

TO UNDERSTAND FOREIGN COURT CITATION:  
DISSECTING ORIGINALISM, DYNAMISM,  
ROMANTICISM, AND CONSEQUENTIALISM

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“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”

*Chief Justice John Marshall*<sup>1</sup>

“[The] constitution [was] intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.”

*Chief Justice John Marshall*<sup>2</sup>

I. INTRODUCTION

Recent controversy surrounding citation to foreign court precedent by the United States Supreme Court has overshadowed the very decisions those citations helped create.<sup>3</sup> There has not been a buzz like this in the legal community since *Roe v. Wade*,<sup>4</sup> and now the legislators have joined the bandwagon as well.<sup>5</sup> My

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<sup>1</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

<sup>2</sup> *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819).

<sup>3</sup> See *Atkins v. Virginia*, 536 U.S. 304 (2002); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>4</sup> 410 U.S. 113 (1973).

<sup>5</sup> The Senate introduced a resolution on March 20, 2005, about two weeks after *Roper* was

principal observation regarding the Court's trifecta of *Atkins*, *Lawrence*, and *Roper*<sup>6</sup> is that these decisions reveal the judiciary's eagerness to walk in stride with existing global social norms. This is not for the faint-hearted, as it requires judicial invalidation of laws that lead to either absurd conclusions, or hopeless dead-ends. The Court, therefore, looks for extra support in foreign citations as it seeks to expand the frontiers of liberty, privacy, and equal protection that were frozen within the narrow doctrines of *Bowers v. Hardwick*<sup>7</sup> and *Stanford v. Kentucky*.<sup>8</sup>

*Lawrence* and *Roper* evoked strong sentiments for a general theory of foreign court citation.<sup>9</sup> This Article, however, does not seek to answer whether the Supreme Court needs to articulate a general theory for foreign citation. This would be counterproductive, as doing so would unnecessarily call into question the competent jurisprudence that resulted from those citations. Therefore, I seek to explore the issue at a more fundamental level. By understanding the foreign law jurisprudence of individual Supreme Court Justices, I will attempt to develop a framework for foreign court citation.

This analysis will serve multiple purposes. First, by developing an individual jurisprudential profile, one seeks to gain insight into the Justices' foreign source inclination. Second, by tracking the evolution of jurisprudence, one searches for the specific practices being endorsed by foreign law. For example, Justices can cite

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decided. S. Res. 92, 109th Cong. (2005). The Senate cited the Court's decisions in *Atkins*, *Lawrence*, and *Roper*. *Id.* The House Resolution was introduced on February 15, 2005. H.R. Res. 97, 109th Cong. (2005). Both resolutions conclude:

That it is the sense of the [Senate/House of Representatives] that judicial interpretations regarding the meaning of the Constitution of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution of the United States.

S. Res. 92; H.R. Res. 97. As of now, however, both resolutions sit frozen, unable to move because of bureaucratic delay. See S. Res. 92, The Library of Congress THOMAS, <http://thomas.loc.gov> (last visited June 11, 2006) (reporting that the last major action taken on Resolution 92 was on Mar. 20, 2005, when it was "[r]eferred to the Committee on the Judiciary"); H.R. Res. 97, The Library of Congress THOMAS, <http://thomas.loc.gov> (last visited June 11, 2006) (reporting that the last major action taken on Resolution 97 was on September 29, 2005, when it was "[f]orwarded by Subcommittee to Full Committee by the Yeas and Nays: 8-3").

<sup>6</sup> See *Atkins*, 536 U.S. 304; *Lawrence*, 539 U.S. 558; *Roper*, 543 U.S. 551.

<sup>7</sup> 478 U.S. 186, 191, 194-95 (1986), *overruled by Lawrence*, 539 U.S. at 576-78.

<sup>8</sup> 492 U.S. 361, 379-80 (1989), *abrogated by Roper*, 543 U.S. at 574-75.

<sup>9</sup> Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 640, 644 (2005) (considering constitutional comparativism in light of the theories of "originalism, natural law, majoritarianism, and pragmatism").

foreign sources of law to elicit confirmation or to render invalidation of a specific doctrinal development. In both cases, however, the process reveals the philosophy and methodology of constitutional interpretation. Third, an understanding of the first two threads allows one to foresee the future trajectory for a specific brand of constitutional adjudication within American jurisprudence.

This Article proceeds with an ambitious goal of focusing on a subset of Justices whose impact on foreign citation, I shall argue, provides a more efficient and less cumbersome framework. Furthermore, somewhere down the road, this will help to develop a comprehensive theory on foreign court citation.

Let us take a quick preview of some Justices. Instantly, one is drawn to the Scalia-Breyer debate,<sup>10</sup> not because of the wide publicity it generated, but because of the judicial hyper-plane it created due to the sharp divergence within the Justices' respective interpretive methodologies. While Justice Scalia gives primacy to the literal meaning of the text and statutes,<sup>11</sup> Justice Breyer engages in an understanding of what meaning the Constitution held for its citizenry.<sup>12</sup> Since the literal meaning of the texts and statutes cannot comport to the existing social convictions, the very essence of Justice Scalia's constitutional interpretation is the immutability of the Constitution, the evolution of which is unconscionable.<sup>13</sup> On the other hand, Justice Breyer defends the use of foreign sources of law as part of the process from which law emerges. To him, judges in other nations "are human beings . . . who have problems that often, more and more, are similar to our own. They're dealing with . . . certain texts, texts that more and

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<sup>10</sup> See Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer (Jan. 13, 2005), <http://domino.american.edu> (last visited Apr. 11, 2006) [hereinafter Transcript].

<sup>11</sup> Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 38 (Amy Gutmann ed., 1997). Justice Scalia searches out the ordinary meaning of the words used at the time of the provision's adoption, frequently consulting dictionaries of the era. In fact, Justice Scalia consults dictionaries more often than any of his colleagues. See Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1439 n.14, 1441-42 (1994).

<sup>12</sup> STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 16-18 (2005).

<sup>13</sup> Justice Scalia acknowledges that his textualist approach is regarded in "some sophisticated circles" of the legal profession as "simpleminded—'wooden,' 'unimaginative,' 'pedestrian.'" Scalia, *supra* note 11, at 23. He rejected this characterization and denied that he was "too dull to perceive the broader social purposes that a statute is designed, or could be designed, to serve." *Id.* Justice Scalia insisted that the Justices "have no authority to pursue those broader purposes or write those new laws." *Id.*

more protect basic human rights. Their societies more and more have become democratic . . . .”<sup>14</sup>

This view received strong rebuke from Justice Scalia as he thunders in his dissent in *Roper* that “the basic premise of the Court’s argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand.”<sup>15</sup> He further elaborates, “I do not believe that approval by ‘other nations and peoples’ should buttress our commitment to American principles any more than (what should logically follow) disapproval by ‘other nations and peoples’ should weaken that commitment.”<sup>16</sup>

Justice Breyer seeks judicial modesty and caution in his advocacy for achievement of the Constitution’s democratic purposes.<sup>17</sup> He is not interested in clinging strictly to the Constitution’s text. Justice Breyer views the very text of the Constitution as testament to the Framers’ intention for the American people, which is, to imbibe in them the spirit of “active liberty.” Therefore, he compares the development of his jurisprudence to “creat[ing] a framework for democratic government—a government that, while protecting basic individual liberties, permits individual citizens to govern themselves.”<sup>18</sup> Justice Breyer’s jurisprudence does not boil down to any simple, or single, intellectual thread. Unlike the self-professed *textualism* of Justice Scalia,<sup>19</sup> Justice Breyer does not consider himself to belong to any specific intellectual group. He adheres to the idea of learning from others, while mixing in his brand of judicial *pragmatism*, which embraces notions of active liberty, purposiveness, and consequentialism.<sup>20</sup>

In his pursuit for the best interpretation of the indeterminate text of our constitution, Justice Kennedy has sought out the laws and practices of other nations. If Justice Scalia is the *originalist*,<sup>21</sup> then Justice Kennedy should be considered the *anti-originalist*, as he clearly rejects the originalist ideal of defining constitutional rights by recourse to text and longstanding tradition. Contrary to traditional originalist theory, Justice Kennedy feels that the present

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<sup>14</sup> Transcript, *supra* note 10.

<sup>15</sup> *Roper v. Simmons*, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting).

<sup>16</sup> *Id.* at 628.

<sup>17</sup> BREYER, *supra* note 12, at 6.

<sup>18</sup> Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 271 (2002).

<sup>19</sup> Scalia, *supra* note 11, at 23.

<sup>20</sup> See BREYER, *supra* note 12, at 115–16.

<sup>21</sup> For a general description and critique of the originalist approach to constitutional interpretation, see *id.* at 116–17.

day Americans have a better understanding of the meaning of the Constitution than the Framers themselves did. Justice Kennedy has stated that “over time the intentions of the framers are more remote from their particular political concerns and so they have a certain purity and a certain generality now that they did not previously.”<sup>22</sup>

It is against this backdrop that Justice Scalia disfavors the notion of sophisticated judicial interpretation, which takes into account the evolving social convictions, mainly on moral grounds. But, Justice Kennedy notes, “it sometimes takes humans generations to become aware of the moral consequences, or the immoral consequences, of their own conduct. That does not mean that moral principles have not remained the same.”<sup>23</sup> Justice Kennedy urges us to examine the moral content of liberty from scratch in each case. He succinctly opines, “the object of [constitutional interpretation by the judiciary] is to use history, the case law, and our understanding of the American constitutional tradition in order to determine the intention of the document.”<sup>24</sup>

Justice Ginsburg’s jurisprudence is anchored in the concept of a living, dynamic constitution. She believes that the Framers’ intent will be best honored if someone reads the Constitution “as belonging to a global 21st century, not as fixed forever by 18th century understandings.”<sup>25</sup> In her speeches and writings, she rejects outright the idea of a Constitution frozen in time.<sup>26</sup> She is open in her dissent to the insularity in current U.S. jurisprudence, as not being fully in consonance with the idea of looking beyond the borders of the United States when grappling with challenging and novel questions of law. She advances the argument that the Framers could not foresee the evolution of society two hundred years from its inception, and therefore could not have comprehended the consequences of law in the society today. I shall argue that Justice Ginsburg’s philosophy is borne out of her own

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<sup>22</sup> *Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 184 (1989) (questioning by Sen. Joseph R. Biden Jr., Chairman, S. Comm. on the Judiciary).

<sup>23</sup> *Id.* at 153 (questioning by Sen. Arlen Specter, Member, Sen. Comm. on the Judiciary).

<sup>24</sup> *Id.* at 86 (questioning by Sen. Joseph R. Biden Jr., Chairman, S. Comm. on the Judiciary).

<sup>25</sup> Ruth Bader Ginsburg, Assoc. Justice, Supreme Court of the United States, Keynote Address Before the American Society of International Law Annual Meeting, A Decent Respect to the Opinions of [Human]kind: The Value of a Comparative Perspective in Constitutional Adjudication (Apr. 1, 2005), <http://www.asil.org/events/AM05/ginsburg050401.html>.

<sup>26</sup> *Id.*

experiences as a young lawyer navigating through the morass of a myopic society still trying to evolve in gender and race issues. Perhaps that feeling of eighteenth century myopia haunts her as she embraces the legal opinions of jurists outside the United States. Many other jurists have faced similar challenges in dealing with the fundamental human principles of liberty, equality and justice.

In this quest to understand the Supreme Court's use of foreign court citation, one would be remiss not to mention the ageless wisdom of the late Chief Justice Rehnquist. Despite his reservation toward foreign laws, he noted that U.S. jurisprudence could not stay insulated from the rising tide of comparative constitutionalism in a speech in 1993, stating:

For nearly a century and a half, courts in the United States exercising the power of judicial review [for constitutionality] had no precedents to look to save their own, because our courts alone exercised this sort of authority. When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.<sup>27</sup>

While, in his later years, the Chief Justice failed to express support for the relevance of foreign law in American jurisprudence, his earlier reasoning remains sound and even more relevant today.<sup>28</sup>

Exploring the trajectory of foreign citation in the Court rests on an unambiguous understanding of the jurisprudential philosophy of the Justices. This requires uncovering an established pattern of opinions for guidance in charting a roadmap. In this regard, I shall restrict my analysis here on Justices Scalia, Ginsburg, Kennedy and Breyer, respectively. I shall refrain from introducing foreign court citation tendencies of the other Justices in depth, although I will briefly illustrate their positions.

On the issue of foreign court citation, perhaps one of the greatest

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<sup>27</sup> William Rehnquist, *Constitutional Courts—Comparative Remarks* (1989), reprinted in *GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993).

<sup>28</sup> See *Planned Parenthood v. Casey*, 505 U.S. 833, 945 n.1 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (citing abortion decisions from West Germany and Canada, but failing to indicate or emphasize their importance to the case).

challenges is to untangle the role of Justice Stevens. Besides a paucity of available opinions from which to extricate Stevens' tendencies, his narrow decision-making and "one case at a time policy" makes it rather irrelevant to engage in scholarship to develop groundwork for foreign court citation analysis.<sup>29</sup> At times, Stevens' apparent liberalism tempts us to delve deeper into his jurisprudence for indications of a predilection toward foreign court citation, yet his unpredictability thwarts us from doing so. The fundamental originalism of Justice Thomas' jurisprudence almost perfectly concurs with Justice Scalia's opinions on this matter, which makes it difficult to create a unique framework for any current analysis of Justice Thomas.<sup>30</sup> Justice Thomas' originalist jurisprudence differs from Justice Scalia's textualism, however, in that Justice Thomas resorts to extreme intentionalism and puts primacy on Framers' beliefs and practices when interpreting the Constitution.<sup>31</sup> Justice Souter's jurisprudence, on the other hand, is full of diverse opinions and a divergence from doctrines.<sup>32</sup> Therefore, it is nearly impossible to observe any noticeable trends in his theories that would illuminate our journey. Former Justice O'Connor, however, had recently become very exuberant about embracing foreign court citations, as we note in her dissenting opinion in *Roper*:

[T]his Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence

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<sup>29</sup> See generally CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 83 (1999) (discussing how members of the Court, including Justice Stevens, have failed to decide whether the right to death via physician assisted suicide is a fundamental right).

<sup>30</sup> See generally SCOTT DOUGLAS GERBER, FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS 25 (1999) (accusing Justice Thomas of initially being little more than "a clone" of Justice Scalia).

<sup>31</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 580–83 (2004) (Thomas, J., dissenting) (turning to The Federalist Papers to understand the Framers' practices during previous wars and arguing for nearly unchecked power for the President); *id.* at 554, 561–62 (Scalia, J., dissenting) (ultimately declaring that Hamdi's detention was lawful, Scalia, through the historical commentaries of William Blackstone, still placed constitutional limits on the powers of the President in times of war).

<sup>32</sup> See Suzanna Sherry, *Lee v. Weisman: Paradox Redux*, 1992 SUP. CT. REV. 123, 132–33 (1993) (noting Justice Souter's independent conclusion regarding state sponsored prayer at a public school graduation in the context of the Establishment Clause); David J. Garrow, *Justice Souter Emerges*, N.Y. TIMES, Sept. 25, 1994, § 6 (Magazine), at 36, available at 1994 WLNR 3547672 (describing the decision-making and opinion drafting process in *Planned Parenthood v. Casey*).

between domestic and international values, especially where the international community has reached clear agreement—expressed in international law or in the domestic laws of individual countries—that a particular form of punishment is inconsistent with fundamental human rights. At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus.<sup>33</sup>

This Article proceeds as follows: Part II examines some of the most striking and significant cases in which Justice Scalia has differentiated himself in advancing his jurisprudence of total rejection of foreign citations. Part III introduces the constitutional interpretation of Justice Ginsburg and examines the tendencies in her jurisprudence that comports to foreign court decisions. By examining Justice Kennedy's jurisprudence, which is still evolving, Part IV traces Justice Kennedy's jurisprudential roots, and predicts how his law of nations approach might influence death penalty cases and cases dealing with terrorist defendants. Part V examines Justice Breyer's interpretive rationale and analyzes his judicial restraint, despite his vociferous campaign for comparative constitutionalism. Finally, the conclusion in Part VI explores a potential future trajectory of foreign court citation in the United States.

## II. TEXTUALIST PARADIGM OF JUSTICE ANTONIN SCALIA'S ORIGINALISM

Why does Justice Scalia have no use for foreign law?<sup>34</sup> The question begs us to recognize Justice Scalia's constitutionalism. Justice Scalia's constitutionalism, though rooted in the originalist brand of interpretation,<sup>35</sup> is markedly different than that of Justice Thomas.<sup>36</sup> Justice Scalia's originalist ideology is manifested in its

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<sup>33</sup> *Roper v. Simmons*, 543 U.S. 551, 605 (2005) (O'Connor, J., dissenting). In *Roper*, Justice O'Connor's analysis zeroed in on the dignity aspects of Eighth Amendment jurisprudence and its use in other cases of that permit foreign law usage. *See id.* at 604–05.

<sup>34</sup> Justice Scalia's reluctance to the usage of foreign court citation has been well documented. In a recent debate at American University with Justice Breyer, he declared, "I do not use foreign law in the interpretation of the United States Constitution." *See Transcript, supra* note 10.

<sup>35</sup> *See id.* (Justice Scalia states, "[W]hat I do when I interpret the American Constitution is I try to understand what it meant, what was understood by the society to mean when it was adopted.")

<sup>36</sup> *See* Samuel Marcossan, *Colorizing the Constitution of Originalism: Clarence Thomas at the Rubicon*, 16 *LAW & INEQ.* 429, 479–80 & n.211 (1998) (arguing that Justice Scalia relies

reliance on textualism,<sup>37</sup> the interpretive process that interprets the law based on the text and tradition of the Constitution, without focusing on the moral or intellectual compass of the society or individual. Anchored in the text, structure, and history of the Constitution, textualism seeks the most literal meaning, free from the perceptive idealism of broader social purpose. Only in the event of an absurd conclusion will the textualist seek guidance from historical trends in the constitutional text or statute.<sup>38</sup>

Justice Scalia's originalism differs from that of Judge Robert Bork's originalism, as Justice Scalia's originalism searches not merely for the Framers' intent,<sup>39</sup> but gives ultimate primacy to the text, structure, and history of the document, precisely in that

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more on the plain text of the document). Differences between Justices Scalia and Thomas can also be seen through their individual analyses regarding the Declaration of Independence. See *Troxel v. Granville*, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting). In *Troxel*, Justice Scalia notes:

In my view, a right of parents to direct the upbringing of their children is among the "unalienable Rights" with which the Declaration of Independence proclaims "all men . . . are endowed by their Creator" . . . . The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts . . . .

*Id.*

In contrast, Justice Thomas takes the Declaration of Independence more literally and bases his opinions in a strict accordance to it, assiduously believing that the principles of the Declaration of Independence illuminate the Constitution. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring) (finding that, the strict scrutiny standard applies to all government classifications based on race, as he opines, "As far as the Constitution is concerned, it is *irrelevant* whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged.") (emphasis added).

<sup>37</sup> See, e.g., William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1510 (1998) (reviewing ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997)) (noting how Justice Scalia rejects the use of common sense principles when the plain language of the rule is clear); Donald J. Kochan, Book Note, *The Other Side of the Coin: Implications for Policy Formation in the Law of Judicial Interpretation*, 6 CORNELL J.L. & PUB. POL'Y 463, 464-66 (1997) (reviewing, ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997)); Larry Kramer, *Judicial Asceticism*, 12 CARDOZO L. REV. 1789, 1790-92 (1991) (discussing Justice Scalia's deep commitment to a formalist jurisprudence).

<sup>38</sup> See Gregory E. Maggs, *Reconciling Textualism and the Chevron Doctrine: In Defense of Justice Scalia*, 28 CONN. L. REV. 393, 397 (1996) (stating that textualist judges simply do not use legislative history when interpreting statutory language); Bradley C. Karkkainen, "Plain Meaning": *Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 401, 405 (1994) (noting Justice Scalia's consistent loyalty to the structure and plain meaning of statutory language over its legislative history).

<sup>39</sup> Glenn Harlan Reynolds, *Sex Lies and Jurisprudence: Robert Bork, Griswold and the Philosophy of Original Understanding*, 24 GA. L. REV. 1045, 1050-51 (1990) (describing the crux of Judge Bork's originalist approach as the idea that "courts' actions must be constrained by a theory, one that is capable of predicting results"); see also, ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 143 (1990) (arguing that use of the "original understanding" of the Constitution is the only approach consistent with American democracy).

order.<sup>40</sup> If the text does not yield a clear meaning, Justice Scalia would turn next to the structure of the statute for the most plausible and narrow interpretation. If structure produces multiple interpretations, Justice Scalia will then consult the history of the statute. Essentially, Justice Scalia seeks the meaning that was intended by the Framers for the society when it was written. By discerning the historical meaning of the terms used—he avoids any fanciful analysis of the Framers' mind to uncover a hidden interpretation.<sup>41</sup>

Justice Scalia's approach to constitutional interpretation can, at times, end up in the dead-ends of inconsistency or absurdity when the Supreme Court is confronted with contemporary social issues not explicated in the text. In *Coy v. Iowa*,<sup>42</sup> the Court had to determine whether the Confrontation Clause of the Sixth Amendment grants criminal defendants a right to interact face-to-face with their accusers.<sup>43</sup> In *Coy*, the criminal defendant was charged with the sexual assault of two thirteen-year-old girls who were camping near the defendant's backyard.<sup>44</sup> During the trial's testimony, the District Court allowed a physical screen to be placed in front of the girls.<sup>45</sup> The girls could not see the defendant, but the defendant was able to see their silhouettes and hear their voices.<sup>46</sup> The Iowa Courts held that the screening device did not violate the defendant's Sixth Amendment right to confrontation.<sup>47</sup> In his plurality opinion, Justice Scalia sought to establish a textual interpretation of the Confrontation Clause, where a criminal defendant's right to confrontation extended far beyond the meaning of cross-examination. Delving deep into the textual roots of the Sixth Amendment, Justice Scalia used a literal interpretation of the word "confrontation" by examining its Latin roots<sup>48</sup> and reviewing Shakespeare.<sup>49</sup> He then resorted to a more modern interpretation of

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<sup>40</sup> Karkkainen, *supra* note 38, at 464–66.

<sup>41</sup> *See id.*

<sup>42</sup> 487 U.S. 1012 (1988).

<sup>43</sup> *Id.* at 1015.

<sup>44</sup> *Id.* at 1014.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1015.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 1016. In his opinion in *Coy*, Justice Scalia states regarding the right to confrontation, "[s]imply as a matter of Latin as well, since the word 'confront' ultimately derives from the prefix 'con-' (from 'contra' meaning 'against' or 'opposed') and the noun 'frons' (forehead)." *Id.*

<sup>49</sup> *Id.* In the context of U.S. constitutional interpretation, originalism is a family of theories that share the theme that a Constitution or statute has a fixed and knowable

the phrase, and ultimately held that Sixth Amendment contains the inalienable right of a criminal defendant to literally confront his accuser ‘face-to-face’ to ensure the integrity of the fact-finding process.<sup>50</sup> This narrow textualist interpretation is witnessed again in *Harmelin v. Michigan*,<sup>51</sup> where the Cruel and Unusual Punishment Clause of the Eighth Amendment was challenged by a defendant sentenced to a mandatory life sentence without parole for possession of more than 650 grams of cocaine.<sup>52</sup> In determining whether the sentence was cruel and unusual, Justice Scalia again resorted to literal textual interpretation. Justice Scalia reasoned that “the Eighth Amendment[’s protection against cruel and unusual punishment] contains no proportionality guarantee.”<sup>53</sup>

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meaning, which should be adhered to by judges. See Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 915 (1998). A neologism, “originalism” is a formalist theory of law that is closely intertwined with textualism. See *id.* While it is mostly popular among U.S. political conservatives, some liberals such as Hugo Black and Akhil Amera also subscribe to the theory. *Id.* at 916. One theory within originalism’s “family of theories” is original intent—the view that interpretation of a written constitution is, or should be, consistent with what was meant by those who drafted and ratified it. See *id.* at 915–16. The original meaning theory, which is closely related to textualism, is the view that interpretation of a written constitution should be based on what the ordinary meaning of the text would have been at the time it was adopted; that is, what it would have been understood to mean by reasonable persons living at the time of its ratification. *Id.* These theories, textualism and originalism, both stress the idea that there is an authority that is contemporaneous with the ratification that should govern its interpretation. Conversely, the two theories differ as to what exactly that authority is: 1) the intentions of the authors; 2) the understanding of either the authors or the ratifiers; or 3) the plain meaning of the text. See generally *id.* at 915–25; Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980). Earlier discussions often used the term interpretivism to denote theories that sought to derive meaning from the constitutional text alone (textualism), or from the intentions of the originators (intentionalism). See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 1–2 (1980) (discussing the interpretivist approach); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 706 (1975). Justice Scalia has explained in his own words his preference for originalism over nonoriginalism. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862–64 (1989).

Justice Scalia’s textualism led him to invoke Shakespeare in *Coy*: “Shakespeare was thus describing the root meaning of confrontation when he had Richard the Second say: ‘Then call them to our presence—face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak . . .’ Richard II, Act 1. sc. 1.” 487 U.S. at 1016.

<sup>50</sup> *Coy*, 487 U.S. at 1015–16, 1019–20.

<sup>51</sup> 501 U.S. 957 (1991).

<sup>52</sup> *Id.* at 961.

<sup>53</sup> *Id.* at 965. Justice Scalia’s unflinching reliance on textualism is again evident in *Harmelin*, when he explains, while describing the meaning of cruel and unusual, that:

Wrenched out of its common-law context, and applied to the actions of a legislature, the word “unusual” could hardly mean “contrary to law.” But it continued to mean (as it continues to mean today) “such as [does not] occur in ordinary practice,” “[s]uch as is [not] in common use.” . . . The language bears the construction, however—and here we come to the point crucial to resolution of the present case—that “cruelty and unusualness” are to be determined not solely with reference to the punishment at issue

Again, diving deep into the archives of English constitutional history<sup>54</sup> and American constitutional and legal history,<sup>55</sup> Justice Scalia noted that the Cruel and Unusual Punishment Clause was to be understood within the exclusionary confines of “modes of punishment,”<sup>56</sup> outside the scope of proportionality jurisprudence.<sup>57</sup> This textual reliance resulted in the rejection of the defendant’s claim,<sup>58</sup> an outcome that is contradictory to *Coy*.<sup>59</sup>

Providing only glimpses of Justice Scalia’s jurisprudence, *Coy* and *Harmelin* barely expose the differing inclinations that exist between Justice Scalia and some of his colleagues towards foreign court citations.<sup>60</sup> To understand the difference, we need to highlight the narrow doctrinal boundary beyond which his textualism can never transcend. His unrelenting fidelity to the Constitution’s text

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(“Is life imprisonment a cruel and unusual punishment?”) but with reference to the crime for which it is imposed as well (“Is life imprisonment cruel and unusual punishment for possession of unlawful drugs?”). The latter interpretation would make the provision a form of proportionality guarantee. The arguments against it, however, seem to us conclusive.

*Id.* at 976 (citing WEBSTER’S AMERICAN DICTIONARY (1828); WEBSTER’S SECOND INTERNATIONAL DICTIONARY 2807 (1954)) (internal citations omitted) (footnote omitted).

<sup>54</sup> *Id.* at 966–67, 974.

<sup>55</sup> *Id.* at 977–78.

<sup>56</sup> *Id.* at 981. Justice Scalia notes in *Harmelin*:

The logic of the matter is quite the opposite. If “cruel and unusual punishments” included disproportionate punishments, the separate prohibition of disproportionate fines (which are certainly punishments) would have been entirely superfluous. When two parts of a provision (the Eighth Amendment) use different language to address the same or similar subject matter, a difference in meaning is assumed.

*Id.* at 978 n.9.

<sup>57</sup> *Id.* at 981. Justice Scalia is extremely literal in his understanding of the frontiers of cruel and unusual punishment, as he notes:

[I]t might be argued, why would any rational person be careful to forbid the disproportionality of fines but provide no protection against the disproportionality of more severe punishments? Does not the one suggest the existence of the other? Not at all. There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment, and even capital punishment cost a State money; fines are a source of revenue. As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit.

*Id.* at 978 n.9.

<sup>58</sup> *Id.* at 996.

<sup>59</sup> 487 U.S. 1012, 1015–16, 1019–20 (1988).

<sup>60</sup> See, e.g., *Walton v. Arizona*, 497 U.S. 639, 671 (1990) (Scalia, J., concurring) (suggesting that the “and” in the Eighth Amendment requires that punishments be both cruel and unusual to violate the text). According to George Kannar, Justice Scalia believes a semantically based textualism serves to minimize a judge’s “interpretive discretion and the influence of social, political, or moral context, except as that context has made its way directly into the ‘ordinary meaning’ of relevant, legally operative words.” George Kannar, Comment, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1308 (1990).

sometimes manifests in his meticulous method of finding and using the dictionary's definition and grammatical usage to carry out constitutional interpretation.<sup>61</sup> We see this in *California v. Hodari D.*,<sup>62</sup> where the constitutionality of an alleged "seizure" was challenged under the Fourth Amendment.<sup>63</sup> Justice Scalia took a narrow view of "seizure"<sup>64</sup> that was out of touch with the earlier view of the Court,<sup>65</sup> due in part to his reliance on nineteenth century dictionaries.<sup>66</sup> Here an even narrower textualism is revealed, in which Justice Scalia relied on an interpretation deduced in consultation with a more pristine version of the dictionary than those published today.<sup>67</sup>

In *Lawrence v. Texas*,<sup>68</sup> a Texas statute prohibiting homosexual sodomy was challenged on equal protection and due process grounds.<sup>69</sup> The Court was to determine whether the Substantive

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<sup>61</sup> Karkkainen, *supra* note 38, at 439–40.

<sup>62</sup> 499 U.S. 621 (1991).

<sup>63</sup> *Id.* at 623.

<sup>64</sup> *Id.* at 624. Justice Scalia states in *Hodari D.* that to constitute a seizure of the person, just as to constitute an arrest, "the quintessential 'seizure of the person' under [the] Fourth Amendment jurisprudence," there must be either the application of physical force, "however slight[]," or there must be submission to an officer's "show of authority" that restrains the subject's liberty. *Id.* at 624–25.

<sup>65</sup> *Id.* at 629–30 (Stevens, J., dissenting).

<sup>66</sup> As Justice Scalia notes, "[w]e have long understood that the Fourth Amendment's protection against 'unreasonable . . . seizures' includes seizure of the person. From the time of the founding to the present, the word 'seizure' has meant a 'taking possession.'" *Id.* at 624 (majority opinion) (citing NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 67 (1828); J. BOUVIER, A LAW DICTIONARY 510 (6th ed. 1856); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2057 (1981)) (internal citations omitted).

<sup>67</sup> *Id.*

<sup>68</sup> 539 U.S. 558 (2003).

<sup>69</sup> *Id.* at 562–63. Historically, equal protection clauses have evolved on twin pillars of judicial paradigms—1) heightened scrutiny; and 2) rational basis review. Although a sure-fire test has not been established by the Court as to the applicability of the heightened scrutiny doctrine, it could be applied in cases where occurrence of discrimination is likely due to prejudice and hostility based on race and gender, as seen in *United States v. Virginia*, 518 U.S. 515, 515–16 (1996), and *Loving v. Virginia*, 388 U.S. 1, 11 (1967). The issue at hand in *Lawrence* was whether heightened scrutiny doctrine can be extended to discrimination based on sexual orientation. 539 U.S. at 566; see also Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 201–02 (1994) (arguing that *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), was the "first judicial opinion in the United States to hold that discrimination against same-sex couples is sex discrimination"). On the other hand, a rational basis review would require the plausibility that governmental interference with consensual sexual behavior, homosexual sodomy in this case, was brought about for moral reasons only without having any risk of actual harm. Professor Sunstein provides a good discussion for possible due process grounds in *Lawrence* through a comprehensive presentation of pre-*Lawrence* Supreme Court jurisprudence. See Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 37–39 (2003) (discussing the Court's view on permissible uses of substantive due process to invalidate state legislation).

Due Process Clause of the Fourteenth Amendment could prohibit states from infringing on an individual's "fundamental liberty interest" by invoking the compelling state interest test.<sup>70</sup> Adhering to his narrow doctrinal analysis, Justice Scalia examined the rights that are "deeply rooted in this Nation's history and tradition,"<sup>71</sup> and as a result concluded that homosexual sodomy between consenting adults in a relationship does not constitute a fundamental liberty.<sup>72</sup> Thus, by removing the fundamental liberty component from the Fourteenth Amendment, he was able to draw a conclusion, which is again stripped of touch with emerging awareness of liberty.<sup>73</sup> Empowered by their comprehension of foreign sources, the majority noted that "emerging awareness" can expand the concept of fundamental rights and ultimately reshape our Fourteenth Amendment jurisprudence.<sup>74</sup>

The reading of *Coy*, *Harmelin*, *Hodari D.*, and *Lawrence* brings us to the fundamental issue: What is the Constitution according to Justice Scalia? To Justice Scalia the Constitution is dead; dead like a human cadaver,<sup>75</sup> useful for anatomical purposes, but unable to illustrate any post-mortem marks of an evolving civilization. The Constitution thus provides no illumination of broader social purposes for Justice Scalia. With a jurisprudence that is frozen in time and unable to extricate from the bondages of eighteenth century social convictions, Justice Scalia's originalism is opened to deficiencies. Legal scholars advance myriad explanations, ranging from Justice Scalia's distaste for judicial activism<sup>76</sup> to his abhorrence in legislating from the bench<sup>77</sup> to his "rule of law as a

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<sup>70</sup> *Lawrence*, 539 U.S. at 593 (Scalia, J., dissenting) (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

<sup>71</sup> Justice Scalia notes, "[w]e have held repeatedly, in cases the Court today does not overrule, that *only* fundamental rights qualify for this so-called 'heightened scrutiny' protection—that is, rights which are 'deeply rooted in this Nation's history and tradition.'" *Id.* (citing *Glucksberg*, 521 U.S. at 721) (second emphasis added).

<sup>72</sup> *Id.* at 597–98.

<sup>73</sup> *See Id.* at 598 ("Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior.").

<sup>74</sup> *Id.* at 572–73 (majority opinion) (looking to developments in European law for support for the majority's decision and reasoning).

<sup>75</sup> This is a metaphor that I use as the opposite of the "living constitution," partially to convey the apparently dead-end constitutional interpretation resulting from strict adherence to eighteenth century texts and statutes; especially in the light of evolving social norms and mores.

<sup>76</sup> In Justice Scalia's opinion, judges should not determine cases based on the prevailing political environment; rather, they should engage in interpretation based on the meaning of the text. *See Kannar, supra* note 60, at 1308.

<sup>77</sup> *See Karkkainen, supra* note 38, at 403–04 (recognizing that Justice Scalia favors strict constructionalism over analyzing legislative intent and history).

law of rules” paradigm.<sup>78</sup> The fundamental weakness, however, remains the same, a Constitution frozen and unmovable like the dead cadaver. Justice Scalia knows it. His recent references to the “faint-hearted” branch of originalism<sup>79</sup> also remains unable to accommodate the expanded framework of fundamental rights needed for the changing times.

Finally, a Constitution buried into the black hole of eighteenth century rigidity cannot be illuminated from the tide of legal currents flowing overseas marking the evolving awareness of fundamental rights. We have seen it in his scathing indictment of citation to foreign authorities in *Lawrence*.<sup>80</sup> But, illumination needs perception. Perception requires reception. The dead do not have reception. Herein lies the truth of Justice Scalia’s jurisprudence, which much to my dismay, is not likely to be illuminated by foreign sources of law. If we have any doubt, his dissent in *Roper* perhaps says it all.<sup>81</sup>

### III. DYNAMIC CONSTITUTIONALISM OF JUSTICE RUTH BADER GINSBURG

Since her elevation to the Court, Justice Ginsburg has progressively embraced a jurisprudence that sits in polar opposite to that of Justice Scalia. The dynamic Constitution of Justice Ginsburg<sup>82</sup> is anchored in her pursuit of an expanded frontier of equal protection. During her service on the Court thus far, she has taken sharp detours from Justice Scalia’s frozen in time, cadaver-

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<sup>78</sup> See generally Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (arguing for the establishment of the “general principle of decision,” rather than the use of a “totality of the circumstances’ test” in individual cases to promote judicial uniformity).

<sup>79</sup> Scalia, *supra* note 49, at 862 (observing the problem of the “faint-hearted originalist,” who is unable or unwilling to adhere to the original understanding in the most difficult cases).

<sup>80</sup> 539 U.S. 558, 598 (2003) (Scalia, J., dissenting).

<sup>81</sup> Justice Scalia’s dissent in *Roper* is perhaps his most scathing indictment against foreign court citations by other Justices, as he chides by saying, “[b]y what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?” *Roper v. Simmons*, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting).

<sup>82</sup> By referring to a dynamic Constitution, attention is drawn to the process by which the Constitution adapts to the changing conditions in the society. As the frontiers of the freedom of speech, the freedom of religion, the rights to privacy and sexual practices among consenting adults continue to expand within the meaning of our Constitution, we are confronted with its dynamic aspect. In most parlances, the phrases “dynamic Constitution” and “living Constitution” are used synonymously. See generally RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 3–4 (2001) (explaining that the Constitution provides principles that the Court identifies and implements “through a highly moralized, philosophic inquiry”).

like Constitution and embraced a living Constitution.<sup>83</sup> With a judicial philosophy anchored in a comprehensive comparative viewpoint, Justice Ginsburg consistently embraced decisions of foreign courts.<sup>84</sup> Only recently, however, as the Supreme Court handed down several path-breaking opinions on affirmative action and minority sexual rights, Justice Ginsburg's perspectives became better known.<sup>85</sup> In several previous cases, we have become familiar with her judicial philosophy. In *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*,<sup>86</sup> Justice Ginsburg relied on a House of Lords decision to interpret the Warsaw Convention's limitations on airline liability for injury to a passenger.<sup>87</sup> Invoking *Sidhu v. British Airways PLC*, a House of Lords decision, as the authority to determine a carrier's obligation under the law, Justice Ginsburg denied the passenger's claim and reversed the Second Circuit.<sup>88</sup>

Before *Lawrence* and *Atkins* created the present buzz, Justice Ginsburg again looked across our shores to settle cases.<sup>89</sup> In *Eldred v. Ashcroft*, the Court undertook constitutional scrutiny of

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<sup>83</sup> The term "living" is used to denote that the Constitution is still evolving in consonance with the evolving needs of the society, rather than possessing a fixed in time, definitive meaning. The concept of a living Constitution is noted by the Court in *Trop v. Dulles*, where the Court states that "the words of the [Eighth] Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 356 U.S. 86, 100–01 (1958) (footnote omitted). The concept further gained currency in a 1987 lecture presented by Justice Thurgood Marshall where he argued that the Constitution must be interpreted in light of the moral, political, and cultural climate of the age of interpretation. Justice Thurgood Marshall, Remarks at the Annual Seminar of the San Francisco Patent and Trademark Law Association, Maui, Hawaii (May 6, 1987), [http://www.thurgoodmarshall.com/speeches/constituional\\_speech.htm](http://www.thurgoodmarshall.com/speeches/constituional_speech.htm).

<sup>84</sup> See *Eldred v. Ashcroft*, 537 U.S. 186, 205–06 (2003); *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 172–74 (1999).

<sup>85</sup> See Ginsburg, *supra* note 25.

<sup>86</sup> 525 U.S. 155 (1999).

<sup>87</sup> *Id.* at 172–74.

<sup>88</sup> *Id.* at 172–74, 176. The central issue before the Court was to determine the Warsaw Convention's exclusivity in dealing with air carrier liability for passenger injuries sustained during international transportation. *Id.* at 160. In delivering the opinion of the Court, Justice Ginsburg noted that "[t]he British House of Lords, in *Sidhu v. British Airways plc*, considered the same history, but found it inconclusive," and thus reasoned, the convention's proposal "will not bear the weight the Court of Appeals placed on it." *Id.* at 173–74 (citation omitted).

<sup>89</sup> Following her opinion in *United States v. Virginia*, Justice Ginsburg began to embrace a more expansive view of rights and her jurisprudence began to untangle from her centrist assimilation. This prompted her to look for laws that could adapt to her decision-making process, and perhaps by extension, to begin comparative side-glances across our borders in doing so. See Deborah L. Markowitz, *In Pursuit of Equality: One Woman's Work to Change the Law*, 14 WOMEN'S RTS. L. REP. 335, 340 (1992); Scott M. Smiler, *Justice Ruth Bader Ginsburg and the Virginia Military Institute: A Culmination of Strategic Success*, 4 CARDOZO WOMEN'S L.J. 541, 581–82 (1998).

congressional power in prescribing copyright duration.<sup>90</sup> The petitioners' challenged the Copyright Term Extension Act enacted by Congress in 1998.<sup>91</sup> In delivering the opinion of the Court, Justice Ginsburg examined the scope of Congress' power under the Copyright Clause and held it constitutional.<sup>92</sup> To defend her decision, she sought guidance from the copyright term adopted by the European Union in 1993.<sup>93</sup> In *Eldred*, Justice Ginsburg noted, "[a]s we read the Framers' instruction, the Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the Clause."<sup>94</sup> It seems that too often, Court opinions containing foreign citations receive undue negative publicity, which may overshadow important constitutional developments. This clearly reveals Justice Ginsburg's fidelity to the Framers' intentions, which, however, remains obfuscated by the public hoopla surrounding Justice Ginsburg's campaign for a dynamic Constitution.<sup>95</sup> Justice Ginsburg's loyalty to the Framers' intention does not contradict her call for more comparative constitutional interpretation. She notes, "[i]f U.S. experience and decisions can be instructive to systems that have more recently instituted or invigorated judicial review for constitutionality, so we can learn from others now engaged in measuring ordinary laws and executive actions against charters securing basic rights."<sup>96</sup>

Looking beyond our borders will indeed be futile if the U.S. Constitution is read as a document frozen since the Founders ratified it. According to Justice Ginsburg, the Constitution ought to

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<sup>90</sup> 537 U.S. 186, 192–94 (2003) (rejecting petitioners Copyright Clause and First Amendment challenges to Congress' power to extend the terms of existing copyrights).

<sup>91</sup> *Id.* at 193. In this case, Justice Ginsburg relied on all aspects of Constitutional interpretation, such as, textual meaning, historical precedents, and relevant foreign cases to make the judgment. *See id.* at 199–200, 202–04, 205–06.

<sup>92</sup> *Id.* at 208.

<sup>93</sup> *Id.* at 205–06.

<sup>94</sup> *Id.* at 222.

<sup>95</sup> See Richard Posner, *No Thanks, We Already Have Our Own Laws: The Court Should Never View a Foreign Legal Decision as a Precedent in Any Way*, LEGAL AFF., July-Aug. 2004, at 40. Judge Posner discusses three reasons why U.S. courts should not cite to foreign courts as authority. First, judges could capriciously decide which case to follow. Second, foreign decisions come from countries with vastly different "socio-historico-politico-institutional background[s]" of which U.S. judges know little about. *Id.* at 41–42. Third, citing to foreign courts is undemocratic because foreign judges have no democratic legitimacy in the United States. *Id.*; see also Eric D. Hargan, *The Sovereignty Implications of Two Recent Supreme Court Decisions*, White Paper, Federalist Society, 7–9, available at <http://www.fed-soc.org/Intllaw&%20AmerSov/hargensov.pdf> (last visited Apr. 2, 2006).

<sup>96</sup> Ginsburg, *supra* note 25.

be read as belonging to a global twenty-first century, not as fixed forever by eighteenth century understandings.<sup>97</sup> To make her point more cogently, she invokes the immortal words of Justice Oliver Wendell Homes, Jr.:

[W]hen we are dealing with words . . . [in] the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.<sup>98</sup>

Life experience has undoubtedly shaped the jurisprudential philosophy of Justice Ginsburg in enormous ways. When she graduated from law school, her Fourteenth Amendment guarantee of equal protection was frozen under the men-only professional schools, sex-segregated job advertisements, and not to mention, the mandatory unpaid maternity leaves. But, she did not believe in the Framers' intent of narrow doctrinal interpretation of gender equality in *Craig v. Boren*,<sup>99</sup> nor was she satisfied with the status quo of *Muller v. Oregon*<sup>100</sup> to remain in the empty cupboard of the Constitution for women.<sup>101</sup> She embarked on a crusade to expand the frontiers of equal protection as she argued, "Inherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity."<sup>102</sup>

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.* (quoting *Missouri v. Holland*, 252 U.S. 416, 433 (1920)).

<sup>99</sup> See *Craig v. Boren*, 429 U.S. 190, 192, 210 (1976) (holding that an Oklahoma law setting different minimum drinking ages for men and women was unconstitutional on equal protection grounds); Brief for Motion of American Civil Liberties Union for Leave to File Brief Amicus Curiae and Brief Amicus Curiae, *Craig v. Boren*, 429 U.S. 190 (1976) (No. 75-628), 1976 WL 181333 (revealing that Ruth Bader Ginsburg argued this case for the ACLU).

<sup>100</sup> *Muller v. Oregon*, 208 U.S. 412 (1908).

<sup>101</sup> William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2131-32 (2002); see also *Muller*, 208 U.S. at 421-23 (holding that the physical structure and maternal nature of women differentiated and "disadvantage[d them] in the struggle for subsistence," and thereby justified enacted legislation limiting the amount of time a woman may work each day). The court decided such even though it had recently declared the same restrictions on men to be an "unreasonable, unnecessary, and arbitrary interference with the right and liberty of the individual to contract in relation to his labor." *Id.* at 419. For further analysis of *Muller*, see JUDITH A. BAER, *THE CHAINS OF PROTECTION: THE JUDICIAL RESPONSE TO WOMEN'S LABOR LEGISLATION* 61-67 (1978).

<sup>102</sup> *United States v. Virginia*, 518 U.S. 515, 533 (1996).

Justice Ginsburg's struggle to extricate the Constitution from its frozen inequality compelled her to look beyond the shores of America to find sources of foreign court decisions that are not out of step with expanded concepts of rights. An example of such exploration is seen in *Grutter v. Bollinger*,<sup>103</sup> where Justice Ginsburg continued to be attentive to the legal developments in the rest of the world.<sup>104</sup> In her concurring opinion, Justice Ginsburg considered two United Nations' conventions, the first of which was the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, which the United States ratified in 1994.<sup>105</sup> The second United Nations Convention that she consulted was the 1979 *Convention on the Elimination of All Forms of Discrimination Against Women*, which has not been ratified by the United States.<sup>106</sup> Both Conventions, cited in Justice Ginsburg's concurring opinion, differentiate between policies of oppression or exclusion that are sometimes permissible and at other impermissible.<sup>107</sup> Additionally, both of them provide guidance regarding the prudent usage of temporary special measures that can hasten the process of achieving *de facto* equality.<sup>108</sup> In her concurring opinion, Justice Ginsburg expressed the notion of revisiting the issue of eliminating affirmative action at a later time by noting that all such programs must have a "logical end point."<sup>109</sup> She reasserted her belief in the Equal Protection Clause by explaining that:

[t]he International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994, endorses "special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms."<sup>110</sup>

This devotion to a more robust Equal Protection Clause may

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<sup>103</sup> 539 U.S. 306 (2003).

<sup>104</sup> *Id.* at 344 (Ginsburg, J., concurring).

<sup>105</sup> *Id.* While rendering her concurring opinion for the Court, Justice Ginsburg made reference to the majority's "observation that race-conscious programs 'must have a logical end point'" and how this position is in conformance with international legal practices. *Id.*

<sup>106</sup> *Id.* This Convention discusses permitting "temporary special measures aimed at accelerating *de facto* equality' that 'shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.'" *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *See id.* at 344.

<sup>110</sup> *Id.* (citations omitted).

explain Justice Ginsburg's proclivity towards comparative constitutionalism. Her usage of foreign laws however, comes from a deeper understanding of the Framers' intention. This is enshrined in her expansive view of the Fourteenth Amendment jurisprudence, which contains a conception of liberty that has not been diminished by originalism. Therefore, jurisprudence empowered by comparative dialogue, emboldened by sharing and learning from across the globe, is the very basis of Justice Ginsburg's constitutional interpretation, which she reiterated recently:

I am inspired by counsel from the founders of the United States. The drafters and signers of the Declaration of Independence cared about the opinions of other peoples; they placed before the world the reasons why the States, joining together to become the United States of America, were impelled to separate from Great Britain. The Declarants stated their reasons out of "a decent Respect to the Opinions of Mankind."<sup>111</sup>

This respect for the "opinions of mankind" has been one of the key drives in forming the comparative constitutionalism of Justice Ginsburg. Her embrace of foreign court citation is equally enshrined in her judicial paradigm of global justice for global problems, as well as in her ideas of equality and liberty.<sup>112</sup> Justice Ginsburg believes that we live in an era of increasing global cooperation where sex discrimination, minority rights, and equal protection are being felt, litigated and decisions are constantly being rendered. Further, Justice Ginsburg believes that if we believe in the sanctity of the "opinions of mankind," perhaps we can learn from the global commonalities in the ways in which these cases are being adjudicated.<sup>113</sup>

Finally, the dynamic constitutionalism of Justice Ginsburg takes shape from her sacred conceptions of liberty and equality. Her judicial philosophy was developed via her half-century's work in extricating these components from the frozen version of the Constitution. In this journey, she is guided by her belief in an evolving awareness of the opinion of mankind and her judicial philosophy of global solutions for global problems. As we look through her vision, we conclude that Justice Ginsburg seeks out Framers' intention as she consults foreign sources of law.

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<sup>111</sup> Ginsburg, *supra* note 25.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

#### IV. IDYLIC ROMANTICISM OF JUSTICE ANTHONY M. KENNEDY'S COMPARATIVE CONSTITUTIONALISM

Public speeches<sup>114</sup> and public debates<sup>115</sup> helped create a cult status for Justice Breyer as the Court's resident internationalist jurist.<sup>116</sup> Quietly however, Justice Kennedy has become the most influential figure in shaping the Court's direction regarding judicial invalidation of settled laws based on foreign citation. While Justice Breyer relies on a predictable pattern of foreign citation that draws from his pragmatism and consequentialism,<sup>117</sup> Justice Kennedy's jurisprudence is developing in fascinating and innovative directions.<sup>118</sup> Justice Kennedy has rendered majority opinions on two of the most contentious decisions of our time, *Lawrence*<sup>119</sup> and *Roper*.<sup>120</sup> Reading *Lawrence* and *Roper* gives one a view inside the evolving jurisprudence of Justice Kennedy and provides insight into the Court's broadening of the constitutional boundaries of personal liberty and substantive due process.<sup>121</sup>

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<sup>114</sup> See, e.g., Stephen Breyer, *Keynote Address Before the American Society of International Law Proceedings*, (Apr. 2003), in 97 AM. SOC'Y INT'L L. PROC. 265 (2003).

<sup>115</sup> See, e.g., Transcript, *supra* note 10.

<sup>116</sup> See, e.g., Daniel Bodansky, *The Use of International Sources in Constitutional Opinion*, 32 GA. J. INT'L & COMP. L. 421, 424-25 (2004); Joan L. Larsen, *Importing Constitutional Norms from a "Wider Civilization"*: Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation, 65 OHIO ST. L.J. 1283, 1284-86 (2004).

<sup>117</sup> I discuss this aspect of Justice Breyer's jurisprudence in the next section. See *infra* Part V.

<sup>118</sup> Conservative commentator Cal Thomas has stated that what concerns him most is that: Justice Anthony Kennedy takes us on a journey with no fixed origin, no map, but a certain destination. . . . Kennedy dismisses thousands of years of law, history and theology, choosing to rely solely on modern times . . . [as he] deletes the wisdom of the ages, preferring to download the squishy morality of post-modernism.

Cal Thomas, *End of the Constitution?*, JEWISH WORLD REV., JULY 1, 2003, <http://www.jewishworldreview.com/cols/thomas070103.asp>. I argue that Justice Kennedy's jurisprudence began evolving long before *Lawrence*. In striking down public school prayer at graduations in *Lee v. Weisman*, he cited psychological studies about the development of adolescents. 505 U.S. 577, 593-94, 599 (1992). Justice Scalia scolded Justice Kennedy for his use of these sources by deriding their relevance in a legal opinions as "psychology practiced by amateurs." *Id.* at 636 (Scalia, J., dissenting). See also *Granholm v. Heald*, 125 S.Ct. 1885, 1892, 1907 (2005) (citing several economic studies in striking down state laws that prohibited direct delivery of wine to customers by out-of-state wineries); *supra* notes 69 & 71. For a discussion on Justice Kennedy's constitutional interpretation of privacy rights, see Julie E. Payne, Comment, *Abundant Dulcibus Vitiis, Justice Kennedy: In Lawrence v. Texas, an Eloquent and Overdue Vindication of Civil Rights Inadvertently Reveals What is Wrong with the Way the Rehnquist Court Discusses Stare Decisis*, 78 TUL. L. REV. 969, 1004 (2004).

<sup>119</sup> 539 U.S. 558 (2003).

<sup>120</sup> 543 U.S. 551 (2005).

<sup>121</sup> See *Lawrence*, 539 U.S. at 573 (recognizing that the European Court of Human Rights, which at the time had twenty-one member nations, struck down a similar sodomy law); *Roper*,

Justice Kennedy came to the Court as a moderate conservative whose constitutional understanding was based on “historical experiences and . . . broadly held social values.”<sup>122</sup> Yet, it was a far cry from Judge Bork’s original intent,<sup>123</sup> or Justice Scalia’s textual originalism.<sup>124</sup> In the last two decades however, Justice Kennedy’s constitutional interpretation blossomed, as he wrote more majority opinions than any other Justice, with findings increasingly reliant on the understanding of the global judiciary.<sup>125</sup> Justice Kennedy’s majority opinion in *Roper* has done more for constitutional comparativism than the panoply of cases decided on foreign citations in the last half-century.<sup>126</sup> It may be safe to propose that

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543 U.S. at 554, 578 (recognizing that a majority of the international community condemns a “juvenile death penalty” and subsequently holding that the Eighth and Fourteenth Amendments prohibit the use of the death penalty for offenders under eighteen).

<sup>122</sup> 15 THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE 1916–1987, at 1034 (Roy M. Mersky & Gary M. Hartman eds., 1991).

<sup>123</sup> Judge Bork provides a very simplified description of originalism, where he believes in Constitutional interpretation reflecting the original Framers’ intention. Like his failed nomination, his strain of originalism has been discarded owing to its apparent failure in light of existing social norms. Judge Bork’s originalism still remains a premier interpretive tool to develop understanding on originalism, and his status as a constitutional icon remains intact. See generally Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8–9 (1971).

<sup>124</sup> See, e.g., *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997) (stating how “comparative analysis [is] inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one”).

We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* . . . that the sentencing practices of other countries are relevant. While “[t]he practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so ‘implicit in the concept of ordered liberty’ that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well,” they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.

*Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) (citations omitted), *abrogated by Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>125</sup> A reading of *Roper* illuminates Justice Kennedy’s jurisprudence, where judges are bound to expand the frontiers of liberty and privacy by enforcing the larger values and principles in the Constitution. Like his earlier decision in *Lee v. Weisman*, Justice Kennedy cited psychological studies to argue that the death penalty for juvenile offenders is disproportionate because as a class juveniles are less developed emotionally and intellectually, and hence more susceptible to peer pressure. See *Roper*, 543 U.S. at 569; *Lee v. Weisman*, 505 U.S. 577, 593–94 (1992). *Roper*’s promise to broaden individual freedom and solidify human dignity is enshrined in Justice Kennedy’s understanding of constitutional commitment, which he believes is in consonance with the evolution of humanistic and just jurisprudence in other parts of the world. See *Roper*, 543 U.S. at 578 (stating that through “our” acknowledging of other nations’ understanding of fundamental rights, “we” further the importance of those fundamental rights to our nation rather than undermining our pride in, and fidelity to, the Constitution).

<sup>126</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 572–73, 576–77 (2003) (discussing how even

this trend will continue.

Why does Justice Kennedy rely so much on foreign cases? It is because he is uncertain about the interpretation while his constitutionalism takes root in his idyllic romanticism. After two decades on the Court, his jurisprudence is now taking shape as he is exploring new ways to expand the constitutional framework to deal with today's issues. As his Constitution is not bottled in the settled traditions and literal interpretations of Justice Scalia, he agonizes over the outcomes that deal with evolving concepts of liberty and rights. Therefore, Justice Kennedy's Constitution is a great beacon. It illuminates as it comes in contact with foreign decisions that either support or contradict our laws. Thus, Justice Kennedy's constitutional interpretation gives more expansive provisions to enumerated rights than the majority found in *Michael H. v. Gerald D.*<sup>127</sup> Similarly, it allows the privacy interest of the Fourteenth Amendment to go beyond the majority's narrow reading in *Romer v. Evans*.<sup>128</sup> This evolving awareness of rights and privacy interests may stem from Justice Kennedy's romantic ideals of a dynamic Constitution. In both *Michael H.* and *Romer*, Justice Kennedy rightfully understood how to deal with social issues that the Court did not have to deal with in the past.<sup>129</sup> He learned that the Court could no longer keep the Constitution insulated from evolving social

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though *Bowers* is based on common, global values, foreign courts have rejected its holding and reasoning).

<sup>127</sup> 491 U.S. 110, 129–30 (1989) (finding that a state's presumption that a husband is the parent of a child that is born, during the course of his marriage, to his spouse, does not violate the due process rights of the child's natural father).

<sup>128</sup> 517 U.S. 620, 631–32, 635 (1996). The narrowness of *Romer's* holding left many unanswered questions, and by using only the rational basis doctrine, the Court perhaps opened the door for the more comprehensive review we observed in *Lawrence*. *Id.* at 635 (requiring a law to “bear a rational relationship to a legitimate governmental purpose” and finding the law in question to have neither a “legitimate purpose” nor a “discrete objective”). *Lawrence* seemed to rise above rational basis review, specifically discussing the privacy and liberty rights a person has in making certain decisions without government intrusion. 539 U.S. at 562.

<sup>129</sup> As Lisa Parshall has written:

Although he concurred in the judgment in *Michael H. v. Gerald D.*, Justice Kennedy signaled discomfort with the restrictive methodology used by the majority in denying the asserted liberty interest in that case. Justice Kennedy signed onto Justice Sandra Day O'Connor's concurrence that objected to the majority's assertion that the historical analysis used to identify traditional liberty interests must be conducted at “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.” By distancing themselves from the majority opinion's approach, Justices Kennedy and O'Connor indicated their unwillingness to “foreclose the unanticipated by the prior imposition of a single mode of historical analysis.”

Lisa K. Parshall, *Redefining Due Process Analysis: Justice Anthony M. Kennedy and the Concept of Emergent Rights*, 69 ALB. L. REV. 237, 240–41 (2005).

convictions. The Court needed new tools to interpret the laws—prompting Justice Kennedy to look elsewhere for guidance. Justice Kennedy came to the bench as a conservative, but the positions he took in *Michael H.*, *Romer*, and *Casey* began to show his more progressive jurisprudence in the face of prejudice. While the position he took in *Michael H.* looked to expand unenumerated rights,<sup>130</sup> his opinion in *Romer* looked beyond the traditional rational basis test and entertained the substantive issue of same-sex privacy rights, seeking to protect these rights under the Fourteenth Amendment.<sup>131</sup> By rejecting the morality-based opinion of *Bowers*, Justice Kennedy again dabbled in the jurisprudence of uncertainty, but was preparing to deal with it in the future,<sup>132</sup> which he did in *Lawrence*. Therefore, his most recent and expansive enumeration of liberty in *Roper* is yet a natural progression of his jurisprudence.<sup>133</sup> His opinion for the Court in *Lawrence* embodies his profound understanding of an expansive vision of liberty, which is freedom from governmental intrusion.<sup>134</sup> This vision of liberty was nurtured through his experience in *Planned Parenthood v. Casey*, where he reaffirmed *Roe v. Wade* and a woman's right to choose.<sup>135</sup> His opinion in *Casey* not only confirmed his deep reverence for the historical traditions of the Court as a storied institution, but also brought out his romanticism. A bright light of idealism illuminated his opening remark in *Casey* where he stated that “[l]iberty finds no refuge in a jurisprudence of doubt.”<sup>136</sup> Again in *Lawrence* he opens with similar sentiments: “Liberty protects the person from unwarranted government intrusions into a dwelling or other private

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<sup>130</sup> See 491 U.S. at 133–34 (O'Connor, J., concurring).

<sup>131</sup> See 517 U.S. at 634 (1996).

<sup>132</sup> When the 1986 *Bowers* decision upheld the prohibition against homosexual sodomy in an unusually dismissive majority opinion, it was widely believed that the jurisprudence would take many years to evolve, making the opinion in *Romer*, which was within a decade of *Bowers*, notably progressive. See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986); *Romer*, 517 U.S. at 635 (holding that a state's classification of homosexuals is a violation of the Equal Protection Clause).

<sup>133</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>134</sup> *Lawrence*, 539 U.S. at 562.

<sup>135</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992). *Roe's* Due Process Clause protection of abortion as a fundamental right was on shaky grounds due to various reasons, especially by virtue of the Court's narrow ruling that only impediments to abortion during the first trimester were to be subjected to strict judicial scrutiny. *Id.* at 844, 846; see also *Roe v. Wade*, 410 U.S. 113, 164 (1973).

<sup>136</sup> *Casey*, 505 U.S. at 844. *Casey* granted the states more flexibility than before to regulate and discourage abortion. In contrast to *Roe's* limitations, under *Casey*, the states became empowered to impose waiting periods and other information related obstacle so long as those provisions do not impose an undue burden on the ultimate abortion right. See *id.* at 878.

places.”<sup>137</sup> All the while, Justice Kennedy exhibited a broader, evolving definition of liberty, stating that: “Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.”<sup>138</sup> We have seen similar viewpoints in both *Casey*<sup>139</sup> and *Romer*.<sup>140</sup> Different, however, from his stance in *Casey* and *Romer*, Justice Kennedy in *Lawrence* systematically decimates *Bowers* by showing flaws in its methods of constitutional interpretation and by supporting his reasoning with foreign citations.<sup>141</sup> In *Bowers*, Chief Justice Burger’s concurring opinion relies on the condemnation of homosexual acts in historic and moral traditions,<sup>142</sup> an interpretive theory which Justice Kennedy responds to by stating: “[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”<sup>143</sup> Not only did Justice Kennedy expand the vision of substantive due process, but also he established his fidelity to *stare decisis*, while nudging the frontier of personal liberty a bit more.<sup>144</sup> He stated, “we think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”<sup>145</sup> Justice Kennedy showed that both the British and the European Courts of Human Rights have dealt with situations similar to this with conclusions opposite to that derived in *Bowers*.<sup>146</sup>

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<sup>137</sup> *Lawrence*, 539 U.S. at 562.

<sup>138</sup> *Id.*

<sup>139</sup> *See* 505 U.S. at 846.

<sup>140</sup> *See* 517 U.S. 620, 623 (1996).

<sup>141</sup> *Lawrence*, 539 U.S. at 576–77.

<sup>142</sup> Chief Justice Burger noted in *Bowers* that the denial of homosexual rights was based on a careful consideration of historic tradition, in which states consistently intervened in homosexual conduct on the grounds of moral and ethical standards. *See Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (Burger, J., concurring).

<sup>143</sup> *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring). Justice Kennedy dismissed Chief Justice Burger’s reasoning on grounds of historical inaccuracy and improper relevance. In *Lawrence*, Justice Kennedy explained that historical traditions could be taken into consideration only up to certain extent, echoing his earlier findings in *Lewis*. *See* 539 U.S. at 571–72.

<sup>144</sup> *See id.* at 577–78.

<sup>145</sup> *Id.* at 571–72.

<sup>146</sup> *Id.* at 576. Justice Kennedy cites a decision by the European Court of Human Rights (ECHR) allowing homosexual conduct as evidence of a lack of consensus on the illegality of such conduct. *Id.* at 573. By referring to ECHR as one of the “authorities,” Justice Kennedy criticizes Chief Justice Burger’s claims in his opinion in *Bowers*. *Id.* at 572–73. By granting

The findings in *Lawrence* provide us with an elaborate view of all pertinent elements of Justice Kennedy's jurisprudence. Besides broadening the horizons of liberty, privacy and substantive due process, he shows great reverence to *stare decisis* and his inclination to endorse constitutional interpretation of similar problems approached from a paradigm of originalism. He provides a fitting commentary on the judiciary's responsibility to protect its citizens from the erosion of fundamental rights, when he notes:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.<sup>147</sup>

In *Roper*, Justice Kennedy significantly extended the prominent findings in *Lawrence*.<sup>148</sup> I argue that behind Justice Kennedy's missionary zeal to cite foreign law, there exists his ever-expanding view of personal liberty, which has been shaped by his general lack of insularity with foreign cultures.<sup>149</sup> Additionally, the determination in *Roper* is much more complex than that in *Lawrence*. It is centered on the proportionality component of punishment within the framework of our Eighth Amendment, which Justice Kennedy reshapes by advancing a psychological argument regarding juvenile criminal culpability.<sup>150</sup> Here, it appears the psychological analysis of juvenile criminal culpability was given currency because of a broader sense of liberty. This awareness may be a direct result of giving primacy to dynamic constitutional interpretation. Justice Kennedy's *Roper* opinion is significant, both from its broader impact on capital jurisprudence, and from the Courts' practices in using comparative material. Justice Kennedy's *Roper* decision allows us to examine the evolution of death penalty jurisprudence for juveniles by tracing the tension between the two

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importance to the ECHR opinion in overturning Supreme Court precedent, Justice Kennedy opened the door for a new terrain in U.S. Constitutional interpretation.

<sup>147</sup> *Id.* at 578–79.

<sup>148</sup> 543 U.S. 551, 575–78 (2005).

<sup>149</sup> *Id.* at 578 (stating that “[i]t is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty”).

<sup>150</sup> *Id.* at 569.

competing arguments. The first argument centers on the psychological analysis of law that seeks to reduce the culpability of the offender and advances both the morality and the disproportionality argument. The other argument seeks to insulate the domestic national consensus from being overrun by the strong tides of opposite sentiments across the globe. Additionally, the *Roper* decision reexamines the set of ethical visions that influenced *Penry v. Lynaugh*<sup>151</sup> to *Atkins v. Virginia*, while we witness the emergence of a newer constitutional interpretation narrowing the scope of punitive capital jurisprudence. The success in advancing less severe death penalty jurisprudence does not require the finding of support in history or domestic tradition. Rather, it depends on our willingness to engage in an inquiry into society's evolving standards, especially if the historical tradition is infected with a flawed analysis of proportionality.

To lend credence to his foreign citations, Justice Kennedy discusses the practice at length in *Roper*.<sup>152</sup> The point of contention however, is not whether he was successful in defending his use of citation, but whether his constitutional interpretation in expanding the Eighth Amendment's reach is valid. We may decide, based on a heightened awareness of the importance of the rehabilitative mode over the retributive mode, that we should reinterpret our Eighth Amendment. Foreign court citations' may provide the necessary support for such directional change when there is no relevant internal support. Finally, the *Roper* decision alerts us to a new realism in the Supreme Court's decision-making process. Perhaps, emboldened by their successes in embracing the legislations and judicial decisions of other countries, courts in the future could fall prey to judicial hubris. This, under no circumstances, takes away from the significant inroads the Court has made in expanding the concept of liberty, privacy and rights—virtues enshrined in the living, dynamic Constitution. Justice Kennedy's romantic conception of the Constitution goes a long way in advancing this belief.

V. JUSTICE STEPHEN G. BREYER'S CONSTITUTION AS A CONTRACT:  
PRAGMATIC CONSEQUENTIALISM OR JUDICIAL ACTIVISM?

As the debate over the role of foreign court decisions intensifies

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<sup>151</sup> 492 U.S. 302 (1989), *abrogated by Atkins*, 536 U.S. 304 (2002).

<sup>152</sup> 543 U.S. at 575–78.

among the legal scholars,<sup>153</sup> no other Justice has come to the forefront with such force to champion the case for foreign citation as Justice Breyer.<sup>154</sup> In his famous speech at the 97th Annual Meeting of the American Society of International Law, Justice Breyer set the context for using foreign court decisions, and then defended the practice by invoking comments made by other Justices.<sup>155</sup> Justice Breyer assures the legal community that this evolving practice of constitutional comparativism will not lead the justices down any blind foreign alley; rather, it will help guide them into a broader array of consequences to choose from.<sup>156</sup> This is made possible by evaluating foreign problems that are similar to our own. In his dissent in the 1997 case of *Printz v. United States*,<sup>157</sup> Justice Breyer echoed this idea of recognizing a multitude of possibilities coming from common issues.<sup>158</sup> Just two years later, in the 1999 case *Knight v. Florida*,<sup>159</sup> Justice Breyer took a more expansive look at foreign cases in his dissent from the majority opinion.<sup>160</sup> These citations to foreign authorities and their vigorous defense illuminate the central theme of Justice Breyer's comparative constitutional

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<sup>153</sup> See Transcript, *supra* note 10.

<sup>154</sup> See *id.*

<sup>155</sup> Stephen Breyer, Assoc. Justice, Supreme Court of the United States, The American Society of International Law 97th Annual Meeting: The Supreme Court and the New International Law (Apr. 4, 2003) (transcript available at [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_04-04-03.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_04-04-03.html)).

<sup>156</sup> *Id.*

<sup>157</sup> 521 U.S. 898 (1997).

<sup>158</sup> See *id.* at 976 (Breyer, J., dissenting). Justice Breyer noted in *Printz*:

[T]he United States is not the only nation that seeks to reconcile the practical need for a central authority with the democratic virtues of more local control. At least some other countries, facing the same basic problem, have found that local control is better maintained through application of a principle that is the direct opposite of the principle the majority derives from the silence of our Constitution. The federal systems of Switzerland, Germany, and the European Union, for example, all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central "federal" body. They do so in part because they believe that such a system interferes less, not more, with the independent authority of the "state," member nation, or other subsidiary government, and helps to safeguard individual liberty as well.

Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem—in this case the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent governmental entity.

See *id.* at 976–77 (Breyer, J., dissenting) (citations omitted).

The *Printz* dissent by Justice Breyer thus began what has now become an effective campaign in favor of references to foreign sources of law by the Court.

<sup>159</sup> 528 U.S. 990 (1999).

<sup>160</sup> *Id.* at 995–98 (Breyer, J., dissenting).

jurisprudence in his invocation of “common” legal problems.<sup>161</sup>

In the jurisprudence of Justice Scalia, we saw a complete rejection of foreign citation.<sup>162</sup> In the jurisprudence of Justice Ginsburg, we saw endorsement of foreign citation that emerged out of her personal experience with the frozen inequalities of equal protection.<sup>163</sup> In the jurisprudence of Justice Kennedy, we witnessed a romanticizing of the Constitution in charting broader boundaries of fundamental rights. Against this backdrop, we seek to understand Justice Breyer’s comparative jurisprudence. First, we examine the consequences, and second, we search for roots.

Justice Breyer’s identification of common legal problems across the world sits at the core of his comparative constitutionalism. Legal problems surrounding sex discrimination, the death penalty, or privacy rights exist around the globe. They have become “common problems” because they could occur in any one jurisdiction or in any number of jurisdictions concurrently. How foreign judges decide such common issues can invariably lead to the discovery of a host of legal consequences, which U.S. courts could examine to discern the potential effects of various interpretations of our laws with similar trends. Moreover, such decisions by the U.S. Supreme Court can contribute to other countries’ understandings of their problems and can possibly justify the actions of their independent judiciaries. The Framers did consider the limitless possibilities of comparative constitutionality, as *Federalist No. 63* noted:

An attention to the judgment of other nations is important to every government . . . independently of the merits of any particular . . . measure, it is desirable . . . that it should appear to other nations as the offspring of a wise and honorable policy . . . [and] in doubtful cases, particularly where the national councils may be warped by . . . passion, or momentary interest, the presumed or known opinion of the impartial world, may be the best guide that can be followed.<sup>164</sup>

Invocation of “common problems” is derived from the responsibility to accord “a decent respect to the opinions of

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<sup>161</sup> In this section of the decision, Justice Breyer looked to foreign law on the issue, not as binding authority, but as “useful,” because foreign courts had “considered roughly comparable questions under roughly comparable legal standards.” *Id.* at 997–98.

<sup>162</sup> See generally Transcript, *supra* note 10.

<sup>163</sup> See Breyer, *supra* note 155.

<sup>164</sup> THE FEDERALIST NO. 63, at 423 (James Madison) (Jacob E. Cooke ed., 1961).

mankind.”<sup>165</sup> This is where we must seek the roots of Justice Breyer’s jurisprudence. He does not embrace foreign legal practices out of any romantic idealism that desires to expand the frontiers of privacy in American jurisprudence; nor is he driven by a missionary zeal to navigate on the outliers of the Constitution’s substantive due process protections. Justice Breyer’s jurisprudence emerged from of his desire to understand the Constitution’s legal guidelines more clearly. Justice Breyer’s contribution to comparative constitutionalism comes simply as a by-product of seeking excellence.<sup>166</sup> Critics who chastise Justice Breyer’s use of foreign references are off the mark. There is no grand experiment to unwind the years of American practice because Justices Breyer’s jurisprudence is anchored in a more pragmatic conception of liberty than those of Justices Ginsburg or Kennedy. This anchored liberty is the concept of an ancient and active liberty,<sup>167</sup> as well as a negative and modern liberty,<sup>168</sup> to be nurtured via the seamless processes of engagement in “an active and constant participation in collective power.”<sup>169</sup> Justice Breyer believes this usurpation of active liberty, properly channeled through democratic decision-making, will bring judicial restraint and thus can satisfy the

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<sup>165</sup> THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

<sup>166</sup> See generally *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer J., dissenting) (trying to reconcile the struggles that arise in a centralized government that attempts to provide its constituent parts some political autonomy).

<sup>167</sup> Justice Breyer argues that it is necessary to consider ancient, active liberty that is, the liberty to engage in “an active and constant participation in collective power” as well as negative, modern liberty (freedom from state constraint), when considering the resolution of a case. BREYER, *supra* note 12, at 4–5 (quoting the political philosopher Benjamin Constant). “[Justice] Breyer contends the Constitution embodies an appreciation for, if not an outright commitment to, the promotion of active, ancient liberty. This active liberty is cast in terms of the ‘sharing of a nations’ sovereign authority among that nation’s citizens.’” Mark Rush, *Book Review*, 15 L. & POL. BOOK REV. (2005) (reviewing STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005)), available at <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/breyer1005.htm> (last visited Apr. 25, 2006).

<sup>168</sup> See IAN CARTER, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY, POSITIVE AND NEGATIVE LIBERTY* (Spr. 2003), <http://plato.stanford.edu/entries/liberty-positive-negative/>. According to the *STANFORD ENCYCLOPEDIA OF PHILOSOPHY*:

Negative liberty is the absence of obstacles, barriers or constraints. One has negative liberty to the extent that actions are available to one in this negative sense. Positive liberty is the possibility of acting—or the fact of acting—in such a way as to take control of one’s life and realize one’s fundamental purposes. While negative liberty is usually attributed to individual agents, positive liberty is sometimes attributed to collectivities, or to individuals considered primarily as members of given collectivities.

*Id.*

<sup>169</sup> BREYER, *supra* note 12, at 5. Justice Breyer believes that “courts should take greater account of the Constitution’s democratic nature when they interpret constitutional and statutory texts,” and therefore should consider the consequences their decisions might have for the promotion of ancient active liberty. *Id.*

Constitution's democratic objectives.<sup>170</sup> He notes, "increased emphasis upon the Constitution's participatory objectives can help bring about better law."<sup>171</sup> It is interesting to note that Justice Breyer actually shows great reverence to judicial restraint and provides a way to achieve it in his book,<sup>172</sup> even though his critics have assailed him for showing judicial activism.<sup>173</sup> Justice Breyer's philosophy of active liberty has evolved and matured since his ascension to the Court. Sadly however, his familiarity with, and citation of, foreign court decisions have occluded his unwavering support for the American democratic experiment.<sup>174</sup> Two intellectual threads can be seen in Justice Breyer's judicial process. One draws enormously from the Constitution's democratic nature in interpreting texts and statutes; the other actively searches for that right decision based on an explicit analysis of consequences of those decisions that promote ancient liberty. The appreciation for this active liberty in Justice Breyer refines one's understanding of the Court's restraint against dealing with Congress' legislative powers, which was clearly evident in *Printz*.<sup>175</sup> There, the Supreme Court was asked to determine whether the interim provisions of the Brady Handgun Violence Prevention Act were unconstitutional on grounds that the Federal Government issued directives to state and local law enforcement officers to conduct background checks on prospective handgun purchases.<sup>176</sup> While the majority, led by Justice Scalia, found the Act unconstitutional, Justice Breyer, in his dissent,<sup>177</sup> invoked the experiences of other nations that even better served

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<sup>170</sup> See *id.* at 20.

<sup>171</sup> Stephen Breyer, Assoc. Justice, Supreme Court of the United States, Harvard Tanner Lectures on Human Values 2004–2005: Our Democratic Constitution (Nov. 17, 18 & 19, 2004) (transcript available at [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_11-17-04.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_11-17-04.html)).

<sup>172</sup> BREYER, *supra* note 12, at 17–20, 37–38.

<sup>173</sup> See, e.g., Thomas L. Jipping, *From Least Dangerous Branch to Most Profound Legacy: The High Stakes in Judicial Selection*, 4 TEX. REV. L. & POL. 365, 408–09 (2000).

<sup>174</sup> See *Printz v. United States*, 521 U.S. 898, 976–77 (1997) (Breyer, J., dissenting).

<sup>175</sup> *Id.* at 905 (majority opinion). "Petitioners here object to being pressed into federal service," and argued that the Brady Act's "compelling [of] state officers to execute federal laws is unconstitutional." *Id.*

<sup>176</sup> Justice Scalia noted that "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." See *id.* at 935.

<sup>177</sup> See *id.* at 977 (Breyer, J. dissenting) (responding to a question posed by fellow dissenter, Justice Stevens: "Why, or how, would what the majority sees as a constitutional alternative—the creation of a new federal gun-law bureaucracy, or the expansion of an existing federal bureaucracy—better promote either state sovereignty or individual liberty?").

both state sovereignty and individual liberty.<sup>178</sup> He noted:

[T]he United States is not the only nation that seeks to reconcile the practical need for a central authority with the democratic virtues of more local control. At least some other countries, facing the same basic problem, have found that local control is better maintained through application of a principle that is the direct opposite of the principle the majority derives from the silence of our Constitution. The federal systems of Switzerland, Germany, and the European Union, for example, all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central “federal” body. They do so in part because they believe that such a system interferes less, not more, with the independent authority of the “state,” member nation, or other subsidiary government, and helps to safeguard individual liberty as well.

Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem—in this case the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent governmental entity.<sup>179</sup>

The seeds of active liberty were therefore already planted in *Printz*, which in later years Justice Breyer has refined in order to map out the process by which it can foster the democratic experiment of our Constitution. If Justice Breyer is true to the democratic traditions of the Constitution and is bent on promoting active liberty, what is he searching for when he looks to foreign sources of law? He is searching for the right decisions for each case, for his Constitution is not a consistent, fixed analysis of legal traditions or textual statutes. Justice Breyer is driven by his belief in consequential evaluation, and he looks to comparable foreign sources of law to validate and legitimize his judicial process, while knowing fully that “[n]ot all foreign authority reaches the same conclusion.”<sup>180</sup> It is in this spirit of consequentialism that Justice

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<sup>178</sup> See *id.* at 976–77.

<sup>179</sup> *Id.* (citations omitted).

<sup>180</sup> *Knight v. Florida*, 528 U.S. 990, 996 (1999) (Breyer, J., dissenting).

Breyer goes to the great length of citing decisions from the Constitutional Court of Zimbabwe—not exactly a bastion of human rights values.<sup>181</sup>

Justice Breyer's consequentialism brings hope against judicial activism. Judicial activism leaves the door open for multiple potential decisions based on an interpretation of the Constitution. The consequentialist approach reduces those multiple possibilities by selecting a subset that conforms to the most desirable consequence. Multiple reasonable solutions arrive either due to the law's incompleteness or contradictions in a particular arena. They emerge from society's evolving awareness, which gives rise to the concept of rights never considered before. In this context, the findings of foreign courts and their legislative developments can help by offering "points of comparison."<sup>182</sup>

Finally, I submit Justice Breyer's jurisprudence sits at the confluence of contrasting intellectual and philosophical developments. His consequentialism directs the process by finding its guidance from the Constitution, where the text is viewed as a contract with the citizens. Within a broader formalism of this contractual paradigm lies the smaller subset of his jurisprudence, an active liberty for the people, a reasonable sovereignty for the larger collective organism (the State), and a restraint on judicial activism. The contract with the people requires the fulfillment of the best interest of the individual, although at times it may be at odds with the expansive concept of liberty, and at times it may come as an antithesis to the judiciary's concept of federalism. But, in the end, it is firmly anchored in pragmatic consequentialism, which will continue to be the hallmark of his jurisprudence. Its pursuit will continue to reverberate across the constitutional courts, from Australia to Zimbabwe, and will find its way into the opinions of our Supreme Court through Justice Breyer's analyses.

## VI. CONCLUSION

My goal in this paper has been to present four different jurisprudential methodologies, each of which illuminates the guiding principles central to the Justices' practice of foreign court citation. Supreme Court decisions in *Lawrence* and *Roper* present us with a challenge to develop either a consistent roadmap or a

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<sup>181</sup> *Id.* (Breyer, J., dissenting).

<sup>182</sup> Breyer, *supra* note 155.

reliable trajectory with which to evaluate when and how foreign laws are to be used. I have argued that a comprehensive theory of citation is neither feasible nor relevant. Synthesizing the diverging jurisprudence of Justices Scalia, Ginsburg, Kennedy, and Breyer, I sought to identify events in our constitutional history that could trigger invocation of foreign law.

Great moments of jurisprudence happen when courts create precedent. This is accomplished either by judicial invalidation of prevailing laws or by incremental interpretation of existing statutes, both accompanied by quantum change in existing jurisprudence. *Atkins*, *Lawrence*, and *Roper* all fall within these categories. These great moments occur whenever the existing law is deficient in dealing with emerging social mores, which require the Court to broaden the frontiers of established rights in areas of privacy, autonomy, and individual liberty. In these circumstances, foreign laws can help in interpreting the indeterminate texts of the American Constitution by understanding the consequences of foreign adjudications on similar domestic problems. This empowering impact of comparative constitutionalism can be seen in various foreign court citations by Justices Breyer, Kennedy and Ginsburg as they compared similar problems with contrarian results, where the originalistic domestic results were hopelessly out of touch with existing societal norms. Foreign laws therefore, provide the judiciary with new tools to interpret the American Constitution as it seeks to walk in sync with emerging social norms—a framework in which Justice Scalia has no interest.

As we seek to identify a consistent framework for foreign court citation, this procedural divergence among the Justices does not appear to be out of consonance. From a theoretical paradigmatic viewpoint, this result is expected because the outcome of this experiment depends not only on the effectiveness of the procedure, but also on practitioner's adherence to such theory. Therefore, if the foreign court citations were to follow a pattern of theoretical development, its consequences to the American people would be determined by the individual Justice's fidelity to that process.

To what extent do foreign sources of law and international conventions go in shaping jurisprudence in general? We cannot be too precise, as I am painfully aware of the failures associated with any unified theoretical framework. Emboldened however by the fidelity with which I witnessed the foreign law practices of the Court, I will indulge in some qualified observations.

Foreign sources of law could influence Supreme Court jurisprudence in two distinct areas. First, heightened awareness of the broader understanding of liberty and proportionality may reshape Eighth Amendment jurisprudence by keeping it in conformity with a global consensus. As a result, we might find significant quantum, incremental doctrinal development in the existing death penalty jurisprudence. Second, as the Justices become increasingly prone to review the existing frontiers of due process jurisprudence, we might see some loosening of rigidities in some of the enemy combatant cases.<sup>183</sup> Depending upon the emerging political climate, we might see the Court expanding its narrow, incremental interpretation of existing laws relating to indefinite detentions.

My aim in this paper was to draw some broad outliers around the phenomenon of foreign court citations by United States Supreme Court Justices. As the Court transitions from the Rehnquist Court to the Roberts Court, it seems prudent to leave some Justices out of this review and enquiry, on account of relevant jurisprudence being either non-existent or insignificant. The article therefore, respectfully suggests that the reading of the jurisprudence of the four Justices above provides us with the first steps toward a comprehensive theory of citation to foreign court precedent.

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<sup>183</sup> See Saby Ghoshraj, *On the Judicial Treatment of Guantanamo Detainees in the Context of International Law*, in *GUANTANAMO BAY AND THE JUDICIAL-MORAL TREATMENT OF THE OTHER* (The Inst. for Human Rights ed., 2007) (forthcoming 2007) (providing a detailed commentary on the role of the United States Supreme Court in enemy combatant cases).