justice Breyer examined other nations' federal structures in the course of determining whether the federal government could

43. *See infra* Part IV.D.
44. 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

constitutionally command state institutions to enforce federal law.[45] In Justice Breyer's view, the instrumental nature of federalism counseled in favor of examining other nations' experiences to determine whether particular arrangements promote or inhibit the underlying goal the structural provision seeks to achieve.[46] Examining the structures of other federal nations, Justice Breyer noted that many were able to maintain vibrant federal systems even when the central government was able to issue mandates of the sort at issue in that case.[47]

The opposing view is reflected in Justice Scalia's majority opinion in *Printz*. Justice Scalia dismissed Justice Breyer's invocation of other nations' federal structures.[48] He observed that the structure of American government was simply different than that of other nations.[49] Thus, he concluded that while comparative study might be highly relevant to constitution drafting, it was irrelevant to constitutional interpretation.[50]

Justice Scalia's remark illustrates the argument that choices about governmental structure are exactly that—choices—rather than normatively transcendent principles or empirically testable propositions for which recourse to foreign law might be appropriate. In Justice Scalia's view, structural provisions are arbitrary, in the sense that they reflect the drafters' decisions that certain structures were best suited to achieving the goals they sought to achieve.[51] Other nations' constitution-makers might well make different choices.[52] While the choices of foreign constitution-makers might be useful as examples of structures that *should* be embraced— "constitution drafting" —they are irrelevant

45. *See id.*

46. *See id.* (examining foreign precedent to determine whether the commandeering of state governments attempted by the challenged federal law was the best balance of the need for a central government and the liberty promoted by local control).

47. *Id.*

48. *Id.* at 921 n.11.

49. *Id.*

50. *Id.*

51. *Id.* at 919-22.

52. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 711 (1988) (Scalia, J., dissenting) ("[M]any countries of the world get along with an executive that is much weaker than ours—in fact, entirely dependent on the continued support of the legislature."); *see also* Raines v. Byrd, 521 U.S. 811, 828 (1997) (noting that more expansive legislator standing rules might exist in other nations' systems, even if they do not exist in the American system).

to understanding the choices that the American Constitution's drafters actually *did* embrace— "constitutional interpretation."

Thus, at first glance, structural provisions, in part because of their instrumental nature, may well not be amenable to interpretation by reference to other nations' structural law. At least this would be the case if one believed that structural provisions had actual determinate meaning, as opposed to merely standing for a broad principle, such as the existence of a vibrant federal system, which could be applied by reference to how other legal systems deal with the same issue.[53] But this first cut is insufficiently precise. Why is an instrumental provision necessarily arbitrary, in the sense of representing a willful choice rather than an adoption of a rule based on reason or universal values? Professor Vicki Jackson, discussing the uses of comparative federalism law, advances the discussion by arguing that federalism arrangements are historically contingent and (in a non-pejorative way) unprincipled, and thus not amenable to illumination by reference to foreign judicial analysis.[54] She writes that "federalism provisions are often peculiarly the product of political compromise in historically situated moments, generally designed as a practical rather than a principled accommodation of competing interests," and thus are "unique to the parties' situations."[55] She continues that federalism arrangements are not only a compromise, but also a compromise that "typically constitutes an interrelated 'package' of arrangements."[56] Thus, while the historically contingent nature of those provisions makes their proper interpretation resistant to foreign law borrowing,[57] this "package deal" aspect makes it inappropriate to interpret those provisions as isolated principles.[58]

The contingent nature of structural provisions arguably extends to the identity of the groups constituting the society to be governed. If structural arrangements can be understood as agreements setting the rules of the road between the groups constituting the society, then the unique combination of groups in

53. *But see Printz*, 521 U.S. at 976, 977 (Breyer, J., dissenting) (describing *Printz* as posing the "common legal problem" of "reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent governmental entity").

54. Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 247-50 (2001).

55. *Id.* at 273.

56. *Id.*

57. *See id.* at 273.

58. *See id.* at 273-74.

a given society necessarily means that different arrangements can never truly be compared. Federalism provisions in the Indian Constitution—designed largely to accommodate the nation's ethnic and religious diversity—may be incomparable to those in the German Basic Law, which were motivated not by such diversity but instead by a desire to prevent the totalitarian centralizing of power that accompanied Nazism.[59] In our own day, we are witnessing the creation of a federal structure in Iraq, whose provisions most assuredly respond to the unique relationships between the ethnic and religious groups struggling for power in that nation.[60] None of these may be comparable to the provisions of American federalism, with its own unique set of historical and social circumstances.

In sum, this argument maintains that both the historical contingency of these provisions and their interrelationship to other parts of the overall compromise struck when establishing constitutional structure tie their meaning closely to purely domestic interpretive sources. Analogous foreign provisions are fundamentally different, given that they resulted from different sets of pressures and actors.

However, it is unclear why the characteristics described above describe only structural provisions. For example, the history of the Reconstruction Amendments suggests that "political compromises in historically situated moments" greatly influenced whether the broadly worded guarantees of the Thirteenth or Fourteenth Amendments would encompass the right to vote or "social," as opposed to "civil," equality.[61] The Founders' compromise with slavery also resulted from such a historically situated moment. Moreover, the Founders' compromise constituted a key part of an "interrelated 'package' of arrangements" that made possible a national consensus in favor of ratifying the Constitution itself.[62] As

59. *See, e.g.*, Clifford Larsen, *States Federal, Financial, Sovereign and Social: A Critical Inquiry into an Alternative to American Financial Federalism*, 47 AM. J. COMP. L. 429, 460 (1995) (noting that the Allies' postwar concern with Nazi centralization led them to impose a federal structure on Germany, creating states that for the most part had no historical roots).

60. *See* IRAQI CONSTITUTION arts. 109-110 (dealing with allocation of power over oil resources); art. 111 (dealing with clashes between local and national law); art. 114 (dealing with rights of provinces to form larger regions), *available at* http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/24_08_05_constit.pdf.

61. *See* Jackson, *supra* note 54, at 273.

62. *See id.* at 273-74.

a result of that compromise, however, language in rights provisions such as the Fifth Amendment's Due Process Clause had to be contorted—that is, read against the context of a uniquely American history—in order to accommodate slavery-protective federal laws such as the Fugitive Slave Acts, and the permissibility of slavery in the District of Columbia.[63] These examples illustrate that rights provisions, just like structural ones, may well be historically situated compromises that make their cross-national comparisons inappropriate as well.[64]

Even more fundamentally, the very difference between structural and rights provisions is hardly watertight. Rights provisions are not simply statements of individual rights as against an abstract "government"; instead, they also function as protections of minorities *against majorities.*[65] Indeed, Akhil Amar has argued that the Bill of Rights was in fact originally intended as structural

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63. *See generally* JACOBUS TENBROEK, EQUAL UNDER LAW (1965).

64. Of course, sometimes the historical context of a constitution-drafting period is reflected in the actual text of a given provision. Thus, for example, provisions of the German Basic Law explicitly condition grants of individual rights on the continued security of the democratic system itself. *See* Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837, 854-55 (1991). This provision resulted from the experience the Basic Law's framers had with the rise of Nazism and the Nazis' use of democratic freedoms to subvert that very system. Judith Wise, *Dissent and the Militant Democracy: The German Constitution and the Banning of the Free German Workers Party*, 5 U. CHI. L. SCH. ROUNDTABLE, 301, 302 (1998). But in such cases the inappropriateness of foreign borrowing is much clearer, and less controversial, given the clear textual commitment to a certain choice. By contrast, provisions such the Due Process and Equal Protection Clauses are at least potentially open to borrowing, given their open-ended quality. *E.g.*, Robert A. Sedler, *The Legitimacy Debate in Constitutional Adjudication: An Assessment and a Different Perspective*, 44 OHIO ST. L.J. 93, 110 (1983) ("From *Lochner* to *Roe* . . . the Court clearly has not seen its function in constitutional adjudication to be limited to implementing the values constitutionalized by the framers. The Court itself has infused values into the open-ended concepts of due process and equal protection."). While the Due Process and Equal Protection Clauses are open-ended and leave significant room for judicial interpretation, the Clauses and their historical context provide no clear basis for using foreign law as an interpretation aid. The question of whether borrowing is an appropriate interpretative tool when construing these clauses therefore raises borrowing questions that are more difficult to answer than in the context of, for example, the German Basic Law.

65. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 964-66 (1983) (Powell, J., concurring) (finding the legislative veto to be unconstitutional given the procedural due process violations inherent in allowing a majoritarian legislature to determine when an agency has correctly applied a regulation to an identified individual); Hunter v. Erickson, 393 U.S. 385 (1969) (holding that requirement that any city ordinance regulating on basis of race must be first approved by majority was unconstitutional).

protections for localism against the forces of a centralized government.[66] Thus, rights provisions can be understood as additions to government structure, by denying certain powers to majorities, even if today we have come to pigeonhole provisions as "structural" or "rights granting."[67]

For these reasons, any possible distinction between structural and rights provisions cannot by itself serve as the basis for determining the appropriateness of foreign law borrowing, even assuming that these two types of provisions can coherently be distinguished. Fundamentally, both structural and rights provisions result from particular historical and social circumstances; therefore, this characteristic does not support a distinction on this issue. A more supple analysis is required, one that examines the particular function which foreign law is being offered up to play.

The next section of the Article considers the particular uses foreign law can play in constitutional interpretation.[68] It uses rights provisions as illustrations, in part because as a practical matter gay rights advocates' constitutional rights claims rest largely (though not completely)[69] on individual rights provisions, most notably due process and equal protection. In addition, though, rights provisions are especially prone to claims that foreign law provides insight into their meaning. Rights provisions are often written in language, such as "equal protection" or "liberty" or "freedom of speech," that has come to signify global norms. A search for the meaning of such a provision thus naturally leads to the meaning of those global norms.

In addition, courts' primary roles as protectors of rights render them unable to shy away from construing vaguely worded, open-

66. AKHIL AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION chs. 1-6 (1998).

67. *See generally* William D. Araiza, *The Trouble with* Robertson*: Equal Protection, the Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 CATH. U. L. REV. 1055, 1092-1101 (1999) (discussing the individual rights background of separation of powers issues).

68. *See infra* Part III.

69. Most notably, the law review literature has abounded with discussions about whether the Full Faith and Credit Clause could be used to expand same-sex marriage rights from individual states to the entire nation, and, conversely, whether Congress appropriately used its power to enforce that clause when it sought to prevent such an outcome by enacting the Defense of Marriage Act. *See, e.g.*, Phyllis G. Bossin, *Same-Sex Unions: The New Civil Rights Struggle or an Assault on Traditional Marriage?*, 40 TULSA L. REV. 381, 386 (2005).

ended rights provisions; by contrast, they might be more willing (and indeed, feel obligated) to demur when confronting interbranch or federal-state conflicts.[70] The requirement that courts adjudicate rights claims, even when they involve indeterminate language and a contested drafting history, means that they will often search for sub-constitutional rules or decisional aids to assist them. Such rules and aids do not reflect actual constitutional meaning, but instead constitute heuristics that help the court approximate the actual constitutional rule when it decides the case. Building on his previous work,[71] the author suggests that foreign law, even if not an appropriate tool in actually defining the content of constitutional provisions, can play a very useful role in providing aids that assist a court in determining for itself the unique meaning of American constitutional provisions.

III. INTERPRETING RIGHTS PROVISIONS BASED ON FOREIGN LAW

The practice of borrowing from foreign (and, indeed, international)[72] law when interpreting rights provisions requires a theory of how such law properly influences the meaning of the given provision.[73] This is different from the status of international law *as such* as binding on American courts.[74] Of course, foreign law may influence the development of a customary norm of international law, which might then in its own right bind American courts. But this is a different question from whether and how foreign law itself should directly influence American law.

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70. *See, e.g.*, Garcia v. San Antonio Metro. Trans. Auth., 469 U.S. 528, 555-56 (1985) (concluding that federalism-based concerns about the imposition of federal regulations on states are best addressed through the political process); Goldwater v. Carter, 444 U.S. 996, 998-99 (1979) (Rehnquist, J., concurring) (using the political question doctrine to refuse to intervene in a struggle between the President and members of the Senate over the Senate's role in abrogating treaty obligations).

71. *See* Araiza, *supra* note 19; William D. Araiza, *Court, Congress, and Equal Protection: What* Brown *Teaches Us About the Section 5 Power*, 47 HOWARD L. REV. 199 (2004).

72. *See infra* Part IV.

73. *See generally* Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 641 (2005).

74. *See, e.g.*, Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L L. 1 (1992) (discussing the acceptance of customary international law as binding in United States courts); *see also* discussion *infra* Part IV.

A. *Foreign Law as a Source of Constitutional Law*

It is necessary to develop a theory of contemporary foreign law's relevance to constitutional interpretation in order to answer the contention that the particular rights provision at issue represents only a grant of discrete, bounded rights defined by the historical circumstances of the drafting and the intentions of the drafters and ratifiers.[75] Of course, this contention goes beyond questioning the practice of foreign law borrowing to challenge any interpretive method that seeks to find meaning in a provision beyond that clearly intended by its drafters.[76] It has been argued, for example, that the concerns motivating the Thirty-Ninth Congress require that the Equal Protection Clause be understood simply as a mandate of racial equality (and indeed, racial equality with regard only to a discrete set of rights), rather than as a general expression that all persons should in some way be treated "equally."[77] Under a strict originalist methodology, it would be inappropriate to consider not only contemporary foreign law conceptions of what constitutes equal treatment, but even evolving domestic understandings of what classifications should be disfavored.[78]

Broader interpretive philosophies suggest different uses of foreign law. For example, if one believes that a given constitutional provision constitutionalizes a less specific, more evolving conception of rights, as, for example, the Eighth Amendment is currently understood,[79] then the question becomes one of identifying the relevant community whose evolving opinions count. That community could include foreigners, if, for example, the provision at issue constitutionalizes a norm that is understood to be

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75. Even an originalist interpretive theory might give effect to foreign law. However, that foreign law would be the foreign law existing at the time of the drafting, and then, of course, only if the judge was convinced that the drafters looked to that foreign law when writing the provision in question. *See* Alford, *infra* note 73, at 645-58 (discussing the role foreign law plays in originalist interpretation).

76. This statement assumes that the drafters themselves intended, or at least were not opposed to, an interpretive methodology that focused on their own intent. This assumption is contested. *See, e.g.*, H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (concluding that the framers would have opposed such a methodology).

77. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 171 (1977).

78. *See, e.g., id.*

79. *See infra* Part IV.B.

global, such as equality or freedom of conscience.[80] If the meaning of such a norm is developed through the legal process, then it might be appropriate to say that that community would consist of foreign lawyers and jurists, who develop such norms through their work with analogous language within their own legal systems.[81]

Thus, unless the provision at issue can be thought of as having a built-in reference to evolving foreign law, either in the necessary implications of its text[82] or the clear intentions of the drafters,[83] the relevance of such law can only be determined after resolving the question of the proper interpretive methodology. Such a theory might, for example, suggest that a court should seek to "translate" the drafters' intentions into contemporary context.[84] Alternatively, it might call for judges to focus on the bare text of the particular provisions, or to current majoritarian understandings of what that text should mean,[85] without reference to the meaning the drafters intended to convey when using that text. Thus, it might call for judges to construe the term "equal protection of the laws" according to the court's best notion about what those words *can* encompass and *should* normatively mean, rather than what the

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80. *See* Peter J. Spiro, *Treaties, International Law, and Constitutional Rights*, 55 STAN. L. REV. 1999, 2021-25 (2003) (discussing how cases of human rights are particularly likely to involve sets of universally held values).

81. *See, e.g.*, Ian Johnstone, *Security Council Deliberations: The Power of the Better Argument*, 14 EUR. J. INT'L L. 437, 450 (2003) (discussing the concept and composition of an interpretive community as including those that develop and apply the legal norm at issue).

82. For example, the provision authorizing Congress to define and punish crimes "against the Law of Nations" would seem to incorporate the evolution of the law of nations. U.S. CONST. art. I, § 8, cl. 10. Compare Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004), for a discussion of the Court's position that takes only cautious steps in the judicial definition of offenses against the law of nations, in part to avoid intruding on congressional prerogatives to decide issues of foreign relations.

83. *But cf. Sosa*, 542 U.S. at 727-28 (attempting to determine whether the drafters of the Alien Tort Statute intended to embrace an evolving conception of customary international law when authorizing federal courts to hear cases alleging violations of the law of nations).

84. *See generally* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) (arguing that constitutional notions will change over time as a matter of fidelity, which means that they must change in order to stay in accord with the Constitution's original meaning).

85. For example, the argument has been made that the people, acting through Congress, should have significant discretion in determining the appropriate meanings of the various guarantees of the Fourteenth Amendment. *See, e.g.*, Robert C. Post & Reva B. Siegel, *Equal Protection By Law: Federal Antidiscrimination Law After* Morrison *and* Kimel, 110 YALE L.J. 441 (2000).

drafters intended to accomplish by writing them. Alternatively, one might embrace a theory in which legislatures have the authority to interpret what equal protection of the laws means today.[86]

Obviously, such theories are highly controversial. The underlying debates about these interpretive theories are at least as contested as the question of foreign law's appropriate influence on constitutional interpretation. Indeed, most commentators' and judges' views on foreign-law borrowing probably flow from their position on these larger issues of interpretive methodology, rather than vice-versa.[87] This Article avoids such a grand inquiry into methods of constitutional interpretation, which would overwhelm its focus on the appropriateness of foreign-law borrowing. Instead, it examines the possibilities for more modest use of foreign law in constitutional adjudication.[88]

B. Foreign Law as an Input into Constitutional Analysis

A more promising approach to foreign law's use in constitutional interpretation distinguishes between the tasks of finding constitutional meaning and applying that meaning to decide particular cases. While it might be difficult to use foreign law to influence the abstract meaning of American constitutional provisions, it is far more defensible to use foreign law as a decisional aid in applying that meaning to particular contexts. To clarify this point, this part of the Article first explains the distinction between constitutional law and sub-constitutional decisional aids.[89] It then examines two ways in which foreign law can assist in the application of constitutional law to a given set of facts.[90]

1. Interpreting the Constitution and Deciding Cases

A court's prime obligation in hearing a case is to rule for one side or the other. While seemingly a truism, this observation implies an important point—that a court's prime function is not to

86. *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641 (1966) (suggesting that Congress could determine for itself the requirements of the Equal Protection Clause).

87. Alford, *supra* note 73, at 641 ("Comparativism is not a constitutional theory; it is a methodology that is employed depending on a judge's particular theory.").

88. *See infra* Part III.B.

89. *See infra* Part III.B.1.

90. *See infra* Parts III.B.1-2.

interpret law. Of course, a court may have to interpret law in the course of deciding which party should prevail, but in such a case the task of law interpreting is subsidiary and instrumental, and often unnecessary. For example, courts generally do not pass on legal arguments unnecessary to the decision of the case. Only legal conclusions necessary to the decision of the case are considered the binding precedent created by that case, while all other legal analysis is deemphasized as dicta.[91] Decisions that have no impact on actual parties are beyond the scope of the federal judicial power to decide "cases and controversies."[92] Thus, the legal force of a court's actions on third parties—that is, its authoritative statement of law—is inextricably tied to the result of the dispute the court adjudicated.[93]

Thus, a court's prime responsibility is to decide the case in front of it. While that responsibility sometimes requires the court to interpret law, often a court will confess its inability truly to determine what the Constitution requires. At times this inability will lead a court simply to decline to decide a case.[94] However, this option is usually not available when the question is one of individual rights, given courts' special responsibility to vindicate those rights.[95] In such situations courts must decide, despite their inability to distill from the Constitution a rule precise enough to govern particular cases.

As the author has argued elsewhere, rational basis review under the Equal Protection Clause provides a clear example of courts deciding cases without authoritatively interpreting the

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91. To continue this point, when the majority of a multi-judge panel agrees on a result but disagrees on the rationale, the narrowest rationale taken by a member of the majority becomes the holding. *See* Marks v. United States, 430 U.S. 188, 193 (1977) (citing Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).

92. *See, e.g.*, DeFunis v. Odegaard, 416 U.S. 312 (1974) (holding that a case that is mooted is beyond the Court's Article III judicial power).

93. Similarly, in *Marbury v. Madison*, Chief Justice Marshall defended the practice of judicial review as incident to a court's need, as part of deciding a case, to determine which law applied when two laws conflicted. 5 U.S. 137, 177-78 (1803).

94. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 217 (1962) (citing as one of the criteria for calling an issue a non-justiciable political question the lack of judicially-manageable standards for deciding the case).

95. *See, e.g.*, *Marbury*, 5 U.S. at 163-166 (concluding that once a right has vested in an individual it falls to the courts to provide a remedy for any violation of that right); *cf.* Lujan v. Defenders of Wildlife, 504 U.S. 555, 575-77 (1992) (holding that generalized grievances are beyond the scope of the judicial power, given the capacity of the public to vindicate its generalized rights in the political branches).

underlying legal principle.[96] Briefly, the argument is that institutional competence concerns make it impossible for a court truly to know what equal protection requires in many situations. As a result, the courts often accord deferential scrutiny to challenged classifications, relying on presumptions of constitutionality and conclusions about the burdened party's ability to influence the political process to prevent or remedy inappropriate classifications.[97] The results of such "rational basis" scrutiny—that the government almost always wins—should not be understood as reflecting the true equal protection requirement.[98] Rather, those results reflect courts doing their best to identify the constitutional law applicable to a case through the use of presumptions, estimations of political strength, and other sub-constitutional, but judicially manageable, rules of thumb.

2. Foreign Law as an Input in Deciding Cases: The Example of Equal Protection

Foreign law can provide similar decisional aids in constitutional cases. On this theory, traditional domestic sources of the meaning of provisions such as equal protection or substantive due process often don't provide precise answers to questions courts must answer. Foreign law can assist in the process of applying such vague constitutional rules, even if it does not play a role in uncovering the abstract meaning of those rules.

An example may clarify this argument. Consider a claim that that the Defense of Marriage Act (DOMA)'s definition[99] of marriage to exclude same-sex unions violates the equality component of the Fifth Amendment's Due Process Clause. Our intuition might suggest that a court's evaluation of this claim would be assisted by foreign courts' evaluations of similar claims made under equality provisions of those other nations' constitutions. But how?

Presumably the first doctrinal question would be whether the Equal Protection Clause even addresses the relevant discrimination—in this case, discrimination based on sexual orientation or with regard to the ability to marry. Using foreign

96. *See* Araiza, *supra* note 19, at 535-38.
97. *See id.* at 538.
98. *See id.* at 537.
99. 28 U.S.C. § 1738 (2000).

law—for example, the scope of other nations' contemporary equality principles—to influence that decision suggests that contemporary foreign law can help uncover actual constitutional meaning. Such a use implies an acceptance of particular interpretive methodologies, and the rejection of others, most notably one based on the intention of the drafters of the text. After all, it is questionable whether foreign law equality norms (to the extent they even existed in 1866) influenced the drafters, and even more questionable whether the drafters directed their gaze primarily at such foreign norms, rather than to the pressing questions of slavery and racial equality that had ignited the Civil War. Of course, even if all that were true, an originalist interpreting the Equal Protection Clause would still refuse to resort to *contemporary* foreign law.[100]

The fact that using foreign law implies acceptance of one interpretive theory and rejection of another does not make such use illegitimate. As argued above, however, the fundamental disagreement about interpretive methodologies cautions against immediate embrace of a borrowing theory that presupposes a choice on this more fundamental question. A more modest theory allows courts to utilize foreign law in developing sub-constitutional decisional rules to assist them in deciding constitutional cases. Even more modestly, courts could use foreign law to illuminate the context surrounding such sub-constitutional rules.

Equal protection provides a prime example of the role foreign law can play. The historical context of the Equal Protection Clause makes it clear that race classifications are almost never appropriate, at least when their purpose or effect is to subordinate one race.[101] In that sense, one might say that the rule against race classification,

100. *See, e.g.*, Alford, *supra* note 73, at 645-59.

101. It becomes difficult at this point to discuss the role historical understandings should play in understanding the Fifth Amendment's equality guarantee. Most of the history generally thought to be relevant derives from the Equal Protection Clause, ratified more than seventy years after the Fifth Amendment. Because the Court has concluded that the Fifth Amendment's equality guarantee is co-extensive with the Fourteenth Amendment's, (see Bolling v. Sharpe, 347 U.S. 497 (1954)), and since a robust equality guarantee is generally thought to have entered the Constitution via the Fourteenth Amendment, and only then "reverse incorporated" into the Fifth Amendment (see generally Richard A. Primus, Bolling *Alone*, 104 COLUM. L. REV. 975, 982-85 (2004) for a discussion of the rise of reverse incorporation), it might make sense to focus on the history of the Fourteenth Amendment, even when discussing the federal government's equality obligations.

or perhaps race subordination, is in fact constitutional "law."[102] However, other classifications—gender, sexual orientation, and indeed every classification other than race—do not present compelling historical arguments for their prohibition by the drafters. Nevertheless, all of the Justices on the Court have agreed, at least in principle, that a valid equal protection claim may be made in the absence of a race-based classification.[103] As the author has argued elsewhere, the equal protection principle is animated by a second principle: a rule against arbitrary classifications devoid of a genuine public purpose either through utter irrationality[104] or animus.[105]

The rule against purely private-regarding classifications is properly considered a rule of constitutional law: it does not derive from any more fundamental principle found in equal protection, but instead stands for the foundational proposition that in general government may not classify simply for the sake of singling out.[106] As a rule of constitutional law, under the theory being sketched out here foreign law should play no role in uncovering it.

However, foreign law can play a significant role in deciding cases under that rule. Deciding whether a particular gender, sexual orientation or other non-racial classification satisfies a public purpose presents a difficult challenge to courts. In deciding such issues, the Supreme Court has often relied on methodologies that reach this question only indirectly, by asking whether the political

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102. For purposes of this Article, it is irrelevant whether race classification in general, or race subordination in particular, constitutes this core rule of equal protection. *Compare, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 346 (2003) (Ginsburg, J., concurring) (reserving this question), *with* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520 (1989) (Scalia, J., concurring) (arguing that the Equal Protection Clause aims at race classification per se).

103. *See, e.g.*, Vill. of Willowbrook v. Olech, 528 U.S. 562 (2000) (per curiam). In addition to *Olech*, of course, the Court has found a variety of non-racial classification decisions to violate the Equal Protection Clause. *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996) (sexual orientation); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (mental retardation); Zobel v. Williams, 457 U.S. 55 (1982) (status as recent arrival from out-of-state); Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion) (gender).

104. *See* Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, 488 U.S. 336 (1989) (striking down a property tax valuation scheme as arbitrary and thus in violation of the Equal Protection Clause).

105. *See* Araiza, *supra* note 19, at 551; *see also Cleburne Living Ctr.*, 473 U.S. at 448; Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (simple dislike of a group an inappropriate ground on which to classify).

106. *See generally Olech*, 528 U.S. 562.

situation facing the burdened group is such that arbitrary burdens are likely to be caught by the political process.[107] When that inquiry yields the result that a group is not a suspect class, the court then applies a very deferential ends-means scrutiny with a presumption of constitutionality.[108] As the author has argued elsewhere, such deferential review and such a presumption reflect institutional competence concerns, rather than an assumption that most of those classifications are likely constitutional in some abstract sense.[109]

a. Foreign Law as an Empirical Input

Foreign law can play a helpful role in mitigating that judicial incompetence and allowing courts to play a more meaningful role in evaluating constitutional gay rights claims. To the extent that foreign law engages the questions of social reality that underlie equal protection claims, it can provide useful inputs into an analysis that is itself based on American constitutional doctrine. Thus, to return to the DOMA example, foreign law could help an American court decide empirical questions such as whether same-sex households provide the same quality of childrearing as other households, a factor that would surely go into a court's analysis of DOMA's restrictions on gay marriage, should those restrictions be defended with arguments that gays and lesbians do not provide optimal child-rearing environments.[110] To take another example, foreign law could provide another source of expert opinion about the compatibility between homosexuality and military service, and thus provide input into an American court's evaluation of defenses to the current "don't ask, don't tell" policy.

Note that the assistance foreign law provides here derives not just from foreign judicial decisions but also from foreign law more generally. Thus, a legislature's decision to allow gay marriage, an administrative agency's decision to allow gays to adopt, or a military command's decision to institute a non-discrimination rule should count with American courts considering analogous issues in the context of constitutional litigation. For example, Chief Justice

107. *See* Araiza, *supra* note 19, at 526-27.
108. *See id.* at 535-36.
109. *See id.* at 528-42.
110. *See, e.g.*, Baehr v. Miike, CIV. No. 91-1394, 1996 WL 694235, at *17-18 (Haw. Cir. Ct. Dec. 3, 1996) (considering and rejecting claims that concern for children's best interest justifies prohibiting same-sex marriage).

Rehnquist's opinion for the court in *Washington v. Glucksberg* relied in part on a study undertaken by the Dutch government to determine the effects of its assisted-suicide law.[111] While *Glucksberg* was a substantive due process case, the court used the Dutch study to consider the empirical implications of assisted suicide, seeking information about the plausibility of government concerns in a way relevant both to due process and equal protection analysis.[112]

This use of foreign law might seem modest. It suggests that foreign law constitutes nothing more than a respected source of information, akin perhaps to a university research study. But law is different. Because governmental actions carry with them great consequences and are presumed to be the actions of that society acting as a whole, governmental decisions of the sort described above represent more than academic conclusions. Instead, they reflect decisions by a polity, acting through its constituted authority, to change the rules under which it exerts its sovereign power. They are law—albeit foreign law—and thus deserve the respect of other lawmakers, at least to the extent that the foreign lawmakers' values are generally thought to be similar to our own.[113] Decisions by foreign governments that empirical facts support particular outcomes deserve special respect from American courts, since they reflect the wielding of the same sovereign power wielded by American courts.[114]

b. Foreign Law as Social Context

There remains the question whether foreign law can do more than simply provide empirical support in applying domestically derived legal rules. Again, equal protection provides a useful context for this discussion. As argued above, the difficulty of determining when classifications are truly based on public-regarding purposes renders much equal protection jurisprudence a search for judicially manageable indicia of possible animus.[115] The familiar tiered scrutiny structure, and more generally the degree of skepticism with which a court will review a challenged classification,

111. 521 U.S. 702, 734 (1997).

112. *Id.*

113. For a discussion of which nations' laws should be consulted, and on which issues, see *infra* Part III.B.3.

114. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 572-73 (2003) (citing the decision by the British Parliament to decriminalize same-sex conduct).

115. *See supra* note 96 and accompanying text.

reflect the Supreme Court's search for such indicia.

Beyond serving as empirical support for the application of such scrutiny, foreign law may be useful to American courts considering the inherent suspectness of a given classification tool. If the search for the appropriate scrutiny level is fundamentally a search for situations where animus is likely then foreign law may help by indicating the likelihood of animus. This inquiry—halfway between the uncovering of the anti-animus rule itself and the consideration of empirical evidence in the course of applying the appropriate scrutiny level—involves both an inquiry into social facts and morality.

Equal protection analysis cannot avoid moral inquiry. Even John Hart Ely, who provided perhaps the most compelling argument for a value-free, process-based understanding of equal protection (and constitutional law more generally), had to concede the need for value judgments in equal protection when he noted that equal protection doctrine amounted to a search for situations where minorities were ignored in the political process for reasons that were in some sense "discreditable."[116] Standard suspect class doctrine makes this clear when it asks, in addition to questions about historical oppression and current political powerlessness, whether the classification is in some measure unfair or contrary to the idea that one should not be burdened for reasons beyond one's control.[117] Indeed, even the political powerlessness criterion inevitably requires a normative baseline

116. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 152 (1980).

117. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion) (relying in part on the immutability of the gender characteristic in concluding that gender classifications should be strictly scrutinized); Watkins v. U.S. Army, 837 F.2d 1438, 1444 (9th Cir. 1988) (summarizing suspect class doctrine as including a generalized concern that classifications not reflect "gross unfairness that is sufficiently inconsistent with the ideals of equal protection to term it invidious"), *aff'd on different grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc). Even this description does not fully explain standard equal protection doctrine. As Ely concedes, being short or blind or having a low I.Q. is beyond one's control, yet height, vision, and intelligence classifications generally raise no equal protection problems, largely because we do not view the reasons for such classifications as "discreditable." *See* ELY, *supra* note 116, at 152. This moral understanding may well be evolving, as evidenced by passage of statutes such as the Americans With Disabilities Act, 42 U.S.C. §§ 12101-02, 12111-17, 12131-34, 12141-50, 12161-65, 12181-89, 12201-13 (2000). This evolution, however, simply underscores the fact that determinations about the appropriateness of classifications are inherently based on moral judgments.

since most minorities are politically powerless to some degree and suffer from at least some lack of attention from decision makers.[118]

The normative character of standard equal protection analysis thus requires courts considering equality claims to engage both with social reality and with society's understandings of what type of discrimination is "arbitrary" or "unfair." Foreign law can play a role here to the extent that American society's moral understandings are reflected in and influenced by foreign law. The Supreme Court's Eighth Amendment and substantive due process cases have already recognized that foreign law both illuminates and influences domestic moral understandings,[119] and at least two justices have recognized how international law does the same in the equal protection context.[120] Thus, foreign law can influence American equal protection jurisprudence by influencing American perceptions of a classification's arbitrariness, and the moral justifiability for a group's political powerlessness.

In this way, foreign law does not supply the foundational components of American law. Nor, at the other extreme, does it merely supply empirical support for its conclusions. Instead, under this theory foreign law becomes part of the social context that informs an American court's own moral judgments relevant to the constitutional issue. In this sense foreign law is not qualitatively different from other symbolic statements made in the public square. Thus, in the gay rights context, foreign legal statements play similar roles to corporations' grants of domestic partner benefits, popular culture's positive portrayal of gays and lesbians, or a prominent athlete's or soldier's coming out. All of these statements become part of the background of shared—or at least widespread—understandings against which courts must make moral judgments when deciding a case.[121]

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118. *See* Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 715 (1985).

119. *See infra* Part III.B. (discussing how foreign law relating to criminal punishment illuminates the moral judgments relevant to Eighth Amendment issues); *Lawrence*, 539 U.S. at 577 ("The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.").

120. *See* Grutter v. Bollinger, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring, joined by Breyer, J.) (noting how a proper understanding of the moral meaning of race-based affirmative action can be informed by international law).

121. *See* Jay Michaelson, Essay, *On Listening to the Kulturkampf, Or, How America Overruled* Bowers v. Hardwick, *Even Though* Romer v. Evans *Didn't*, 49 DUKE L.J. 1559, 1567 (2000) (explaining how the evolution of American society undermined

Under this theory, it is not foreign law's uniquely legal status that plays this influential role in American law. Instead, it is foreign law's status as the output of institutions—foreign courts—that are respected participants in the public debate about the morality of a given government action. Still, foreign judicial pronouncements may well be especially persuasive to American courts, since foreign courts are largely answering the same type of question in the same general institutional context as their American counterparts.[122] Thus, the reasoned nature of foreign judicial pronouncements, their grounding in a fundamental legal mandate, and courts' awareness that they are establishing limits on government action—rather than mandates for private action—make those pronouncements especially significant to an American court seeking to understand the social context of an issue it must decide.[123]

3. Foreign Law as Law

Is there, however, a theory under which foreign law's uniquely legal qualities influence American equality law? Is there something about the theory of a foreign nation's law or the legal reasoning of foreign courts that can directly translate into American law? In the case of equal protection, foreign law clearly could inform the application of that guarantee, either at the second step of determining which classifications run a high risk of being arbitrary or the third step of actually applying the appropriate level of scrutiny to a given classification. However, for foreign law to influence the first, foundational step of determining what the Equal Protection Clause (or any other constitutional rights guarantee) actually prohibits, one would have to derive a theory of that guarantee in which its meaning has largely melded with the meaning of other nations' analogous provisions.

The example of the Equal Protection Clause illustrates the hurdles such a theory would face. A melding of that provision with equality provisions in foreign constitutions would require that

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the moral assumptions on which *Bowers v. Hardwick* was based).

122. *See, e.g.*, Knight v. Florida, 528 U.S. 990, 994-96 (1999) (Breyer, J., dissenting from denial of certiorari) ("[T]his court has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances.").

123. *See infra* Parts III.B-C.

those foreign provisions have developed in parallel fashion to the largely idiosyncratic evolution of American equal protection. In particular, foreign equality law would have to place special emphasis on racial equality, with other equality claims relegated to a more amorphous concern with arbitrariness and animus.[124] Such parallel development is not out of the question: racial discrimination has been at the forefront of many nations' evolving equality jurisprudence, and racial classifications have also earned the special opprobrium of international law. On the other hand, different nations' unique cultures and histories may lead their equality law to focus just as fundamentally on religious, class, or caste discrimination, sometimes in stark contrast to American constitutional jurisprudence.[125] If one interprets the Equal Protection Clause as fundamentally evincing a dual concern for racial discrimination and more generally for arbitrary discrimination of any type, then it might be difficult to justify foreign borrowing at this core level, given the uniqueness of this combination.

Conversely, one could read the Equal Protection Clause as fundamentally vacuous, in the sense that equality itself is a concept that has no concept aside from moral determinations about which groups deserve to be treated the same. Again, in such a case foreign law *qua* law has no relevance to American constitutional interpretation; indeed, in such a case there is no such thing as true equal protection law. To be sure, foreign law could be useful in adjudicating equal protection claims, but only by providing empirical inputs or social context, as described in the previous subsection.[126] However, other readings of equal protection might be more hospitable to a more fundamental use of foreign law. One interpretive theory would read the texts of constitutional guarantees such as equal protection as too vacuous to provide doctrine precise enough to govern the outcome of actual cases.[127]

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124. *See* Araiza, *supra* note 19, at 522 (examining scrutiny levels applied to equal protection claims based on gender and race).

125. *See, e.g.*, McCreary County v. ACLU, 125 S. Ct. 2722, 2748 (2005) (Scalia, J., dissenting) (suggesting fundamental differences between American and European understandings of what government can do with regard to expressing religious opinion); Dandridge v. Williams, 397 U.S. 471 (1971) (concluding that discrimination based on wealth receives only rational basis scrutiny).

126. *See supra* Part III.B.2.

127. *See* Araiza, *supra* note 19, at 522-23 (examining the Supreme Court's methodology for evaluating equal protection claims). *See generally* DOUGLAS RAE,

Moreover, the distance between the precise intent of the drafters and the underlying principles of their handiwork may have grown too large to justify relying on such precise intent.[128] In those cases, an interpretive theory may call for finding meaning in the Clause's surrounding context, examining the values that have been constitutionalized there, and construing the provision at issue in light of that context. It has been argued, for example, that in interpreting state constitutional provisions that mimic federal provisions, state courts should not ground a differing interpretation of the state provision on some fictional cultural distinction of the state's people, but instead on whatever distinctions might appear through examination of the other constitutional commitments made by the people of that state.[129] Under this theory, then, the meaning of the provision at issue can be found, at least in part, by reference to the values otherwise enshrined as foundational by the state's people.[130]

This interpretive method could apply to the question of

EQUALITIES (1989).

128. *See, e.g.*, Van Orden v. Perry, 125 S. Ct. 2854, 2888 (2005) (Stevens, J., dissenting).

> It is our duty, therefore, to interpret the First Amendment's command that "Congress shall make no law respecting an establishment of religion" not by merely asking what those words meant to observers at the time of the founding, but instead by deriving from the Clause's text and history the broad principles that remain valid today. As we have said in the context of statutory interpretation, legislation "often [goes] beyond the principal evil [at which the statute was aimed] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." In similar fashion, we have construed the Equal Protection Clause of the Fourteenth Amendment to prohibit segregated schools, even though those who drafted that Amendment evidently thought that separate was not unequal. We have held that the same Amendment prohibits discrimination against individuals on account of their gender, despite the fact that the contemporaries of the Amendment "doubt[ed] very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision," Slaughter-House Cases, 83 U.S. 36 (1872). And we have construed "evolving standards of decency" to make impermissible practices that were not considered "cruel and unusual" at the founding.

Id. (footnote and some citations omitted).

129. *See* Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389 (1998) (examining state constitutionalism in light of constitutional history rather than social history).

130. *Id.*

borrowing from foreign law. Under this theory, courts would consider whether a foreign nation's equality law is surrounded by a context of other law that makes it defensible to find in that nation's equality law an analogue to what is found in the Equal Protection Clause. To the extent that other nations have enshrined in their basic documents commitments similar to those found in the U.S. Constitution, it might be appropriate to consider those nations' equality guarantees as analogous to that in the Equal Protection Clause, and thus interpretations of those foreign law guarantees as instructive in interpreting our own. By contrast, those nations whose basic commitments differ from our own would provide poor models for borrowing.

Under this theory of "whole constitution interpretation,"[131] a nation that guarantees equality but nevertheless has an established religion, or a religion qualification test for office-holding, would not be a good candidate as a source of meaning for the Equal Protection Clause, given the linkage American doctrine has drawn between the non-establishment principle and equality of citizenship.[132] Similarly, a nation whose constitution grants individuals affirmative rights against the government, such as rights to a basic level of material well-being, might also be a problematic borrowing source, at least for equal protection claims that are based on the government's failure to provide the material resources necessary to exercise a right on the same terms as wealthier Americans.[133]

This theory goes some way toward answering a troubling question pertaining to foreign borrowing, regardless of the doctrine at issue: from which nations should we borrow? Commentators have objected, for example, to the Supreme Court's recent use of foreign law, describing it as selective.[134] The theory

131. This theory echoes, if distantly, Akhil Amar's theory of intratextualism, in which he argues that constitutional language should be understood in relation to how the same, or similar, language is used elsewhere in the document. *See* Akhil Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

132. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309-10 (2000) (expressing, as a core concern of the Establishment Clause, the principle that an individual's religious views should not mark him as either an insider or an outsider in the political community).

133. *Compare, e.g.*, Harris v. McRae, 448 U.S. 297 (1980) (finding no constitutional right to government funding for abortions), *with* Boddie v. Connecticut, 401 U.S. 371 (1971) (holding that a party's inability to pay did not justify a State from denying access to courts to obtain a divorce).

134. *See, e.g.*, Lawrence Connell, *The Supreme Court, Foreign Law, and*

sketched above answers the more general question about from whom to borrow, by answering that American courts should borrow from those nations whose constitutional commitments in general situate their relevant guarantee (e.g., equality) in roughly the same doctrinal place as does the American provision at issue (e.g., the Equal Protection Clause).

While this theory begins to answer the question of from whom we should borrow, it still raises difficult questions for courts. In particular, under this theory courts would have to employ a case-by-case or doctrine-by-doctrine approach when determining the appropriateness of borrowing from a given nation's constitutional law. For example, an American court considering a sexual orientation equality claim might appropriately borrow from a foreign nation's equality jurisprudence when that foreign nation's constitutional context includes an effective anti-Establishment principle, so that religious disapproval of homosexuality carries the same low constitutional weight it seems to in the United States after *Lawrence*.[135] On the other hand, a court considering a claim that

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Constitutional Governance, 11 WIDENER L. REV. 59, 74 (2004) (discussing Justice Stevens' use of foreign law in *Atkins*); *see also* Edward Lee, *The New Canon: Using or Misusing Foreign Law to Decide Domestic Intellectual Property Claims*, 46 HARV. INT'L L.J. 1, 24 (2005) (examining "cherry-picking" of foreign law). Of course, in *Lawrence* itself, Justice Kennedy used foreign law not so simply to derive the meaning of the Due Process Clause, but also to refute the argument made by Chief Justice Burger's concurrence in *Bowers* that western civilization had consistently condemned same-sex intimacy.

135. Note, of course, that even this seemingly simple statement immediately becomes complicated by the need to determine the reality of the foreign nation's law. For example, the United Kingdom, from which Justice Kennedy drew much of his foreign law support in *Lawrence*, has a head of state that is simultaneously and *ex officio* the head of a church. What this caveat suggests, then, is that the determination which foreign legal systems are relevantly like our own requires careful consideration looking beyond surface characteristics such as the United Kingdom's official religious establishment. *See, e.g.*, Peter Cumper, *Religious Human Rights in the United Kingdom*, 10 EMORY J. INT'L L. 115 (2000) (describing scope of religious liberty in the United Kingdom); A. Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices*, at 47, U.N. Doc. E/CN.4/Sub.2/200/Rev.1 (1960) (describing the establishment of religion in the United Kingdom as "not much more than a mere historic relic"), *quoted in* Nathan Adams, *A Human Rights Imperative: Extending Religious Liberty Beyond the Border*, 33 CORNELL INT'L L.J. 1, 25 n.176 (2000); Jonathan Sacks, *Antidisestablishmentarianism—A Great Word and a Good Ideal*, TIMES (London), July 20, 2002, at 44 ("(Imagine) entering a crowded room, knowing no one, and then discovering to your relief that there is a host who greets you, introduces you to others, and makes you feel at home. In a multifaith England, the Church of England is that host."), *quoted in* Paul Salamanca, *The Liberal Polity and Illiberalism in*

denial of state funding for abortions violates the Equal Protection Clause might find it less defensible to borrow from that same foreign nation's equality jurisprudence if that foreign nation situates its equality guarantee within a context of a constitutional commitment that government provide basic material goods. In the gay rights hypothetical, the foreign nation's equality law can be understood as similar to that of American law, and thus legitimate persuasive authority, because the surrounding context of the equality guarantee is similar. But in the abortion funding example, the fundamentally different understandings of what the government is constitutionally obligated to provide necessarily make the seemingly similar equality provisions not equivalent.

Thus, the requirement that a court consider not just the parallelism between U.S. and a given nation's foreign constitutional structure in general, but with regard to how that foreign law would approach a particular claim, requires that courts determine the appropriateness of borrowing at a fairly specific level of generality. In short, it requires the domestic court to consider carefully what exactly that foreign law is by examining its context.[136]

C. Substantive Rights Claims and Foreign Law

Foreign law borrowing in cases involving substantive rights can be appropriately analyzed under the theories sketched out above. However, substantive claims also raise unique issues that warrant separate discussion. In one sense, substantive rights are less amenable to foreign borrowing because the constitutional provisions bestowing those rights may have more determinate meanings based on judicially cognizable sources. This characteristic distinguishes them from equality rights, given the legally vacuous (if socially rich) concept of equality. For example, a guarantee against unreasonable searches and seizures might be comprehensible based on the framers' understanding of what constitutes a search, or a guarantee of free speech might be properly analyzed against the content-neutrality rule, which itself derives from an understanding of what is required by the Constitution's assumption of popular sovereignty.[137] Because

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Religious Traditions, 4 BARRY L. REV. 97, 100 (2003).

136. *See supra* note 135 and accompanying text.

137. *See* Araiza, *supra* note 19, at 529. For the classic statement of the self-government rationale for speech protection, see Whitney v. California, 274 U.S.

courts can interpret these provisions by recourse to standard, domestic legal sources, one might argue that those sources should be the primary interpretive guides.[138] The assumption, of course, is that such standard legal sources exist and in fact refer back to domestic sources of meaning.

1. Foreign Law as a Source of Due Process Doctrine

The development of American constitutional law makes application of this basic idea somewhat more difficult with regard to rights that are unenumerated, or explicit but still open-ended. The *Slaughter-House* cases gutted the Privileges and Immunities Clause of the Fourteenth Amendment, the provision the drafters probably intended to serve as the primary source of individuals' substantive rights against states.[139] This development forced the Court in later years to turn to the Due Process Clause as a source of substantive rights.[140] As has often been pointed out, the substitution of the Due Process Clause for the Privileges and Immunities Clause as the source of substantive rights has rendered the entire field of substantive constitutional rights far more uncertain, given the relatively more determinate nature of the term "privileges and immunities," and the inherently amorphous nature of the concept of substantive due process.[141]

The shift to due process has largely decoupled the main substantive rights provision in the U.S. Constitution from text and common law precedent. In turn, this move may make it more appropriate to borrow foreign law. In the case of substantive due process, foreign law could be appropriately used not just as a practical decisional input, as described above, but also as a source of meaning for the right itself. Despite the best attempts of Justice Scalia and those of similar mind, the Supreme Court has never repudiated the project of finding substantive rights in the Due Process Clause. Indeed it has continued to move, albeit cautiously, toward expanding the scope of rights it protects. Moreover, the Court has failed to unite behind a due process methodology based solely on history and tradition.[142] Thus, the court's continued

357, 373 (1927) (Brandeis, J., concurring).

138. *See* Araiza, *supra* note 19, at 530.

139. Slaughter-House Cases, 83 U.S. 36, 44 (1872).

140. *See* Araiza, *supra* note 19, at 528-35.

141. *See id.* at 557.

142. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 136-37 (1989) (Brennan,

search for new due process rights remains only partially tethered to domestic historical and legal traditions, and thus, at least potentially open to a broader set of decisional inputs.

Justice Kennedy's opinion in *Lawrence* hints at the broader scope foreign law can play in the due process inquiry. Notably, his discussion of substantive due process deemphasizes inquiry into the historical pedigree of the right at issue.[143] Instead, Justice Kennedy's inquiry began in earnest with a relatively modern case, *Griswold v. Connecticut*, and its progeny.[144] *Lawrence* provides very little discussion of whether the right at issue—however framed—was affirmatively protected or valued by earlier American law and society.[145] Rather, when Justice Kennedy did address the history of affirmative legal protection for sexual intimacy, he looked at more recent legal developments, which he described as "show[ing] an *emerging* awareness that liberty gives substantial protection" to same-sex intimacy.[146]

It is in this part of the opinion that Justice Kennedy used foreign law. In particular, he pointed not just to recent legal evolution in the United States, but also statutory and judicial developments in the United Kingdom and the European Community.[147] On one reading, Justice Kennedy's citation of foreign law reflects nothing more than a refutation of Chief Justice Burger's concurrence in *Bowers*, which relied on a supposed Western consensus disapproving of same-sex intimacy.[148] That concurrence, by relying on such an asserted consensus, invited refutation by citation of contrary western European authority.[149] However, the placement of this argument suggests that Justice Kennedy intended to use foreign law to accomplish more than simply refuting the Burger concurrence. Rather, he used foreign law in his affirmative case, as evidence of "an emerging

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J., dissenting) (noting the lack of agreement on the proper methodology for analyzing substantive due process issues); *see also* Washington v. Glucksberg, 512 U.S. 702, 752 (1997) (Souter, J., concurring in the judgment) (adopting Justice Harlan's view that due process asks whether the state has enacted an arbitrary imposition or purposeless restraint); *id.* at 789-90 (Breyer, J., concurring in the judgment) (also adopting Justice Harlan's due process view).

143. Lawrence v. Texas, 539 U.S. 558, 571-73 (2003).
144. *Id.* at 566.
145. *See generally id.*
146. *Id.* at 573 (emphasis added).
147. *Id.* at 569, 573.
148. *Id.* at 572-73.
149. *See generally id.* at 562-79.

awareness"[150] of the meaning of same-sex intimacy in the same foreign societies whose legal principles Chief Justice Burger thought he had discerned, to the opposite effect, in *Bowers*.[151]

Read in this latter sense, Justice Kennedy's citation of foreign precedent suggests that foreign law can inform the fundamental meaning of due process, by identifying same-sex intimacy as one of the rights due process protects.[152] In this way, foreign law constitutes far more than a mere empirical input into a calculus defined solely by domestic law. Rather, it informs the Court's understanding of what comprises the basic human freedom protected by the Due Process Clause. Indeed, to the extent it derives from nations whose values we share,[153] that foreign law can seem as informing the core meaning of the Due Process Clause, via the "whole constitution interpretation" method described earlier. As such, Justice Kennedy's analysis raises the possibility of an aggressive use of foreign law in constitutional adjudication.

2. *Due Process "Liberty" as an Entry Point for Foreign Law*

Lawrence may have opened the door to consideration of foreign law in defining the basic scope of constitutional protections through a surprisingly direct, but potentially far-reaching, means: its focus on liberty. As Randy Barnett has noted, Justice Kennedy's analysis in *Lawrence* is striking for its focus on the guarantee of "liberty" as opposed to "privacy."[154] This focus caused much of *Lawrence*'s muddying of standard due process doctrine. By focusing on the textual right to liberty rather than on the unenumerated right to privacy, Justice Kennedy's analysis arguably does away with the need to determine whether the interest at stake in a given case is a "fundamental privacy right" or a mere "liberty interest."[155] In turn, it can pass over the question of what degree of scrutiny to apply to the challenged government action.[156] Notably, *Lawrence*

150. *Id.* at 572.
151. *Id.* at 572-73.
152. *Id.*
153. *See id.* at 576-77.
154. *See, e.g.*, Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, 2003 CATO SUP. CT. REV. 21, 21 (2003).
155. *Id.* at 31.
156. *But cf., e.g.*, Roe v. Wade, 410 U.S. 113, 152-53, 162-64 (1973) (identifying abortion as part of the fundamental right to privacy, but acknowledging strong state interests in the preservation of fetal life).

ignored both of these questions.[157]

Lawrence's focus on liberty could ultimately globalize due process analysis. By eschewing the standard due process methodology of determining the fundamentality of the interest and then applying the appropriate level of scrutiny, Justice Kennedy does away with an analysis that looks more closely at American society than at global standards. While the standard inquiry into whether an interest is fundamental looks in large part to American traditions,[158] the closest Justice Kennedy comes to explicitly acknowledging the importance of the right at issue is his statement that same-sex intimacy "has been accepted as an integral part of human freedom in many other countries."[159] It becomes even clearer that this statement is the fulcrum of the argument when he then immediately concludes that Texas had not shown any "more legitimate or urgent" interest in circumscribing that personal choice than had been revealed in the foreign cases.[160] Those two sentences are the heart of whatever individual right/state interest balancing *Lawrence* performs. Indeed, when Justice Kennedy quotes from Justice Stevens's dissent in *Bowers* and elevates those quotations into the rule controlling the result in *Lawrence*, he returns to the combination of liberty and the insufficiency of a state interest in promoting a particular morality.[161] Once again, Justice Kennedy provides no analysis of the weight of the individual's interest, beyond saying that it is part of the liberty that has been acknowledged by foreign courts and legislatures.[162]

By focusing on liberty, Justice Kennedy may have freed due process analysis from the requirement of examining only American

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157. *See Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting) (pointing out these omissions).

158. *See, e.g.*, Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion) (stating that the crucial substantive due process question is whether the interest at stake is solidly grounded in American history and tradition, and concluding that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in American history and tradition.).

159. *Lawrence*, 539 U.S. at 577.

160. *Id.*

161. *See id.* at 577-78.

162. Indeed, the only other place in the opinion where Justice Kennedy argues affirmatively, rather than simply criticizing *Bowers*, is a vague, conclusory statement that "[p]ersons in a homosexual relationship may seek autonomy for [the purposes of personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education], just as heterosexual persons do." *Id.* at 574.

law. As noted earlier, *Lawrence*'s only real description of the legal importance of same-sex intimacy identifies it as a part of human freedom.[163] That description is nowhere near as parochial as the descriptions standard due process doctrine uses to determine whether an interest is fundamental: "a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,"[164] a principle "deeply rooted in this Nation's history and tradition,"[165] or "an enduring American tradition."[166] Indeed, the standard doctrine's very idea of a deeply rooted tradition—necessary perhaps in order to justify protection of an unenumerated privacy right—suggests more of a domestic focus: when we think of deep roots, we necessarily think of *our* roots, *our* history, and *our* tradition.[167] The semantic and conceptual distance between *Lawrence* and what came before it is confirmed by the fact that *Lawrence* actually relied heavily on foreign law when determining the constitutional status of the claimed right.

Lawrence can be read more narrowly, however. It may be that Justice Kennedy concluded simply that the State's morality-based argument failed to overcome the force of the liberty at stake, given the illegitimacy of such a state interest. *Lawrence*'s language also supports this more limited reading. As noted earlier, Justice

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163. *Id.* at 577.

164. Palko v. Connecticut, 302 U.S. 319, 325 (1937) (internal quotation omitted).

165. Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977).

166. Wisconsin v. Yoder, 406 U.S. 205, 232 (1972). Of course, other criteria for the fundamentality of due process rights are more cosmopolitan. Most notably, a strand of cases—perhaps best understood as dealing with questions of fair judicial process—has looked at Anglo-American legal traditions. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 150 n.14 (1968) (considering whether Sixth Amendment right to jury trial applies to states via Due Process Clause). Other cases have spoken more generally (and perhaps less precisely) of rights fundamental to "civilization." *See, e.g.*, *Yoder*, 406 U.S. at 232; Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring). Still, it is worth wondering whether a tradition not strongly established in the United States would nevertheless be found to be fundamental, based on some supposed general acceptance either in those nations whose legal systems are based on English common law, or in some wider civilization. If nothing else, *Lawrence* may signal a more cosmopolitan approach in actual practice from these earlier cases, given its heavy reliance on foreign law. *See supra* notes 150-160 and accompanying text.

167. Indeed, even Justice Brennan's more rights-protective approach to substantive due process did not exclude consideration of American history. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 137 (1989) (Brennan, J., dissenting) (criticizing the plurality's "exclusively historical analysis" as an "unfortunate departure . . . from sound constitutional decisionmaking").

Kennedy closed his attack on *Hardwick* by describing the right at issue as "an integral part of human freedom in many other countries" and then immediately concluding that Texas had shown no more "urgent or legitimate" interest in circumscribing that liberty than had governments in the foreign cases.[168] One way to read this ambiguous language is that the Court's focus on liberty applies only in the rare situation where the government's action is supported by no legitimate interest. Indeed, such a reading would fit within more standard due process law, which recognizes many interests under the "liberty" heading, but also usually gives government much deference when determining whether infringements on liberty are appropriate, but which always requires at least a legitimate justification for that infringement, even if the court has to hypothesize it.[169]

Thus, *Lawrence* may embrace "a presumption of liberty,"[170] or its analysis may simply have flowed from the uniquely weak argument made by the State. Regardless, the point remains that shifting the analytical focus to liberty frees the court from the need to rely on tradition, and thus, on American tradition, and thereby allows consideration of non-domestic interpretive sources. In turn, such a focus on a generic, global liberty may ultimately provide a portal through which American courts can receive foreign law understandings of basic substantive rights. After *Lawrence*'s rejection of morality-based arguments for suppressing liberty,[171] the size and significance of such a portal may well turn on whether the State can articulate a utilitarian basis for the challenged law.[172] For this reason, this portal for reception of foreign law may turn out to be especially significant for gay rights claims, since impairments of gay rights so often seem to be based more on moral disapproval or

168. *See supra* note 159 and accompanying text.

169. *See, e.g.*, Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 572 (1972) (including among rights protected by procedural due process the right to contract); United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) (recognizing a presumption that facts exist necessary to justify government regulation of commercial transactions).

170. *See generally* Barnett, *supra* note 154.

171. *See* 539 U.S. 558, 571-72 (2003).

172. This development also synchronizes substantive due process law with equal protection law, which already largely disapproves of morality-based justifications for unequal treatment. *See, e.g.*, U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (stating that a "bare . . . desire to harm" an unpopular group is insufficient justification for unequal treatment).

dislike than any true public purpose.[173]

IV. INTERNATIONAL LAW AND U.S. CONSTITUTIONAL LAW

Gay rights litigants can also deploy international law principles, to the extent that such principles actually support gay rights claims. Unlike foreign law, international law binding the United States is enforceable in American courts.[174] Still, claims based on international law raise difficult questions for American courts. The status of treaties as binding law turns on whether the treaty is considered self-executing, a complex inquiry that turns on a variety of factors.[175] For its part, the unique character of customary international law makes it difficult both to determine its status relative to treaties or domestic statutes[176] and indeed, even to discern its very existence.[177]

In the case of individual rights claims, part of the reason for the unsettled place of international law is the existence of similar domestic constitutional principles in the Bill of Rights and Fourteenth Amendment. Together these provisions encompass many of, though not all, the subjects addressed by international human rights norms.[178] Undoubtedly, the longevity and (to some

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173. *See* William D. Araiza, *ENDA Before it Starts: Section 5 of the Fourteenth Amendment and the Availability of Damages Awards to Gay State Employees Under the Proposed Employment Non-Discrimination Act*," 22 B.C. THIRD WORLD L.J. 1, 29-36 (2002) (discussing whether a large amount of anti-gay discrimination would fail the rational basis test).

174. The classic statement of the status of international law in American courts was delivered by the Supreme Court in *Paquete Habana*, 175 U.S. 677, 700 (1900): "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." *Id.* As Louis Henkin observes, this statement by Justice Gray "was neither new nor controversial when made in 1900, since he was merely restarting what had been established principle for the fathers of American jurisprudence and for their British legal ancestors." *See* Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1555 (1984).

175. *See, e.g.*, Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 695 (1995).

176. *See* Henkin, *supra* note 174, at 1561-67.

177. *See, e.g.*, MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 44 (3d ed. 1999) ("The determination of customary international law is more an art than a scientific method.").

178. In particular, these provisions do not encompass positive rights, such as those to employment or other material security, that have been the subject of international human rights agreements. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 23, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc

Americans) the apparent comprehensiveness of American constitutional jurisprudence, when combined with the lack of parallel foreign constitutional jurisprudential traditions, have made American courts and lawmakers prone to assuming that international human rights jurisprudence adds nothing to the American tradition.[179] To that extent, international human rights law might be viewed as superfluous, with no reason for litigants or courts to place independent reliance on it.[180] Alternatively, to the extent international norms provide more protection than the Constitution, the United States has often either included a reservation in its treaty ratification[181] or declared the treaty non-self-executing,[182] or, in the case of customary law, objected persistently enough to raise questions about whether the United States has gained exemption from the customary rule.[183]

This Article skirts the difficult, if important, question of how, in the abstract, particular international law principles *qua* international law apply in American courts.[184] Instead, it focuses on how international law can influence the development of domestic constitutional doctrine. This choice reflects American courts' willingness to use international law as an aid in interpreting

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A/810 (Dec. 10, 1948) (right to work).

179. *See, e.g.*, United States v. Then, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring) (noting the history of American uniqueness in constitutional adjudication); S. COMM. ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. DOC. NO. 23, 102d Cong., 2d Sess. 19, *reprinted in* 138 CONG. REC. S8068 (daily ed., Apr. 2, 1992) (stating the view of the Senate Committee that existing U.S. law generally complies with the Covenant).

180. Such a view might even lead the Senate either to fail to enact implementing legislation, or even to declare that a treaty is not self-executing. *See* Laurence R. Helfer & Alice M. Miller, *Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence*, 9 HARV. HUM. RTS. J. 61, 78-80 (1996) (recounting how the Senate used this justification to declare the International Covenant on Civil and Political Rights non-self-executing).

181. *See, e.g.*, Roper v. Simmons, 125 S. Ct. 1183, 1194 (2005) (noting U.S. reservation to the provision of the International Covenant on Civil and Political Rights prohibiting juvenile executions).

182. *See* David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 131-32 (1999) (noting history of non-self-executing declarations appended to Senate ratifications of human rights treaties).

183. *See, e.g.*, Laurin B. Kallins, Note, *The Juvenile Death Penalty: Is the United States in Contravention of International Law?*, 17 MD. J. INT'L L. & TRADE 77, 98-101 (1993) (examining the conduct of the United States in relation to international law norms dealing with the juvenile death penalty).

184. For an introduction to this topic, see Henkin, *supra* note 174.

domestic legal provisions, a willingness shown as recently as last year.[185] When that willingness is combined with new domestic doctrine more hospitable to gay rights claims and international law's increased recognition of gay rights, it becomes clear that this seemingly more modest use of international law offers real opportunities to gay rights advocates. This part of the Article considers these opportunities. It begins by examining the issues surrounding the role of treaties and non-textual international law in domestic legal interpretation. It concludes by briefly examining the substance of those international law norms that may be useful to gay rights litigators.

A. Treaty-Based Law and Constitutional Analysis

Justice Kennedy's focus on more modern developments as the relevant tradition for due process purposes, in addition to affecting the role of foreign law in American courts, may also pave the way for recognition of international legal principles contained in treaties ratified by the Senate. As noted above, norms included in international agreements to which the United States is a party may or may not have binding effect themselves, depending on whether the agreement is self-executing.[186] Moreover, such provisions may be written at too high a level of generality to render them capable of providing precise, determinate rules for deciding individual cases. At the same time, American courts may find it politically or doctrinally difficult to rely on foreign or international tribunals' interpretations of those terms.[187] In addition, the existence of general liberty and equality provisions in the Constitution only complicates the question of whether distinct meaning can be gleaned from international agreements protecting the rights to

185. *See Roper*, 125 S. Ct. at 1198-1200 (using foreign and international law to "confirm" the Court's interpretation of the Eighth Amendment). *Roper* is discussed in more detail below. *See* text accompanying *infra* notes 200-225; *see also* Bayefsky & Fitzpatrick, *supra* note 74, at 72-80 (discussing other cases in which American courts used foreign and international law as aids in interpreting domestic legal provisions); Helfer & Miller, *supra* note 180, at 82 ("Courts in the United States have regularly used human rights treaties to inform state and federal constitutional standards even where the treaties do not create an independent cause of action.").

186. *See supra* notes 181-185 and accompanying text.

187. *See, e.g.*, Helfer & Miller, *supra* note 180, at 82 (distinguishing between the binding nature of the text of an international agreement and foreign and international tribunals' interpretation of that text).

basic human dignity and equality.[188]

Even if they are not themselves formally binding or sufficiently precise to furnish a judicially enforceable rule of decision, substantive rights norms can still play a role in domestic rights adjudications. In most cases other than those dealing with criminal procedure and punishment and freedom of speech and conscience, substantive international norms can play their most significant role by supporting a claim that the norm at issue constitutes a component of the liberty protected by the Due Process Clause.[189] Given *Lawrence*'s focus on more recent history when determining whether certain conduct is protected by the liberty guarantee, the ratification of a treaty surely supports the claim that American society has recognized that interest as significant. Treaty ratification reflects an explicit and deliberative embrace of particular values by a body that has perhaps the strongest claim to represent the nation. Thus, ratification of a treaty containing a human rights norm reflects, as much as almost any other governmental conduct can, a national embrace of that norm as a component of individual freedom, even if ratification is deemed, via a non-self-executing statement, to lack formal domestic legal effect.

Treaty-based equality norms can be thought of as playing a similar role, even if the different natures of substantive and equality guaranties render the analysis slightly different. As the author has argued elsewhere, the legal concept of equality is vacuous in the absence of a determination that a given criterion or criterion-defined group is relevantly different, such that it is appropriate to

188. *Compare, e.g.*, International Covenant on Civil and Political Rights art. 3, Dec. 16, 1966, 999 U.N.T.S. 171, *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm, *with, e.g.*, United States v. Virginia, 518 U.S. 515, 531 (1996) (explaining that gender classifications in order to be constitutional must have an "exceedingly persuasive justification").

189. Of course, this is not to minimize the role that international norms can play in helping courts define the meaning of the criminal procedure and punishment and freedom of speech and conscience provisions of the Bill of Rights. Indeed, in two recent cases the Supreme Court has cited international law as support for its interpretation of the Eighth Amendment's prohibition on cruel and unusual punishment. *See Roper*, 125 S. Ct. 1183; Atkins v. Virginia, 536 U.S. 304 (2002); *see also* Knight v. Florida, 528 U.S. 990, 995-98 (1999) (Breyer, J., dissenting from denial of certiorari) (canvassing foreign and international law to determine the merit of a claim that excessive delay before execution violated the Eighth Amendment). *See generally infra* Part IV.B.

treat them differently.[190] But the determinations that constitute equality law in contemporary America—e.g., that bank robbers are relevantly different from bank account holders, that men are (usually) not relevantly different from women, and that the mentally retarded are (sometimes) relevantly different from mainstream society—do not rest on traditional legal sources. Instead, judgments about which groups and characteristics are in fact different reflect society's value judgments, not conclusions reached after study of standard legal sources.[191]

Thus, when Congress enacts equality-protecting legislation, it should normally be thought of as playing a more direct role in determining the meaning of equality, within broad outer parameters set by courts.[192] For this reason, the author has suggested that Congress should have especially broad power to enforce the Equal Protection Clause, as compared with other more substantive constitutional rights protected by the Fourteenth Amendment.[193] However, in the case of treaties, the failure to act by the means constitutionally prescribed for Congress to enforce the equal protection guarantee—by a full-blown statute that satisfies the standard for "appropriate" enforcement legislation[194]—means that Senate ratification should not be thought of as supplying direct meaning to the Equal Protection Clause.

Of course, the Senate's adoption of an equality norm via treaty ratification remains quite relevant in illuminating contemporary American attitudes toward what equality means,[195] just as its embrace of a particular substantive norm is highly probative of what rights are especially valued in American society. Thus, the Senate's adoption of an equality norm in a treaty should be highly relevant when a court considers the meaning of equal protection. For example, Justice Ginsburg's concurrence in *Grutter v. Bollinger* cited an international agreement as support for the majority's

190. *See generally* Araiza, *supra* note 19.

191. *See id.* at 554-55.

192. *See id.* at 566-68 (explaining the relationship between judicially declared and legislatively determined equal protection law).

193. *See* Araiza, *supra* note 173, at 61-64; *see generally* Araiza, *supra* note 19.

194. *See* U.S. CONST. amend. XIV § 5 ("The Congress shall have the power to enforce, *by appropriate legislation,* the provisions of [the Fourteenth Amendment].") (emphasis added).

195. *See* Araiza, *supra* note 19, at 542-59 (setting forth the characteristics of Congress that make it a good source for determining the contemporary American understanding of equality).

analysis of an equal protection challenge to the University of Michigan Law School's race-based affirmative action plan.[196] In particular, she approved in principle the majority's warning that affirmative action plans should be of limited duration, and cited the International Convention on Elimination of All Forms of Racial Discrimination, which included an analogous limitation.[197] Even though Justice Ginsburg questioned whether the persistence of American racism made the majority's twenty-five-year limit too optimistic,[198] her use of an international treaty norm to illuminate the requirements of the Equal Protection Clause reflects how Congress, through its treaty power, can affect how courts read constitutional provisions.

B. Non-Controlling International Law and Constitutional Analysis: The Example of the Eighth Amendment

International law may develop without formal American participation. Customary global norms may develop without American consent, or in the face of American objection. Treaties may exclude the United States, or the United States may choose not to sign or Senate not to ratify. Alternatively, such signature or ratification could be accompanied by a reservation that restricts the scope of the American legal commitment. In such cases, there is no question of the international norm formally binding United States courts to the derogation of otherwise valid federal or state law.

Even in such cases, international law can inform the content of domestic constitutional law. As sketched out above, *Lawrence*'s focus on liberty has the potential to globalize due process analysis by embracing as the key doctrinal concept an idea that is globally embraced, and thus susceptible to global definition and application.[199] That global meaning can derive not only from foreign courts' interpretations of their own domestic laws, but also from international law, whether treaty-based or customary.

An example—albeit not one interpreting the Due Process Clause per se—is *Roper v. Simmons*, the 2005 case holding that the

196. 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring).

197. *Id.* (citing International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106, Annex art. 2(2), U.N. GAOR, 20th Sess., U.N. Doc. A/6014, Annex art. 2(2) (Dec. 21, 1965)).

198. *Id.* at 344-46.

199. *See* discussion *supra* Part III.C.2.

death penalty for crimes committed by juveniles constituted cruel and unusual punishment.[200] After determining, based solely on domestic law principles, that the Eighth Amendment prohibited juvenile-crime executions,[201] Justice Kennedy's majority opinion concluded its analysis with a canvas of world opinion on the issue.[202] According to the Court, foreign and international authorities, while not "controlling," remained "instructive" for its interpretation of the Eighth Amendment, and the global consensus against such executions "confirm[ed]" the court's conclusion.[203]

Importantly, the *Roper* court conceded that the United States had explicitly refrained from adopting an international legal norm prohibiting juvenile executions.[204] Thus, if international law was to matter to *Roper*, it could not be because the United States had explicitly ratified or acquiesced in the customary development of an international law norm that the Court could then cite either for its own binding force or as an aid to interpreting the Eighth Amendment.[205] Nevertheless, the Court found the global consensus against juvenile-crime execution to be "instructive."[206]

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200. 125 S. Ct. 1183 (2005).

201. *See id.* at 1187-98.

202. *See id.* at 1198-1200.

203. *Id.* at 1198. *But cf. id.* at 1206, 1215-16 (O'Connor, J., dissenting) (agreeing with the majority's general approach to international and foreign law's role in constitutional interpretation, but finding that such law could play no confirmatory role in this case due to the lack of a domestic consensus against the juvenile-crime death penalty).

It is unclear—and for our purposes unimportant—whether *Roper* viewed the international consensus as solely a treaty-based norm or a rule of customary international law. In either case, the norm did not apply to the United States. *See infra* note 204. For that reason in either case the Court faced the question of how to use an international law rule to inform the meaning of a domestic provision when that norm was not formally binding on the United States.

204. *See Roper*, 125 S. Ct. at 1194 (noting American reservation to the International Covenant on Civil and Political Rights' provision banning juvenile executions); *see also id.* at 1199 (noting American failure to ratify the United Nations Convention on the Rights of the Child, which bans juvenile-crime executions).

205. Indeed, under standard international law doctrine, persistent objection to a rule prevents that rule from becoming binding on the objector as a matter of international law. *See* Kallins, *supra* note 183, at 98 (suggesting that the United States had persistently objected to international prohibitions on the juvenile death penalty). *See generally* Holning Lau, Comment, *Rethinking the Persistent Objector Doctrine in International Human Rights Law*, 6 CHI. J. INT'L L. 495, 495 (2005) (explaining the doctrine of the persistent objector).

206. *See Roper*, 125 S. Ct. at 1198 (citing international agreements banning the juvenile-crime death penalty and noting the near-unanimity of state practice on

This step can only be understood by concluding that the court found global opinion—both foreign and international—relevant in some larger sense.

A careful reading of *Roper* reveals how those foreign and international authorities, even while not formally binding on U.S. courts, nevertheless informed the Court's analysis. One of the key issues in the Court's Eighth Amendment analysis was whether the death penalty was being reserved for offenders who committed "'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"[207] In *Roper*, the Court, in addition to simply citing the global consensus against the juvenile-crime death penalty, also attributed that consensus to a particular consideration, namely, "the understanding that the instability and emotional imbalance of young people may often be a factor in the crime."[208] Thus, the Court suggested that international law mattered to the issue before it because world opinion had recognized a factor—the moral culpability of a class of offenders—that constituted a part of the domestic doctrinal analysis.[209] Because global opinion addressed the same concerns addressed by the cognate constitutional provision, that opinion properly influenced, in *Roper*'s view, the Court's conclusion on that issue.[210] In turn, that conclusion properly influenced the Court's interpretation of the domestic constitutional provision.[211] One can easily draw a parallel between

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the issue).

207. *Id.* at 1194 (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)).

208. *Id.* at 1199-1200 (explaining the reasons for the United Kingdom's decision to abolish the juvenile death penalty).

209. *See id.* at 1195 (discussing juveniles' "lack of maturity and . . . underdeveloped sense of responsibility" as a factor that differentiates juveniles from the worst offenders, the class to which the Constitution requires capital punishment to be limited); *see also id.* at 1194 (setting forth the doctrine limiting capital punishment to the worst offenders).

210. *See also supra* note 122 and accompanying text.

211. Admittedly, this analysis does not square perfectly with the Court's own rhetoric that international sources "confirmed" its analysis of the Eighth Amendment. Indeed, Justice O'Connor, taking the majority opinion at its word, parted company with it by concluding that the Court's Eighth Amendment doctrine did not support the majority's result, thus making moot any question of international law's "confirmation" of that result. *See Roper*, 125 S. Ct. at 1206, 1215-16 (O'Connor, J., dissenting). But taking the Court's opinion at its word also requires dealing with its citation of a substantive rationale for the global consensus against the juvenile-crime death penalty. *See id.* at 1200 (majority opinion) (reiterating the global consensus against that practice and then noting that that consensus "rest[ed] in large part on the understanding that the instability and

this analysis and *Lawrence*'s conclusion that foreign law had revealed the lack of any legitimate state interest in suppressing the liberty to engage in same-sex intimacy.[212]

Still, this explanation fails to account for the unique relevance of international, as opposed to foreign, law to the domestic constitutional question. Particular foreign nations may have altered their own criminal punishment schemes in response to conclusions about juveniles' lessened culpability, and those nations' determinations would of course have been relevant to the Eighth Amendment issue. Indeed, *Roper* itself cited the change in British law as particularly relevant to the Eighth Amendment, given the historic relationship between the U.K. and the U.S. and the British law ancestry of the Eighth Amendment.[213] Justice Breyer's dissent from the Court's denial of certiorari in *Knight v. Florida*,[214] another death penalty case, also argued that foreign law was relevant when it "applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances."[215] But what about *international* law?

Here, it may become relevant to consider a second aspect of the Court's Eighth Amendment jurisprudence. When faced with a claim that a particular punishment is cruel and unusual, the Court, in addition to considering issues of proportionality and offender culpability, also asks whether a national consensus has developed that a particular punishment should not be imposed in a given set

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emotional imbalance of young people may often be a factor in the crime").

To truly integrate this part of the majority's analysis into its international-law-as-confirmatory rhetoric, one might speculate that domestic opinion—the "national consensus" that both the majority and Justice O'Connor searched for in their analyses—implicitly included moral and empirical conclusions about the relevance of juveniles' "instability and emotional imbalance." Thus, after Justice O'Connor concluded that a domestic consensus had not gelled, she could then conclude that global opinion on those moral and empirical issues was simply irrelevant. Therefore, the confirmation to be found in global opinion referred not to the ultimate question whether the juvenile-crime death penalty violated human dignity; instead, global opinion properly spoke to the subsidiary questions of juveniles' culpability. In turn, the conclusion on that question would feed into the domestic analysis that asked whether death penalty was in fact being reserved for those "'most deserving of execution.'" *Id.* at 1194 (quoting Atkins v. Virginia, 506 U.S. 304, 318 (2003)).

212. *See* Lawrence v. Texas, 539 U.S. 558, 577 (2003).

213. *See Roper*, 125 S. Ct. at 1199-1200.

214. 528 U.S. 990, 993 (1999) (Breyer, J., dissenting from denial of certiorari).

215. *Id.* at 997.

of circumstances.[216] The Court has noted that the "'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'"[217]

This sort of "counting the states" jurisprudence obviously parallels the process of determining the content of international law. Customary law is determined in large part by state practice, with a customary law norm being declared only after a practice has been generally adhered to for a sufficient amount of time.[218] Of course, significant differences exist between the two communities—national and global—that make the analogy imperfect. Most notably for purposes of this Article, customary international law arises not just from general acceptance; instead, it requires that the acceptance be based on some sense of legal obligation.[219] By contrast, in the Eighth Amendment context there is no obligation that state legislatures have changed their criminal punishment schemes because of some sense that higher law requires it. Instead, state legislatures generally change their sentencing schemes for policy reasons, presumably including, in the case of sensitive issues such as the execution of juveniles or the mentally retarded, moral judgments.[220]

Still, the fact remains that consensus, or at least agreement among multiple parties, matters in determining the content of both international law and the Eighth Amendment. By itself this similarity means little for the actual meaning of the Eighth Amendment. However, it would mean more if one assumed that the international community counted, even to a limited degree, in determining whether a consensus existed with regard to what punishments were so disproportionate as to violate the human dignity the court has recognized as the foundation of the Amendment.[221] So understood, *Roper*'s focus not just on the bare

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216. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 311 (2002).

217. *Id.* at 312 (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).

218. *See, e.g.*, DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 15 (2001). General practice is insufficient for a norm to become customary law; in addition, compliance with the norm must be based on a sense of legal obligation. *See id.* at 15-16.

219. *See id.*

220. *See Atkins*, 536 U.S. at 323-24 (Rehnquist, C.J. dissenting).

221. *See, e.g., id.* at 311 ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.") (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958)).

fact that some nations have rejected the juvenile death penalty,[222] nor even on those nations' rationales,[223] but also on the simple fact of global consensus,[224] would become comprehensible.[225] International, not just foreign, law, would matter.

C. International Community and Gay Rights

The above analysis implies a broader definition of the community whose values should matter when determining consensus for purposes of deciding an Eighth Amendment issue.[226] In this broader understanding of community, nations play the role otherwise assigned to states.[227] For gay rights advocates pressing substantive and equality claims, the question becomes how this globalization of community, expressed through international law,[228] can influence the interpretation of domestic constitutional provisions such as the Due Process,[229] Equal Protection,[230] and Free Speech Clauses.[231]

Part of the answer turns on the particular right at issue, and the type of evidence relevant to its interpretation. For example, just as Eighth Amendment issues turn in part on society's judgments of the culpability of different types of offenders, substantive due process issues turn to no small degree on the social

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222. *See* Roper v. Simmons, 125 S. Ct. 1183, 1199-1200 (2005).

223. *See supra* notes 207-211 and accompanying text.

224. *See Roper*, 125 S. Ct. at 1199 (noting that every nation in the world except the United States and Somalia has ratified the United Nations Convention on the Rights of the Child, and no ratifying nation has entered a reservation to the Convention's prohibition on juvenile executions).

225. *See also Atkins*, 536 U.S. at 316 n.21 (noting, after a discussion of the national consensus against executing the mentally retarded, that "[a]dditional evidence . . . reflects a much broader social . . . consensus" against the practice, including, among other indicia, the "overwhelming[] disapprov[al]" of the world community).

226. *See supra* Part IV.B.

227. *See, e.g., Atkins*, 536 U.S. at 322-23 (Rehnquist, C.J., dissenting) (identifying state legislation as the "clearest and most reliable objective evidence of contemporary values").

228. *But cf. id.* (relying on legislation as an indicator of social consensus).

229. *See* Lawrence v. Texas, 539 U.S. 558, 574-75 (2003) (relying on substantive due process to protect right to same-sex intimacy).

230. *See* Romer v. Evans, 517 U.S. 620, 626-27 (1996) (relying on equal protection to protect gays' and lesbians' equal access to government protection).

231. *See, e.g.*, Holmes v. Calif. Army Nat'l Guard, 124 F.3d 1126, 1136 (9th Cir. 1997) (considering First Amendment challenge to military's restrictions on service by gays and lesbians); Tobias Barrington Wolff, *Compelled Affirmations, Free Speech and the U.S. Military's Don't Ask, Don't Tell Policy*, 63 BROOKLYN L. REV. 1141 (1997).

understanding of the conduct for which constitutional protection is sought. Between *Bowers v. Hardwick* and *Lawrence v. Texas*, "the right [of] homosexuals to engage in sodomy"[232] evolved into the right to be free of laws "touching upon the most private human conduct, sexual behavior, and in the most private of places, the home."[233] The evolution in the court's conceptualization of the issue surely derives in part from the change in American culture's understanding of gay America between 1986 and 2003.[234] As the author has argued elsewhere, equality claims are most firmly grounded in such social judgments.[235]

In such cases, the community from which the relevant social judgments are drawn may become more and more globalized. As explained in an earlier part of this Article, judge-made foreign law can play a role as respected statements of social values, made by institutions similarly situated to American courts.[236] Decisions by other foreign government bodies are similarly deserving of respect, given their representativeness and the fact that they, again like American courts, are faced with the problem of how best to exercise sovereign power.

Beyond governmental entities, however, the global community can make its judgments known through a variety of social institutions. Just as domestic entities other than states share in the making of social judgments that influence constitutional meaning,[237] analogous foreign, transnational and international entities can help shape a global consensus relevant to the meaning of domestic constitutional provisions. Religious organizations can speak to questions of moral values.[238] Social, professional and

232. Bowers v. Hardwick, 478 U.S. 186, 190 (1986).

233. *Lawrence*, 539 U.S. at 558, 566-67 (criticizing *Bowers*' characterization of the issue).

234. *See, e.g.*, Michaelson, *supra* note 121 (arguing that changes in American culture in the fifteen years after *Bowers* undercut that case's foundations).

235. *See* Araiza, *supra* note 19, at 554-55 (arguing that Congress is better suited for making judgments about whether a particular law is the result of "animus," not the courts).

236. *See supra* note 122 and accompanying text.

237. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 331 (2003) (noting the belief of military professionals that a racially diverse officer corps is necessary to the success of the military's mission); *Lawrence*, 539 U.S. at 572 (noting the American Law Institute's disapproval of laws criminalizing private consensual sexual conduct); Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (noting the views of professional and religious groups regarding the execution of the mentally retarded).

238. *See supra* note 237 and accompanying text.

affiliational groups, by their statement and deed, can, respectively, express and demonstrate social and professional-group attitudes toward particular conduct or status.[239] Corporate policies can reflect social attitudes, based on marketing strategies,[240] responsiveness to shareholder or employee pressure, or concerns for public image.[241]

Thus, to the extent the meaning of domestic constitutional provisions turns in part on global understandings, the nature of the due process and equal protection guaranties points toward consideration not just of state practice, but of more general social judgments of a transnational or international nature. This development dovetails with the ongoing evolution of international law away from a system limited to relations between sovereign states.[242] The combination of this evolution of international law with American courts' increased receptivity to international law in general holds much promise for litigators seeking a way to leverage into domestic constitutional doctrine human rights norms that are not simply foreign, or even international, but transnational in origin.

D. Gay Rights Claims and International Law

Given the expanded understanding of international legal sources implied by the above analysis, gay rights litigants might be able to find significant international support for claims that domestic constitutional provisions protect gay rights claimants. With regard to actual international law norms—that is, treaty, customary, and *jus cogens* norms—European and United Nations judicial decisions have ruled in favor of gay rights claimants on both privacy and equality grounds, citing general privacy and equal

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239. *Id.*

240. *See, e.g.*, *Grutter*, 539 U.S. at 330-31 (noting the benefits corporations believe they receive from racially diverse workforces).

241. For example, pressure from employees, shareholders, and the public have all pushed corporations to consider improving, among other things, their environmental policies and the working conditions of their factories in the developing world. *See, e.g.*, David Barkin, *The Social and Environmental Impacts of the Corporate Responsibility Movement in Mexico Since NAFTA*, 30 N.C. J. INT'L L. & COM. REG. 895 (2005) (examining "the issues and conflicts that emerged with the CRM as well as the manifestation of these issues in Mexico in the aftermath of NAFTA's promulgation").

242. *See* Spiro, *supra* note 80, at 2024 n.109 (noting that consent of states is not now the only way in which binding international law arises).

protection provisions in international texts.[243] Additionally, a variety of United Nations bodies have declared sexual-orientation discrimination to be prohibited under various international agreements.[244] Finally, a sizable and growing number of nations contain protections for gay and lesbian rights either in their constitutional text or doctrine or their statutory law.[245] While these country-level protections are not themselves international law in the classic sense, and may not be sufficiently widespread to create a rule of customary international law,[246] they would nevertheless help comprise the background social context for judicial interpretation of the due process and equal protection guaranties.

Beyond this international and foreign law, evidence relevant to due process and equal protection claims can be found in the statements and conduct of transnational social groups. As noted above, the same religious, professional, affiliational, and corporate groups whose actions and statements at the domestic level comprise the social judgments informing due process and (especially) equal protection law exist at a transnational level as well.[247] The development of global community norms relevant to gay rights claims should be as relevant to American courts interpreting due process and equal protection claims as the development of analogous norms in the field of criminal punishment. Indeed, Justice Scalia, surely no fan of international

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243. *See* Toonen v. Australia, Comm. No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994) (decision by the United Nations Human Rights Committee, construing the International Covenant on Civil and Political Rights), *available at* http://www1.umn.edu/humanrts/undocs/html/vws488.htm; Dudgeon v. United Kingdom, 45 Eur. H.R. Rep. 52 (1981) (decision by the European Court of Human Rights, construing the European Convention on Human Rights and Fundamental Freedoms), *available at* http://www.worldlii.org/eu/cases/ECHR/1981/5.html; Norris v. Ireland, 13 Eur. Ct. H.R. 186 (1991) (same); Modinos v. Cyprus, 16 Eur. H.R. Rep. 485 (1993) (same); Mouta v. Portugal, 1 FCR 653 (Eur. Ct. H.R. 1999) (European Court of Human Rights decision finding national court's custody decision based on applicant's sexual orientation and same-sex co-habitation, to violate the European Convention on Human Rights' prohibition on discrimination).

244. *See* Brief for Mary Robinson et al. as Amici Curiae Supporting Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 164151.

245. *See id.*; *see also* James D. Wilets, *International Human Rights Law and Sexual Orientation*, 18 HASTINGS INT'L & COMP. L. REV. 1 (1994).

246. *See* International Gay and Lesbian Ass'n, World Legal Survey (A listing of countries that prohibit same-sex conduct), *available at* http://www.ilga.info/Information/Legal_survey/Summary%20information/countries_where_same_sex_acts%20illegal.htm (last visited Nov. 20, 2005).

247. *See supra* notes 237-241 and accompanying text.

opinion's influence on constitutional doctrine, has criticized the idea that the Eighth Amendment possesses a distinctive character that makes recourse to foreign and international materials uniquely appropriate when interpreting it, citing recent due process and equal protection cases.[248] If borrowing is appropriate in the Eighth Amendment context, it should be appropriate in these other areas as well. Even assuming that Eighth Amendment borrowing is properly limited to the decisions of sovereigns—that is, either foreign law, treaty law, customary international law, or *jus cogens*[249]—such a limitation may not be as appropriate in due process and equal protection cases, where the relevant judgments are made at all levels of society, including both sovereigns and formal and informal social groups.[250]

Of course, none of this suggests the impending arrival of a golden age for gay rights litigants. Global opinion, even at the level of transnational organizations, as opposed to sovereign nations or formal international law, simply does not reflect an unambiguously strong consensus favorable to gay rights claims. Still, momentum for gay rights continues to build in advanced industrial democracies, both at the international,[251] national,[252] and transnational level.[253] National and transnational progress is also

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248. *See* Roper v. Simmons, 125 S. Ct. 1183, 1217, 1228 n.9 (2005) (Scalia, J., dissenting).

249. *But see* Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (noting, as part of the consensus against the execution of mentally retarded inmates, the views of religious and professional organizations).

250. *Compare, e.g., id.* at 312 (relying on state legislative decisions as best indicators of consensus relating to Eighth Amendment issues), *with* Michaelson, *supra* note 121 (arguing that underlying changes in American society's judgments regarding homosexuality undermined the foundation of *Bowers v. Hardwick*), *and* Araiza, *supra* note 19, at 554-55 (noting the fundamental role social judgments play in equal protection doctrine).

251. *See* Lawrence v. Texas, 539 U.S. 558, 572-74, 576-77 (2003) (noting decisions of the European Court of Justice, binding on all forty-five nations of the European Union); Brief for Mary Robinson et al. as Amici Curiae Supporting Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 164151, at *11-12 (noting European human rights legislation).

252. *See* Brief for Mary Robinson et al. as Amici Curiae Supporting Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 164151, at *8-30; Wilets, *supra* note 245.

253. *See, e.g.*, Frequent Flier.com, *United Rolls Out New Partner Benefits*, http://frequentflier.com/ffc-0805.htm (last visited Nov. 20, 2005) (noting United Airline's plan eventually to offer domestic partner benefits to all employees worldwide); Human Rights Campaign Foundation, Work Life, http://www.hrc.org/Template.cfm?Section=Search_the_Database&Template=/

evident in westernized developing nations.[254] Even if cultural barriers make it less likely that this momentum will easily translate into changes in other parts of the world, there is still reason to believe that a global consensus will continue to take shape in the coming years and decades. As it does, an evolving domestic constitutional jurisprudence that views American social attitudes in a globalized context should be receptive to claims that such global opinion matters to domestic constitutional interpretation.

V. CONCLUSION

As one commentator has written, "[a]lthough its doctrinal place remains unsettled, international law appears poised to make unprecedented inroads in the making of American constitutional law."[255] The same might be said of foreign law. Several factors appear to be converging to make international and foreign law more prominent in domestic constitutional doctrine. First, for several years justices of the Supreme Court have been moving toward more significant reliance on non-domestic law sources.[256] Second, the Court's embrace in *Lawrence* of a more expansive due process jurisprudence, one that echoes Eighth Amendment doctrine in its willingness to consider non-domestic sources of law, makes those non-domestic sources more relevant to domestic constitutional interpretation.

Because due process and, even more so, equal protection decisions rest on background social judgments, the type of non-domestic law relevant to due process and equal protection decisions is more expansive than formal international law and foreign nation practice. As transnational groups seek to influence American constitutional doctrine, both for its own sake and

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CustomSource/WorkNet/srch.cfm&searchtypeid=1&searchSubTypeID=1 (listing, among other entities that provide domestic partner benefits and have sexual orientation non-discrimination provisions, the International Monetary Fund, Greenpeace, and Human Rights Watch).

254. *See, e.g.*, Brief for Mary Robinson et al. as Amici Curiae Supporting Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 164151, at *12-13 (citing law from South Africa and Colombia); *id.* at *28 (citing law from Fiji and Ecuador); *id.* at *29 (citing law from Costa Rica).

255. Spiro, *supra* note 80, at 2026.

256. *See, e.g.*, Roper v. Simmons, 125 S. Ct 1183 (2005); Lawrence v. Texas, 539 U.S. 558 (2003); Grutter v. Bollinger, 539 U.S. 306, 344, 348 (2003) (Ginsburg, J., concurring); Atkins v. Virginia, 536 U.S. 304 (2002); Knight v. Florida, 528 U.S. 990, 995-98 (1999) (Breyer, J., dissenting from denial of certiorari).

because of its worldwide persuasive value, they can be expected to present arguments to courts more frequently, drawing attention to whatever relevant global consensus exists on the issue at hand. This third development should provide American courts with both the information and the legal argumentation they have indicated they would welcome.

Again, none of this is to suggest that American courts will jettison formal reliance on American constitutional provisions, in favor of deciding cases based on international norms.[257] However, as consciousness of a global legal community recognizing certain rights grows, American courts will no doubt feel increased pressure to conform domestic doctrine to the contours of those rights, at least where American doctrine is neither self-consciously different than,[258] nor inconsistent with,[259] the global view. In that way, American constitutional doctrine surely will become increasingly globalized. This can only redound to the benefit of gay rights advocates, given that foreign nations, foreign opinion, and the world community as a whole have largely superseded the United States as leading protectors of the rights of gays and lesbians.[260]

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257. *Cf.* Sosa v. Alvarez-Machain, 542 U.S. 692, 736-37 (2004) (expressing concern that recognition of a customary rule of law against arbitrary detention would, among other things, allow suits under the Alien Tort Statute to supplant claims under the Fourth Amendment or 42 U.S.C. § 1983 (2000)).

258. *See, e.g.*, *Roper*, 125 S. Ct. at 1217, 1226-27 (Scalia, J., dissenting) (discussing uniquely American jurisprudence relating to search and seizure and religious establishment rights).

259. In the case of the free speech, for example, American constitutional jurisprudence elevates the individual's right to speak over other individuals' rights to be free of insult or verbal oppression. *See, e.g.*, Kim Rappaport, *In the Wake of* Reno v. ACLU*: The Continuing Struggle in Westernized Democracies with Internet Censorship and Freedom of Speech Online*, 13 AM. U. INT'L L. REV. 765, 768 (1998).

260. *See, e.g.*, Heather Mason Kiefer, *Public Opinion Favors Gay Rights in Britain, Canada*, GALLOP POLL, May 24, 2005, http://poll.gallup.com/content/default.aspx?CI=16456 (indicating stronger support for gay rights in general and same-sex marriage in particular in Great Britain and Canada than in the United States); International Gay and Lesbian Human Rights Comm'n, Where You Can Marry: Global Summary of Registered Partnership, Domestic Partnership, and Marriage Laws, http://www.iglhrc.org/site/iglhrc/content.php?type=1&id=91 (last visited Nov. 20, 2005) (noting foreign jurisdictions allowing some form of same-sex legal union); United Kingdom Ministry of Defence, Homosexuality and the Armed Forces, http://www.mod.uk/issues/homosexuality/index.htm (last visited Nov. 20, 2005) (noting change to British policy regarding gays' ability to serve in the U.K. military); Kim Krisberg, *Life for Israeli Gays Pushes Forward Despite Turmoil*, WASHINGTON BLADE ONLINE, March 15, 2002, http://www.aegis.com/news/wb/2002/WB020312.html (noting gay rights provisions in Israeli law).