

“Just One Race Here:” Foreign Law and International Norms in Constitutional Interpretation

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***Abstract:** The Constitution of the United States – the document by which Americans are legally anchored – is subject to various jurisprudential interpretations. Such variance yields legal ambiguity in a number of realms and ultimately impacts the lenses through which justices approach cases presented to the Supreme Court. Countless variables encountered throughout the course of justices’ legal careers ultimately contribute to nuances in jurisprudential interpretation; foreign law serves as one such variable. For centuries, Supreme Court justices have debated the utility of incorporating aspects of foreign law in their own evaluations of American law. For those justices who view the Constitution through the framework of originalism, including Clarence Thomas, Neil Gorsuch, and the late Antonin Scalia, the Constitution is “dead.” By extension, therefore, foreign law, with exception to “old English law,” has no place in impacting how American justices approach their own decision-making. Contrarily, justices who employ legal interpretations based on a living constitutional basis, including Stephen Breyer, Horace Gray, and Ruth Bader Ginsburg, find that utilizing international legal precedents is conducive to formulating sound contemporary constitutional law. This article, through examining centuries of constitutional debates, the aforementioned contrasts in jurisprudence, and applications of constitutional law, aims to analyze the degree to which international law has historically driven and still drives legal decision-making in the United States.*

Keywords: Constitution, Jurisprudence, Foreign Law, Originalism, Living Constitution

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.¹

The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.²

¹ The Declaration of Independence (1776), emphasis added.

² *Roper v. Simmons*, 543 U.S. 551, at 577 (2005), Justice Anthony Kennedy, delivering the opinion of the Court. The best way to understand Kennedy’s jurisprudence is to read his opinions. Several excellent studies also provide insight into his thinking as well: see, for example, Frank J. Colucci, *Justice Kennedy’s Jurisprudence: The Full and Necessary Meaning of Liberty* (Lawrence, Kan.: University Press of Kansas, 2009).

*The Prize for the Court's Most Feeble Effort to fabricate "national consensus" must go to its appeal . . . to the views of assorted professional and religious organizations, members of the so-called "world community."*³

*"In the eyes of government, we are just one race here. It is American."*⁴

Senator Charles Grassley: "Should judges ever look to foreign law for 'good ideas?' Should they get inspiration for their decisions from foreign law?"

*Solicitor General Elena Kagan: "Well, Senator Grassley, I guess I'm in favor of good ideas coming from wherever you can get them, so in that sense I think for a judge to read a Law Review article or to read a book about legal issues or to read the decision of a State court, even though there's no binding effect of that State court, or to read the decision of a foreign court, to the extent that you learn about how different people might approach and have thought about approaching legal issues."*⁵

Introduction

Is international and foreign law part of American law? As the statements noted above indicate, some say yes, others no. The difference between the two is how vociferous proponents and opponents are in presenting their views. Justice Horace Gray famously wrote in 1900 that "international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."⁶ Dean Harold Koh of Yale University Law School used that phrase ("part of our law") in the title of an article he wrote to advocate the use of foreign and international law in judicial decisions.⁷

On the other hand, in 1995, Justice Antonin Scalia in an affirmative action case wrote as noted in the epigram at the top of this essay, "In the eyes of government, we are just one race here. It is American."⁸ His statement has long bewildered anyone who reads it. Certainly, one thing comes to mind for us to interpret his meaning: he thought that all Americans are one and the same, that we need not look beyond our borders to determine who we are and what we may become, and we have the duty to remain insular and limited. Of course, no self-respecting natural or social scientist considers "Americanness" as a race. Races are as multifaceted as

³ *Atkins v. Virginia*, 536 U.S. 304, at 346 (2002), Justice Antonin Scalia, dissenting. See Bruce Allen Murphy, *Scalia: A Court of One* (New York: Simon & Schuster, 2014).

⁴ *Adarand Constructors Inc. v. Peña*, 515 U.S. 200, at 238 (1995), Justice Antonin Scalia, dissenting.

⁵ The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States, Hearing before the Committee on the Judiciary, the United States Senate, 111th Congress, second session, June 28, 2010, Serial No J-11-98: 126, accessed on Dec. 15, 2018, at <https://www.gpo.gov/fdsys/pkg/CHRG-111shrg67622/pdf/CHRG-111shrg67622.pdf>.

⁶ *The Paquete Habana*, 175 U.S. 677 (1900). The case had to do with the seizure of a fishing boat as a claim of taking a prize at sea. See Austen L. Parrish, "Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law," *University of Illinois Law Review* 2 (2007): 637-680, accessed Oct. 29, 2018, <https://ssrn.com/abstract=891269>. Gray is best known for upholding birthright citizenship in his 1898 decision in *United States v. Wong Kim Ark*, 169 U.S. 649, but unfortunately joined the majority in *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁷ Harold Hongju Koh, "International Law is Part of Our Law," *American Journal of International Law* 98 (2004): 43-57, accessed Oct. 2, 2018, https://digitalcommons.law.yale.edu/fss_papers/1782.

⁸ *Adarand Constructors Inc. v. Peña*, 515 U.S. 200, at 238 (1995).

ethnicities, religions, and nationalities. This assessment grounded Scalia’s worldview. It served as the foundation of his unreservedly and intractable belief that foreign law, international norms and conventions, and the ideas of non-American jurists have no place in constitutional interpretation.

On the other side, Justices Anthony Kennedy and Stephen Breyer, Scalia’s longtime colleagues on the Court, have long held a contrary view. Kennedy’s position is engrained above in one of the epigrams that grace the beginning of this essay. Breyer agrees with him. In his book, *The Court and the World*, Breyer wrote that the problems facing Americans in the twenty-first century go beyond national boundaries. As the world shrinks, resulting from enhanced communication, travel, and interchange, Americans must consider how the leaders and jurists of other countries tackle difficult social, political, and legal problems. The Supreme Court, he argues, is no different. Globalization has “significantly affected the nature of the Court’s work,” he writes, “making it ever more important for the justices to understand, and to take account of, foreign legal practices.”⁹

Ten years after Scalia wrote so curiously about the “American race,” he debated Breyer at the Washington College of Law at American University in what is now regarded as a classic clash of ideas. There, they engaged in a conversation, or really a debate, about the use of foreign law and international norms in constitutional interpretation. As one may guess already, Scalia opposed the concept while Breyer praised it, but only to an extent. First, Scalia was quite clear at the very beginning to state unequivocally that he does “not use foreign law in the interpretation of the United States Constitution,” though he conceded that he does do so in matters regarding the interpretation of a treaty, that is, it is perfectly reasonable to consider the interpretation of a treaty by other signatories to the document. Breyer, on the other hand, more expansively said, that judges do “realize full well that the decisions of foreign courts do not bind American courts. . . . But if the lawyers find an interesting and useful foreign case, and if they refer to that case, the judges will likely read it, using as food for thought, not as binding precedent. I think that is fine.”¹¹

Origins of foreign law ideology

The foundation of the different sides that Scalia and Breyer on the use of foreign law and international norms has mostly to do with their different modes of constitutional interpretation. Scalia was a well-known originalist: he argued throughout his long legal career that judges must

⁹ Stephen Breyer, *The Court and the World: American Law and the New Global Realities* (New York: Alfred A. Knopf, 2015), 237. As we will see, Breyer’s colleagues agreed with him. See, for example, Duncan B. Hollis, “Justice Ginsburg on Using Foreign and International Law in Constitutional Adjudication,” *OpinioJuris* (Feb. 2010), accessed Jan. 15, 2019, <http://opiniojuris.org/2010/08/02/justice-ginsburg-on-using-foreign-and-international-law-in-constitutional-adjudication>.

¹¹ Norman Dorsen, “A Conversation between U.S. Supreme Court Justices,” *International Journal of Constitutional Law* 3 (Oct. 2005) 4: 521, 524, accessed Oct. 22, 2018, <https://saudeglobaldotorgl.files.wordpress.com/2014/02/scalia.pdf>. The conversation is on YouTube: <https://www.bing.com/videos/search?q=youtube+scalia+breyer&view=detail&mid=EED19662893CBAE75280EED19662893CBAE75280&FORM=VIRE>. See also Scalia’s address, “Foreign Legal Authority in the Federal Courts,” *American Society of International Law* (Apr. 2004): 307, where he noted that “modern foreign legal materials can never be relevant to an interpretation of, the meaning, of the U.S. Constitution.” For a critique, see Stephen A. Simon, “The Supreme Court’s Use of Foreign Law in Constitutional Rights Cases,” *Journal of Law and Courts* (Sept. 2013) 2: 279-301, accessed Feb. 28, 2019, <https://jstor.org/stable/10.1086/670746>.

interpret all provisions of the Constitution as their framers originally understood and meant them.¹² This is an exercise in historical inquiry, to determine how they may have used language and ideas at the time they drafted and ratified these provisions.¹³ For Scalia, it is perfectly fine to use foreign law, but only if it is, as he once noted, “old English law.”¹⁴ He was perfectly happy, most of the time, to cite how a provision may have wormed its way into the Constitution as a remnant of our British brethren’s common-law tradition.

For him, as he put it in a lecture at Roger Williams University School of Law, the Constitution “is dead . . . It’s not supposed to be flexible. It’s rigid.” And, as if to ensure those listening, he added, “I am a textualist. I am an originalist. I am not a nut. . . . It ain’t perfect but it’s the best thing around.”¹⁵ In a speech before The Federalist Society, he explained that the argument of constitutional flexibility is one that “goes something like this: The Constitution is over 200 years old and societies change. It has to change with society, like a living organism, or it will become brittle and break. . . . But you would have to be an idiot to believe that.”¹⁶

Scalia used “old English law” in a 2012 unanimous opinion he wrote for the Court. The case involved a search without a proper warrant coordinated by the District of Columbia Metropolitan Police Department and the Federal Bureau of Investigation. They suspected that Antoine Jones was a major drug trafficker. They successfully obtained a warrant, in effect for ten days, to place a GPS device on his car in the District to track his moves from location to location. Instead, they placed the device on his wife’s car, tracked him for a longer time than the warrant allowed, and even followed him into Maryland. After his conviction for drug dealing, which included the confiscating over \$800,000 from the car, he appealed, claiming that the evidence had to be tossed out because it was illegally and unconstitutionally obtained.¹⁷

Scalia agreed. He delved into the original meaning of the Fourth Amendment’s protection against “unreasonable searches and seizures.” Lo and behold, in his quest, he turned to the eminent British jurist, Charles Pratt, 1st Earl Camden, who in 1765 that wrote memorable words in a famous case known as *Entick v. Carrington*. Lord Camden, chief justice of the Court of Common Pleas, decried the long tradition of government-issued general warrants, which allowed officers of the Crown to search any place and any person for just about anything that

¹² The key analysis is by Scalia himself, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997). See also Scalia, “Originalism: The Lesser Evil,” *University of Cincinnati Law Review* 57 (1989) 849, accessed Feb. 14, 2019. See more recently, Christopher J. Scalia and Edward Whelan, ed., *Scalia Speaks: Reflections on Law, Faith, and Life Well Lived* (New York: Crown Forum, 2017). Scalia referred to himself as “a fainthearted” originalist because he could not see himself upholding the practice of punishing criminals by flogging and other terrible things like that. Shortly thereafter, he repudiated his “faintheartedness” to call himself “an honest originalist.” See Marcia Coyle, *The Roberts Court: The Struggle for the Constitution* (New York: Simon & Schuster, 2013), 163-165.

¹³ See also Jonathan O’Neil, *Originalism in American Law: A Constitutional History* (Baltimore: Johns Hopkins University Press, 2007), and Ilan Wurman, *A Debt against the Living: An Introduction to Originalism* (Cambridge: Cambridge University Press, 2017). See also Ahkil Reed Amar, *The Law of the Land: A Grand Tour of our Constitutional Republic* (New York: Basic Books, 2015).

¹⁴ Dorsen, 525.

¹⁵ Michael M. Bowden, “A True Original(ist): Justice Antonin Scalia spends a day at RWU Law,” *Amicus* (Summer, 2008): 21.

¹⁶ Widely reported: see Melissa McNamara, “Scalia raps ‘living constitution’.” CBS News, Feb. 14, 2006, <https://www.cbsnews.com/news/scalia-raps-living-constitution/>, accessed Mar. 1, 2019.

¹⁷ *United States v. Jones*, 565 U.S. 400 (2012).

they thought might be suspicious evidence of illegal activity.¹⁸ For Scalia, based on the original meaning of “unreasonable searches and seizures,” thanks to Lord Camden, Jones’s conviction was overturned:

We have no doubt that such a physical intrusion would have been considered a “search” within the meaning of the Fourth Amendment when it was adopted. *Entick v. Carrington* is a “case we have described as a monument of English freedom undoubtedly familiar to every American statesman at the time the Constitution was adopted, and considered to be the true and ultimate expression of constitutional law with regard to search and seizure. In that case, Lord Camden expressed in plain terms the significance of property rights in search-and-seizure analysis: “Our law holds the property of every man so sacred, that no man can set his foot upon his neighbour’s close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour’s ground, he must justify it by law.”¹⁹

Originalism thus encompasses foreign law--but only at the time of the drafting of the Fourth Amendment as long as it is “old English law.”

On the other hand, Breyer follows the polar opposite of originalism: as a disciple of the doctrine of the living constitution, he holds that the proper role of a judge is to adapt the provisions of the document to current conditions, to the changing and changed social and political environment.²⁰ Judges are not to try to figure out what the framers meant: that is an impossible task. As Justice Robert Jackson famously wrote in the 1952 *Steel Seizure Case*, “just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.”²¹ This is, he said, how a democracy works.

Breyer echoed Jackson’s words in the title of his 2010 book, *Making Our Democracy Work*.²² In that case, Jackson wrote that “while the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.”²³ A workable government, a workable democracy. This can only come about when judges interpret the Constitution through their contemporary eyes. In the words of Justice William Brennan,

We current justices read the Constitution in the only way that we can: as twentieth-century Americans. We look to the history of the time of framing and the intervening history of interpretation. But the ultimate questions must be what do the words of the text mean in our time? For the genius of the Constitution

¹⁸ *Entick v. Carrington*, 1765 English Reports 807, King’s Bench. Camden has lent his name to many locations in the United States, including Camden, New Jersey, and the home of the Baltimore Orioles, Oriole Park at Camden Yards.

¹⁹ *Jones*, at 404-405. But compare to this, his view as outlined below in his dissent in *Roper v. Simmons*, 543 U.S. 551 (2005).

²⁰ Numerous books and articles have appeared over the past 25 years concerning the doctrine of the living constitution. See, for example, David A. Strauss, *The Living Constitution* (Oxford: Oxford University Press, 2010), and James E. Fleming, *Fidelity to our Imperfect Constitution: For Moral Readings and Against Originalisms* (Oxford: Oxford University Press, 2015). A bit older, but a fine introduction may be found in Jack Balkin, “Original Meaning and Constitutional Redemption,” *Constitutional Commentary* 24 (Summer 2007): 427-532.

²¹ *Youngstown Sheet & Tube Inc. v. Sawyer (The Steel Seizure Case)*, 342 U.S. 579, at 695, Robert Jackson, concurring.

²² Stephen Breyer, *Making Our Democracy Work: A Judge’s View* (New York: Alfred A. Knopf, 2010).

²³ *Youngstown Sheet & Tube*, at 636.

rests not in a static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.²⁴

Breyer follows in this tradition. He has noted that “state law is state law, but practically speaking, much of that law is national, if not international, in scope. Analogous developments internationally, including the emergence of regional or specialized international legal bodies, tend similarly to produce cross-country results that resemble each other more and more, exhibiting common, if not universal, principles in a variety of legal areas.” He argued that his view will in fact ultimately “carry the day--simply because of the enormous value in any discipline of trying to learn from the similar experience of others.”²⁵

If originalism were not the prevalent doctrine of constitutional interpretation is so many twentieth-century cases, it would have been unthinkable for the justices to rule the way they did on school desegregation in *Brown v. Board*,²⁶ privacy rights in *Griswold v. Connecticut*,²⁷ abortion rights in *Roe v. Wade*,²⁸ same-sex relations in *Lawrence v. Texas*,²⁹ the right of the terminally ill to die in *Gonzales v. Oregon*,³⁰ same-sex marriage in *Obergefell v. Hodges*,³¹ and on and on. Simply put, originalists like Scalia (which also includes contemporary justices like Clarence Thomas, Neil Gorsuch, and Brett Kavanaugh) argue that no framer of any provision of the Constitution ever thought about these issues. Nor would they have argued, as Breyer has done, that it is time for the Court to discuss whether capital punishment violates the Eighth Amendment’s prohibition against “cruel and unusual punishments, as he recently did in *Glossip v. Gross*, setting off a thunderstorm of anger by . . . Scalia, of course.³² Scalia’s response was, unsurprisingly, originalist:

Historically, the Eighth Amendment was understood to bar only those punishments that added “terror, pain, or disgrace” to an otherwise permissible capital sentence.³³ Rather than bother with this troubling detail, Justice Breyer elects to contort the constitutional text. Redefining “cruel” to mean “unreliable,” “arbitrary,” or causing “excessive delays,” and “unusual” to include a “decline in use,” he proceeds to offer up a white paper devoid of any meaningful legal argument.³⁴

On the other hand, one major outcome of the clash of opposites between originalists and living constitutionalists is that most justices now possess a far greater historical sense. In this sense,

²⁴ William Brennan, Address to the Text and Teaching Symposium, Georgetown University, Oct. 12, 1985, accessed Feb. 22, 2019, <http://www.fed-soc.org/resources/id.50/default.asp>

²⁵ Stephen Breyer, Keynote Address, *American Journal of International Law Proceedings* 97 (Apr. 2-5, 2003): 267, 266. For an elaboration, see Breyer, *The Court and the World*, 236-270.

²⁶ *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954).

²⁷ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

²⁸ *Roe v. Wade*, 410 U.S. 113 (1973).

²⁹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

³⁰ *Gonzales v. Oregon*, 546 U.S. 243 (2006).

³¹ *Obergefell v. Hodges*, 576 U.S. ___, 135 S.Ct. 2584 (2015).

³² *Glossip v. Gross*, 135 S.Ct. 2726 at 2747 (2015).

³³ Citing Justice Clarence Thomas’s concurring opinion in *Baze v. Rees*, 553 U.S. 35 at 95 (2008).

³⁴ *Glossip v. Gross* (2015), n.p.

they are all “originalists” insofar as they delve into the original meaning and understanding, but for totally different purposes and goals.³⁵

Historical uses of foreign law: the eighteenth and nineteenth centuries

The now-heated issue of whether justices should cite, must less actually use foreign law, in constitutional interpretation could be easily settled by practice.³⁶ The Court has used foreign law, international norms, treaties, and conventions almost since its inception in 1789.³⁷ Indeed, we can even go further to the iconic words noted above in the Declaration of Independence. But, as most constitutional historians will note, the Declaration possesses no legal foundation for U.S. law or its founding document because, simply, it was crafted and passed by the Continental Congress before there was a United States. So, where else might we look for whether there is precedent for citing foreign law and international norms in constitutional interpretation?

The answer is that just 15 years after the first Federal Government was elected, the Supreme Court resolved a dispute involving a commercial vessel, *The Jane*, flying under the American flag, that was seized as a prize on the high seas.³⁸ It left Baltimore in 1800 headed for St. Barthelemy with the idea that both its cargo of flour and the ship itself would be sold. The captain, unnamed in the opinion of the Court, eventually sold the ship and goods to Jared Shattuck, who was originally from Connecticut, as was the ship. Shattuck had moved permanently to the West Indies and took up Danish citizenship. After he changed the name of the vessel to *The Charming Betsey*, he loaded her with a cargo of produce and headed for Guadeloupe. On the way there, a French vessel attacked the ship, its crew boarded her, and claimed the ship and cargo as a prize. But not for long: soon, the American warship, the *USS Constellation*, captured the French privateer and its captain, Alexander Murray in the suit, took seized the ship and its cargo.³⁹

At the time, the United States law, the Nonintercourse Act of 1800, forbid any commercial dealings with France because of the wars then raging throughout Europe. Because *The Charming Betsey* was now under the command of a French officer, the captain of the *Constellation* sold the produce as a prize and brought the ship back to Philadelphia where the Danish consul argued that Shattuck as a Danish citizen had a right of ownership. Both the federal district court and circuit court appeals agreed, and the captain of the *Constellation* appealed to the Supreme Court.

³⁵ In this regard, see Jack Balkin, *Living Originalism* (Cambridge, MA: Belknap Press of Harvard University Press, 2011).

³⁶ Daniel A. Farber, “The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History,” *California Law Review* 95 (2007) 1: 1335-1336, accessed on Jan. 15, 2019, [https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?referer=https://www.bing.com/&httpsreThe Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History, 95 Cal. L. Rev. 1335 \(2007\)dir=1&article=2729&context=facpubs](https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?referer=https://www.bing.com/&httpsreThe%20Supreme%20Court,%20the%20Law%20of%20Nations,%20and%20Citations%20of%20Foreign%20Law:%20The%20Lessons%20of%20History,%2095%20Cal.%20L.%20Rev.%201335%20(2007)dir=1&article=2729&context=facpubs).

³⁷ Steven G. Calabresi and Stephanie Dotson Zimdahl, “The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision,” *William and Mary Law Review* 41 (Dec. 2005): 743-909, a comprehensive inquiry into this issue and an invaluable source. And more recently, Stephen Yeazell, “When and How U.S. Courts Should Cite Foreign Law,” *Constitutional Commentary* 26 (2009): 59-74, accessed Dec. 1, 2018, <https://scholarship.law.umn.edu/concomm>.

³⁸ *Murray v. The Charming Betsey*, 6 (2 Cranch) U.S. 64 (1804). Calabresi and Zimdahl give many examples of the early use of foreign law by the U.S. Supreme Court, four by John Marshall alone, far too many to recount in the present essay. See Calabresi and Zimdahl, 764-780.

³⁹ The *USS Constellation* is today moored in Baltimore’s Inner Harbor.

Chief Justice John Marshall also agreed. The ship and its cargo had to be returned to Jared Shattuck. He noted that Congress never intended to ban commercial relations between the United States and the West Indies, but only France. He also observed that federal law was subject to interpretation in light of international law and norms. “An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights or to affect neutral commerce further than is warranted by the law of nations as understood in this country. These principles are believed to be correct, and they ought to be kept in view in construing the act now under consideration.”⁴⁰ In this way, he clearly rooted his decision in more than federal law.⁴¹

A better well-known decision by Marshall focused on the 1823 seizure of *The Antelope* leading to a dispute over ownership of the slaves aboard ship.⁴² Article I, Section 9, of the Constitution authorizes Congress to ban the slave trade twenty years after the ratification, and it did so on March 2, 1807.⁴³ The law went into effect on January 1, 1808.⁴⁴ Despite the law, the importation of slaves to the United States continued surreptitiously and legally by other nations such as Spain, Portugal, and Brazil. This was the context in which *The Antelope* developed.

In 1820, federal authorities captured a ship drifting off the coast of Florida, only to find on board over 300 captured African slaves heading for the United States. The crew of the ship were U.S. citizens. The Americans were convinced they were pirates. Spain and Portugal, however, argued that the ship and its human cargo belong to their nations because the ship was flying under the cover of their flags. Because of the law ending the slave trade, the United States moved to deport the slaves back to their African homeland. Inevitably, the dispute made its way before Chief Justice Marshall and involved some leading attorneys, diplomats, and politicians of the time.

Spain was represented by a United States Senator, and Portugal by a former member of the House of Representatives.⁴⁵ William Wirt, who in 1807 prosecuted Aaron Burr for treason and was then a powerful Attorney General during John Quincy Adams’s presidency, represented the United States along with Francis Scott Key, the composer of the words to the National Anthem. So impressed was Chief Justice Marshall he commented at the beginning of his decision, that the case had “drawn from the bar a degree of talent and of eloquence worthy of the questions” to be addressed.⁴⁶

Like most Americans at the time, Marshall believed the slave trade was “abhorrent” and “detestable,” though not slavery itself, just the horrible transportation of human beings chained together for months on slavers across the Atlantic.⁴⁷ Certainly, the slave trade violated “the law of nations.”⁴⁸ While many nations renounced the practice, some nation it. The United States possessed no authority to intervene in their domestic policies, including capturing slaves

⁴⁰ Murray, at 118.

⁴¹ Note, “The *Charming Betsey* Canon, Separation of Powers, and Customary International Law,” *Harvard Law Review* 121 (Feb. 2008) 4: 1215-1235.

⁴² *The Antelope*, 23 (10 Wheat.) 66 (1825). The best analysis is the study by Circuit Court Judge John A. Noonan Jr., *The Antelope: The Ordeal of the Recaptured Africans in the Administrations of James Monroe and John Quincy Adams* (Berkeley: University of California Press, 1977).

⁴³ An Act Prohibiting Importation of Slaves (2 Stat. 426, 1807).

⁴⁴ Ira Berlin, *Generations of Captivity: A History of African-American Slaves* (Cambridge, MA: Belknap Press of Harvard University Press, 2003).

⁴⁵ John Berrien was a Senator from Georgia and John Jared Ingersoll was the former representative.

⁴⁶ *The Antelope*, at 114.

⁴⁷ *Ibid.*, at 115, 118.

⁴⁸ *Ibid.*, at 120.

on the high seas as a prize. “The principle common . . . is that the legality of the capture of a vessel engaged in the slave trade depends on the law of the country to which the vessel belongs. If that law gives its sanction to the trade, restitution will be decreed; if that law prohibits it, the vessel and cargo will be condemned as good prize.”⁴⁹ As long as the practice was under the law of nations, he wrote, it could be considered piracy: therefore, under the law of nations the most of the slaves belonged to their rightful owners: they were sold to American slaveholders and the proceeds transferred to Spain and Portugal. Because a few, however, were taken from American ships, they had a right to return to Africa. They did the following year.

Several years later, in 1857, the Court decided the infamous case of *Dred Scott v. Sandford*.⁵⁰ The dispute, as is well known, focused on a black slave, Dred Scott, whose owner traveled with him to a free state and free territory, at which point Scott claimed he was no longer a slave. Chief Justice Roger Brooke Taney, who wrote the opinion of the Court, denied Scott was a citizen of the United States because of his status as a slave, and thus proclaimed he had no right to bring a case to court. Taney, a Maryland slaveowner, ironically freed his slaves after his father’s death. He clearly opposed slavery personally but did not think the Court was the appropriate institution to end it. He once famously stated, as a litigator in 1819, that slavery was “a blot on our national character,” and “every real lover of freedom confidently hopes that it will be effectually, though it must be gradually, wiped away.”⁵¹

In his opinion, Taney declined to cite foreign law or international norms in his opinion. The reason is that his opinion is the earliest example of the use of originalism (without using the term itself of course). He looked only to what the framers of the Constitution meant and understood at the time they wrote and ratified the document. In words paralleling those of Antonin Scalia 150 years later, Taney wrote:

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or lawmaking power, to those who formed the sovereignty and framed the Constitution. The duty of the court is to interpret the instrument they have framed with the best lights we can obtain on the subject, and to administer it as we find it, according to *its true intent and meaning when it was adopted*.⁵²

While Taney refrained from citing international law, Justice Benjamin Curtis, a Massachusetts Republican who dissented, did. Curtis, who was the first justice on the Supreme Court to hold a degree from a law school, argued in Scott’s favor.⁵³ He pointed out that many blacks were free citizens at the time not only when the Constitution was ratified, but also when the Articles of Confederation were in effect (1781-1788).⁵⁴ They participated in the political process in many states, he states, including possessing the right to vote. But even more: international law prohibits the practice of denying Scott’s

⁴⁹ *Ibid.*, at 118.

⁵⁰ *Dred Scott v. Sandford*, 60 U.S. (19 Howard) 393 (1857).

⁵¹ Note, “The Real Justice Taney, *The Wilson Quarterly* (Fall 2010), accessed Nov. 1, 2018, <https://wilsonquarterly.com/quarterly/fall-2010-what-if-china-fails/the-real-justice-taney/>. See also Timothy S. Huebner, “Roger B. Taney and the Slavery Issue: Looking Beyond--and before--*Dred Scott*,” *Journal of American History* 97 (June 2010) 1: 17-38.

⁵² *Dred Scott*, at 405, emphasis added.

⁵³ It was not until the end of the nineteenth and beginning of the twentieth centuries that lawyers predominantly held law degrees. The conventional way to enter the legal profession until that time was to “read” the law with a mentor until one was prepared to become a member of the Bar.

⁵⁴ The Articles of Confederation were in effect from 1781 until 1788 when the Constitution replaced it.

citizenship and right to appear in court. First, he noted that “the customary law of Missouri is the common law, introduced by statute in 1816.⁵⁵ And the common law, as [Sir William] Blackstone says, adopts, in its full extent, the law of nations, and holds it to be a part of the law of the land.⁵⁶ Second, to reemphasize this perspective, he wrote that “the rules of international law respecting the emancipation of slaves, by the rightful operation of the laws of another State or country upon the status of the slave, while resident in such foreign State or country, are part of the common law of Missouri, and have not been abrogated by any statute law of that State.”⁵⁷

Curtis did not dissent alone. So too did Justice John McLean, a Republican from Ohio. Like Curtis, McLean cited international law as a source of his objections to Taney’s decision. Citing several legal scholars and foreign laws, he noted that “the civil law throughout the Continent of Europe, it is believed, without an exception, is that slavery can exist only within the territory where it is established, and that, if a slave escapes or is carried beyond such territory, his master cannot reclaim him, unless by virtue of some express stipulation.” And he continued on this vein, claiming that no European nation is obligated to return a fugitive slave to his master. And this is “under the civil law or the law of nations.”⁵⁸

Several cases in the second half of the nineteenth century continued the practice of justices comfortably citing foreign law and international norms.⁵⁹ One occurred in 1884 when a man, Joseph Hurtado, was charged with first degree murder by information rather than an indictment, which was permitted under California law.⁶⁰ An information is simply a filing of an informal statement by a prosecutor to proceed. There is no grand jury investigation and the handing down of an indictment. Had Hurtado been tried in federal court, an indictment by grand jury would have been necessary. He thus appealed his case to the Supreme Court, claiming that his conviction was unconstitutional under the Fifth Amendment requirement that a capital crime was only legitimate when a grand jury handed down an indictment. In rejecting his position, Justice Stanley Matthews, writing for six others, held that as a matter of due process, the ideas underlying the principles of the Constitution are a compendium of wisdom from many sources, including foreign law. “The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that, in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown.”⁶¹

Twentieth-century instances

⁵⁵ Curtis cited 1 Ter.Laws, 436.

⁵⁶ *Dred Scott*, at 595, Curtis dissenting. Curtis was citing the great analysis by Sir William Blackstone, *Commentaries on the Laws of England* 4 vols. (Oxford: Clarendon Press, 1865-1869), 4: 67.

⁵⁷ *Ibid.*, at 601.

⁵⁸ *Ibid.*, at 534, McLean dissenting.

⁵⁹ A case in point was *Reynolds v. United States*, 98 U.S. 145 (1878) upheld a federal law prohibiting bigamy in the territory of Utah, aimed directly at Mormon practices.

⁶⁰ *Hurtado v. California*, 110 U.S. 516 (1884).

⁶¹ *Ibid.*, at 530-531.

Several twentieth-century cases cited foreign law and international norms. As noted at the very beginning, Justice Gray noted how important this trend was in 1900 in *The Paquete Habana*. One such case had to do with a law imposing maximum working hours on women in Oregon.⁶² The law was part of an effort in the early century to force government to pass wage and hour laws for labor (minimum wages, maximum hours). The Court continuously, as a matter of what it termed “economic liberty,” continuously overturned such legislation, the most notable case just three years earlier when the Court did so to a New York State law regarding maximum hours for bakers.⁶³ But the Court did not do so here when it came to working hours for women. So, why was that?

An Oregon organization, the National Consumers League agreed that women were weaker than men and thus supported the state’s efforts to pass the law at issue. A member of the group, Josephine Goldmark, recruited her brother-in-law, Louis D. Brandeis, a Boston lawyer and progressive leader, to argue a test case of the law. Brandeis wanted to show the reasonableness of the law based on factual evidence. Accordingly, in his written brief for *Muller*, which Goldmark participated in preparing, Brandeis gathered thirty reports that demonstrated the negative impact of long working hours on women. His 113-page argument, now known as “a Brandeis brief,” contained only two pages of legal arguments while the rest included sociological data and expert opinion. He successfully used this approach in several other cases involving wage and hour laws.⁶⁴ In 1916, President Woodrow Wilson nominated Brandeis to the Supreme Court.

Justice David Brewer wrote the opinion for a unanimous Court upholding the law on the basis of the information that Brandeis had supplied. Brewer noted that the laws of several foreign nations approved of the practice, and he named them: Britain, France, Switzerland, Italy, Germany, Austria, and Holland. And he even provided citations of the laws of these countries. He goes on:

Then follow extracts from over ninety reports of committees, bureaus of statistics, commissioners of hygiene, inspectors of factories, both in this country and in Europe, to the effect that long hours of labor are dangerous for women, primarily because of their special physical organization. The matter is discussed in these reports in different aspects, but all agree as to the danger. It would, of course, take too much space to give these reports in detail. Following them are extracts from similar reports discussing the general benefits of short hours from an economic aspect of the question. In many of these reports, individual instances are given tending to support the general conclusion. Perhaps the general scope and character of all these reports may be summed up in what an inspector for Hanover [in Germany] says: ‘The reasons for the reduction of the working day to ten hours--(a) the physical organization of women, (b) her maternal functions, (c) the rearing and education of the children, (d) the maintenance of the home--are all so important and so far-reaching that the need for such reduction need hardly be discussed.’”⁶⁵

It is useful to see just how deeply impressed Brewer was not only with Brandeis’s prodigious research but with the practices of so many nations. Today, such words would undoubtedly be

⁶² *Muller v. Oregon*, 208 U.S. 412 (1908).

⁶³ *Lochner v. New York*, 198 U.S. 45 (1905).

⁶⁴ Jill Lepore, *These Truths: A History of the United States* (New York: W.W. Norton, 2018), 381-382.

⁶⁵ *Muller*, at 412.

rejected by many women who claim that this stereotyping of the physical differences between men and women is unfair and unrealistic. However, this was well over 100 years ago.

But the trend continued. In 1937, a case came before the Court to determine whether the prohibition against double jeopardy, enshrined in the Sixth Amendment, applied to the states.⁶⁶ Frank Palko was charged with killing two police officers in Bridgeport, Connecticut. When the jury came back with a guilty verdict in the second degree, the prosecutor tried him again, which at the time was permitted under Connecticut law.

In answering the question before the Court, Justice Benjamin Cardozo said no, the double jeopardy provision was “not of the very essence of a scheme of ordered liberty” to apply to the states.⁶⁷ In other words, being retried for the same crime was not a right that was fundamental like free speech, freedom of religion, or a free press. This was not fundamental in American law, he went on, but among the laws of foreign governments as well. He gave the example of the right to remain silent, which is provided for in federal, but not state, investigations, and found this was rooted abroad: “compulsory self-incrimination is part of the established procedure in the law of Continental Europe.”⁶⁸

Perhaps the case closest to contemporary uses of foreign law and international norms, and the one most cited, is one having to do with the desertion of a soldier during World War II.⁶⁹ Albert Trop was serving on a United States military base in Morocco in 1944 when he was held in a stockade for violating military discipline. He escaped and deserted his company. After he surrendered to Military Police, he was dishonorably discharged and returned to the U.S. In 1952, he applied for a passport to travel abroad, but the State Department declined to issue one to him, claiming that under the Nationality Act of 1940, the government deprived him of his U.S. citizenship because of his desertion. He was stateless.

Six years later, his case against the Secretary of State John Foster Dulles reached the Supreme Court. Writing for a bare majority of five to four, Chief Justice Earl Warren overturned the State Department decision and held that no American may be deprived of their citizenship for any reason whatsoever. “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁷⁰ Its source was that the practice was a denial of due process and the Eighth Amendment’s prohibition against cruel and unusual punishments, but there was more: statelessness is “a condition deplored in the international community of democracies. . . . The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime. It is true that several countries prescribe expatriation in the event that their nationals engage in conduct in derogation of native allegiance.”⁷¹

The same occurred eight years later when the Court extended and the rights to remain silent and to counsel when a criminal suspect is held in police custody.⁷² The outcome is so well known today that it is hardly useful to point out just what the Miranda Warning is. But it is embodied in Chief Justice Warren’s majority opinion: a criminal suspect must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against

⁶⁶ *Palko v. Connecticut*, 302 U.S. 319 (1937).

⁶⁷ *Ibid.*, at 325.

⁶⁸ *Ibid.*, 326, note 3.

⁶⁹ *Trop v. Dulles* 356 U.S. 86 (1958).

⁷⁰ *Ibid.*, at 101.

⁷¹ *Ibid.*, at 102.

⁷² *Miranda v. Arizona*, 384 U.S. 436 (1966).

him in a court of law, that he has the right to the presence of an attorney, and that, if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.⁷³

More importantly for our purposes, Warren cited foreign law. He wrote that “the law of the foreign countries described by the [lower] Court . . . reflects a more moderate conception of the rights of the accused as against those of society when other data are considered.”⁷⁴ Here, he cites laws and practices from Britain, Ceylon, India, Scotland. The last of these, he argued, has “limits on interrogation [that] measure up to the Court’s; however, restrained comment at trial on the defendant’s failure to take the stand is allowed the judge, and, in many other respects, Scotch law redresses the prosecutor’s disadvantage in ways not permitted in this country.”⁷⁵ In 1984 Justice O’Connor cited Warren’s use of foreign law in the *Miranda* decision, bringing us up to the present dispute.⁷⁶

Finally, before we arrive at our contemporary moment, the Court heard a death penalty case in which the prisoner faced capital punishment for the rape of a woman who survived the attack.⁷⁷ Justice Byron White ruled that the penalty was disproportionate to the crime. As he noted, “We observe that, in the light of the legislative decisions in almost all of the States and in most of the countries around the world, it would be difficult to support a claim that the death penalty for rape is an indispensable part of the States’ criminal justice system.”⁷⁸ Now, onto the present. . . .

Execution of the mentally challenged and minors: The *Atkins* (2002) and *Roper* (2005) decisions⁷⁹

Daryl Renard Atkins and a friend, William Jones, spent the day drinking and smoking marijuana in Virginia when they ran out of alcohol. They went to a convenience store only to find that they did not have any money either, so they decided to rob a customer. They abducted an airman by the name of Eric Nesbitt, who was stationed at Langley Air Force Base, and forced him to withdraw \$200 from an ATM. They then drove him to a secluded area where they shot him to death. The two were shortly arrested and in a plea deal, Jones agreed to turn testimony against Atkins in exchange for a reduced sentence. Like most states with capital punishment laws, Virginia declares that a defendant is not eligible for the death penalty when he pleads guilty in a capital case. Atkins, however, faced the death sentence.

⁷³ *Ibid.*, at 472.

⁷⁴ *Ibid.*, at 521-522.

⁷⁵ *Ibid.*, at 522.

⁷⁶ *New York v. Quarles*, 467 U.S. 649, at 672, O’Connor concurring in part.

⁷⁷ *Coker v. Georgia* 433 U.S. 584 (1977).

⁷⁸ *Ibid.*, at 592, note 4.

⁷⁹ Rex D. Glensy, “The Use of International Law in U.S. Constitutional Adjudication,” *Emory International Law Review* 25 (2011): 197-267, accessed Feb. 2, 2019, at <http://law.emory.edu/eilr/content/volume-25/issue-1/articles/international-law-constitutional-adjudication.html>.

At trial, both men claimed that the other one had shot and killed Nesbitt. The jury believed Jones, and Atkins was sentenced to death. The Virginia Supreme Court upheld the convictions but overturned the penalty because the lower court had used the wrong verdict form. In the second penalty phase, the court heard testimony from a psychologist that Atkins had an I.Q. of 59, namely that of a nine to 12-year-old boy and had difficulty interacting with the social environment around him. The prosecution's psychologist, in turn, argued that while Atkins exhibited anti-social behavior at times, he was a man of average intelligence and could tell the difference between right and wrong. The jury also learned that Atkins had had 16 previous felony convictions, ranging from robbery to maiming. He was sentenced to death once again.⁸⁰

On appeal, Atkins's lawyer asked the Virginia Supreme Court to reduce his sentence to life in prison because of his mental retardation. The court declined, relying on *Penry v. Lynaugh*, which held that it was constitutional to execute a person who is mentally retarded.⁸¹ In the Court's opinion, Justice Sandra Day O'Connor noted that only one state banned executions of the retarded and concluded that there was a national consensus that appeared to favor the practice. By the time *Atkins* reached the Court, seventeen additional states had banned executions of mentally retarded people. The Supreme Court accepted the *Atkins* case to reconsider *Penry*, which it overruled by a vote of six to three. The opinion of the Court was written by Justice John Paul Stevens, joined by Justices O'Connor, Anthony Kennedy, David Souter, Ruth Bader Ginsburg, and Stephen Breyer. Chief Justice William H. Rehnquist dissented, joined by Justices Scalia and Thomas, and Justice Scalia also wrote a dissent.

Stevens's approach to resolving the case was twofold. First, as O'Connor had in 1989 investigated how the states handled executions of the mentally disabled. He noted that "in the 13 years since we decided *Penry v. Lynaugh*, (1989), the American public, legislators, scholars, and judges have deliberated over the question whether the death penalty should ever be imposed on a mentally retarded criminal. The consensus reflected in those deliberations informs our answer to the question presented by this case: whether such executions are 'cruel and unusual punishments' prohibited by the Eighth Amendment to the Federal Constitution."⁸² He concluded that a 1958 case shed light on this subject.

Stevens noted that it was "not so much the number of these States that is significant, but the consistency of the direction of change."⁸³ Clearly, Stevens accepted "the evolving standards of decency" principle the Court laid down in the 1958 *Trop* decision. He emphasized that over time, the duty of the Court was to ensure the changing nature of the Constitution: in short, the doctrine of the living constitution.

Second, as had Breyer in his "conversation" with Scalia, he focused on foreign law and international norms to determine how other nations and international conventions dealt with the issue. He noted that several secular and religious organizations in the United States had submitted *amicus* briefs in favor of overturning Atkins's death sentence, but then went beyond these arguments to also cite a brief filed by the European Union: "within the world community,

⁸⁰ Thomas G. Walker, *Eligible for Execution: The Story of the Daryl Atkins Case* (Washington, DC: CQ Press, 2008).

⁸¹ *Penry v. Lynaugh* (492 U.S. 302 (1989)). This case, in an opinion for the Court by Sandra Day O'Connor, held that "mentally retarded" defendants convicted of capital crimes were death-penalty eligible. The jury could, however, consider other penalties when considering the mental capacity of the prisoner.

⁸² *Atkins v. Virginia*, 536 U.S. 304 at 301 (2002).

⁸³ *Ibid.*, at 315.

the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”⁸⁴

Justice Scalia was livid. First, in a clear effort to embarrass Breyer, he recounted the facts of the case as starkly as he could and with as much graphic detail as possible:

I begin with a brief restatement of facts that are abridged by the Court but important to understanding this case. After spending the day drinking alcohol and smoking marijuana, petitioner Daryl Renard Atkins and a partner in crime drove to a convenience store, intending to rob a customer. Their victim was Eric Nesbitt, an airman from Langley Air Force Base, whom they abducted, drove to a nearby automated teller machine, and forced to withdraw \$200. They then drove him to a deserted area, ignoring his pleas to leave him unharmed. According to the co-conspirator, whose testimony the jury evidently credited, Atkins ordered Nesbitt out of the vehicle and, after he had taken only a few steps, shot him one, two, three, four, five, six, seven, eight times in the thorax, chest, abdomen, arms, and legs.⁸⁵

He then decried Stevens’s attempt at measuring a so-called national consensus by counting the states with and without a death penalty for those judged to be mentally disabled. By declaring that a few states had repealed these laws made no sense to him, given that Stevens also counted states that did not even have a capital punishment statute. “Not 18 States, but only 7--18% of death penalty jurisdictions--have legislation of that scope. Eleven of those that the Court counts enacted statutes prohibiting execution of mentally retarded defendants *convicted after, or convicted of crimes committed after, the effective date* of the legislation.” But what truly stuck in his craw was Stevens’s reliance on *Trop*’s “evolving-standards-of-decency principle”: presumably, in applying our Eighth Amendment “evolving-standards-of-decency” jurisprudence, we will henceforth weigh not only how many States have agreed, but how many States have agreed *by* how much. Of course, if the percentage of legislators voting for the bill is significant, surely the number of people *represented* by the legislators voting for the bill is also significant: the fact that 49% of the legislators in a State with a population of 60 million voted *against* the bill should be more impressive than the fact that 90% of the legislators in a State with a population of 2 million voted *for* it. (By the way, the population of the death penalty States that exclude the mentally retarded is only 44% of the population of all death penalty States.)

Moreover, what really spurred Scalia on was Stevens’s citation of international standards. “But the Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus’ must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called ‘world community’ . . . whose notions of justice are (thankfully) not always those of our people.”⁸⁶ This grasping at what others beyond the borders of the United States may think of local practices was irrelevant. As he contemplated why Stevens would draw on foreign influences, he concluded that there was only one reason: Stevens (and the rest of the majority) simply did not like the death penalty and would use any means to undermine it.

⁸⁴ *Atkins*, at 31, note 21. An *amicus curiae*, or “friend of the Court, brief is a written argument submitted to the Court by a person or organization that is not a party to the case. The writer(s) may volunteer or be invited by the Court to submit a position.

⁸⁵ *Ibid.*, at 328, Scalia dissenting.

⁸⁶ *Ibid.*, at 343, 346-347 (emphasis in the original).

In other words, Stevens failed to make a judicial decision but rather set out a statement of his (and the majority's) personal preferences. Justices of the Supreme Court, retorted Scalia, are highly unrepresentative of the people of the United States. Moreover, they have no need to cite foreign influences to determine the constitutionality of American law. He quotes from Stevens's opinion that the Constitution "contemplates that in the end *our own judgment* will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."⁸⁷ His response was as pointed as possible: "The unexpressed reason for this unexpressed 'contemplation' of the Constitution is presumably that really good lawyers have moral sentiments superior to those of the common herd, whether in 1791 or today."⁸⁸ At the time of the crafting and ratification of the eighth amendment, 1791 as he noted, the framers of the provision knew and accepted the penalty of capital punishment, period.

Hence, once again, Scalia's animus against the use of foreign law and international norms linked to his originalism. To make clear that his grave distaste for the use foreign law and international standards annoyed him to no end, he noted that "the Court makes no pretense that execution of the mildly mentally retarded would have been considered 'cruel and unusual' in 1791. Only the *severely* or *profoundly* mentally retarded, commonly known as 'idiots,' enjoyed any special status under the law at that time. They, like lunatics, suffered a 'deficiency in will' rendering them unable to tell right from wrong. And to emphasize his use of what the framers may have meant about executing the mentally disabled prisoners at the end of the ratification of the eighth amendment, he cited the great eighteenth-century legal scholar, Sir William Blackstone, whose massive four-volume compendium analyzed centuries of the English common law."⁸⁹

This is where things stood when just three years later, the Court again limited the exercise of the death penalty, this time regarding those who commit capital crimes before they were 18 years old.⁹⁰

Christopher Simmons was 18 years old when he was convicted of capital murder in Missouri and sentenced to death for a crime he committed when he was a 17-year old junior in high school. Simmons and two friends planned to burglarize a house and kill its occupant by throwing the victim from a bridge. Simmons told his friends that he knew they could "get away with it" because they were minors. On the night of the murder, one young man decided not to participate (he later testified against Simmons when the state promised to drop all charges against him). Simmons and the other friend went to the home of Shirley Crook where they reached a lock on a door through an open window. After they turned on a hall light, Crook, whose husband was away, awakened and confronted the young men. Simmons recognized her as a woman with whom he had earlier been involved in a minor automobile accident. He admitted that this factor confirmed his decision to kill her.

After covering Crook's eyes with duct tape, Simmons and his friend drove to her to Meramec River, where they reinforced the tape, covered her head with a towel, and bound her hands and feet with electrical wire. From a railroad trestle, they dropped her into the river, where she drowned. A few days later, fishermen called police after they found her body. Meanwhile, on the same day, her husband returned from his trip and reported her missing with the house in

⁸⁷ *Ibid.*, at 311 (Scalia added the emphasis).

⁸⁸ *Ibid.*, at 348.

⁸⁹ *Ibid.*, at 340.

⁹⁰ Kenneth Anderson, "Foreign Law and the U.S. Constitution," *Policy Review* 131 (June/July, 2005): 33-50, accessed on Mar. 1, 2019, at http://www.academia.edu/2836574/Foreign_Law_and_the_US_Constitution.

disarray. By this time, Simmons was bragging to his friends about his “achievement” and was claiming he could get away with it because he was a juvenile. The police soon heard of his boasting and arrested him. After waiving his Miranda rights, he confessed. He was charged with murder in the first degree, kidnapping, burglary, and robbery.

Tried as an adult in 1993, the state brought to the court his confession and his reenactment of the murder as well as his bragging about the crime. The defense put on no witnesses. After he was found guilty, the jury in the penalty phase delivered a verdict of capital punishment. In line with an earlier Supreme Court decision that allowed the execution of minors between the ages of 15 and 18 years old, Missouri law allowed for the death penalty for juveniles who committed capital crimes who were as young as 16 years old.⁹¹ After the Missouri Supreme Court upheld the verdict, a federal district court denied his appeal.

Then, in 2002, while Simmons was on death row, the Supreme Court ruled in the *Atkins* decision that the Eighth and Fourteenth Amendments prohibited the execution of the mentally disabled. Justice Kennedy ruled that a majority of states either simply did not provide for capital punishment or no longer permitted the death penalty for those who were judged to be mentally disabled. The Court’s reasoning was based on the changing understanding of the terms “cruel and unusual punishments” by considering history, tradition, and precedent, as well as the place of the death penalty in the constitutional design. The key precedent the Court cited was again the *Trop* decision when the Court held that “the evolving standards of decency that mark the progress of a maturing society” must determine which punishments are so disproportionate as to be “cruel and unusual.” Chief Justice Warren in *Trop* and Justice Kennedy in *Atkins* also pointed to foreign and international law to indicate how out of step the United States was in making a U.S. citizen stateless (*Trop*) or executing the mentally disabled (*Atkins*).

Now, armed with the results of *Atkins*, Simmons again appealed to the Missouri Supreme Court, which this time agreed that the reasoning in *Atkins* concerning the mentally disabled applied to juveniles facing capital punishment. The Missouri court claimed that *Atkins* effectively superseded the Supreme Court’s *Stanford* decision. Simmons was re-sentenced to life imprisonment without parole. The state of Missouri appealed to the Supreme Court.

Justice Anthony Kennedy once again delivered the opinion of the Court, in a five to four ruling, affirming the decision of the Missouri Supreme Court. His opinion not only cited *Trop*, but also a 1988 decision when the court held that the execution of a child under the age of 15 violated the prohibition against cruel and unusual punishments in the Eighth Amendment.⁹² He also noted that the *Stanford* decision had made it impermissible to execute children between the ages of 15 and 18. As he had done in *Atkins*, he focused on the change in the “national consensus” as increasingly numbers of states no longer permitted the execution of a juvenile who committed a capital crime before they reached the age of 18. “The evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence *Atkins* held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded. . . . In the present case, too, even in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent. . . . A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment.”⁹³

⁹¹ The case is *Stanford v. Kentucky*, 492 U.S. 361 (1989).

⁹² *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

⁹³ *Roper*, at 564, 568.

For our purposes here, Kennedy's assessment of world public opinion and his reliance on foreign law and international conventions is key. The United States, he stated, "is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. . . . Yet at least from the time of the Court's decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'"⁹⁴ Of course, as we have shown, the process of citing international and foreign law, conventions, and norms predates *Trop*. He noted that only the United States and Somalia had declined to ratify the United Nations Convention on the Rights of the Child. Article 37 of the document expressly prohibited the execution of juveniles who commit capital crimes before they turn 18. Moreover, he observed, other significant international covenants contained similar language. He also wrote that seven countries other than the United States had executed juveniles, and he named Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. The United States would hardly want to be in the company as these nations. He also stated that Britain had ended the practice long ago. "In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty."⁹⁵

The dissent by Antonin Scalia was typical Scalia: full of ridicule, humor, and outrage. To understand the full impact of his anger, I will supply many quotations from his opinion. First, he noted that clearly Kennedy did adopt his favorite mode of interpretation, originalism, but relied only on how the Constitution has evolved over time, i.e., the *Trop* evolving standards. Moreover, he was once again livid over the use of international norms and standards. "The Court thus proclaims itself sole arbiter of our Nation's moral standards--and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures. Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent."⁹⁶

Scalia denounced Kennedy's fuzzy math. In coming up with his view of a new national consensus, Kennedy had counted not only the death-penalty states that no longer permitted the practice of executing juveniles under 18, but he had included those states that prohibited capital punishment for any crime. "Words have no meaning if the views of less than 50 percent of death penalty States can constitute a national consensus. Our previous cases have required overwhelming opposition to a challenged practice, generally over a long period of time. . . . By contrast, agreement among 42 percent of death penalty States in *Stanford*, which the Court appears to believe was correctly decided at the time, ante, at 20, was insufficient to show a national consensus." He calculated that only 47 percent of the states with capital punishment laws prohibited the execution of juveniles. Hardly a national consensus, by his lights. "Consulting States that bar the death penalty concerning the necessity of making an exception to the penalty for offenders under 18 is rather like including old-order Amishmen in a consumer-preference poll on the electric car. Of course, they don't like it, but that sheds no light whatever on the point at issue. . . . The attempt by the Court to turn its remarkable minority consensus into a faux majority by counting Amishmen is an act of nomological desperation."⁹⁷

⁹⁴ *Ibid.*, at 575.

⁹⁵ *Ibid.*, at 577.

⁹⁶ *Ibid.*, at 608, Scalia, dissenting.

⁹⁷ *Ibid.*, at 610-611.

Worse still was the Court’s citation of international law and conventions: here he departed, if only momentarily, from his use of the jurisprudence of Lord Camden and Sir William Blackstone to lambast Kennedy’s opinion. “The Court’s special reliance on the laws of the United Kingdom is perhaps the most indefensible part of its opinion. It is of course true that we share a common history with the United Kingdom, and that we often consult English sources when asked to discern the meaning of a constitutional text written against the backdrop of 18th-century English law and legal thought. If we applied that approach today, our task would be an easy one. . . . The Court has, however--I think wrongly-- long rejected a purely originalist approach to our Eighth Amendment, and that is certainly not the approach the Court takes today. . . . To invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decision making, but sophistry.”⁹⁸ In his view, the Court should either just give up and accept foreign law as part of United States law, which he thought was ridiculous, or completely stop citing foreign law and international norms in constitutional decision making. Even English common law, though? He was not clear.

Life without parole for juveniles: The *Graham* case (2010)

In 1988, the Court ruled that juvenile offenders convicted of a homicide are not eligible for the death penalty as a violation of the Eighth Amendment’s prohibition against cruel and unusual punishment.⁹⁹ The question in *Graham* was whether the prohibition extended to sentence for a juvenile of life without parole when he did not commit a homicide. In this case, Terrence Graham was 16 years old when he was convicted of armed burglary and attempted armed robbery. He spent 12 months in prison and then was released. Six months later, however, he was tried and convicted by a Florida state court of armed home robbery and sentenced to life in prison without parole. The Florida highest appellate court affirmed his sentence.¹⁰⁰

As he had in *Atkins* and *Roper*, Kennedy addressed whether a national consensus provided evidence that the nation opposed the practice. Although he noted that thirty-seven states and the District of Columbia permitted judges to impose life sentences without parole on juvenile offenders who commit non-homicide crimes, he found that actual sentencing practices “discloses a consensus against its use.” In fact, he found that only 12 jurisdictions throughout the United States imposed life sentences without parole on juveniles convicted of committing crimes that did not involve a death. And even most of those jurisdictions did so very rarely. “The available data, nonetheless, are sufficient to demonstrate how rarely these sentences are imposed even if there are isolated cases that have not been included in the presentations of the parties or the analysis of the Court.”¹⁰¹

Perhaps, this finding alone would have demonstrated to Kennedy that the sentence was a violation of the Eighth Amendment’s prohibition against cruel and unusual punishments. But, he went on: he found that the practice was in fact rejected “the world over.” He was careful, and obviously had Scalia’s scathing criticisms in mind, to say that all he wished to do was see what occurred beyond the borders of the United States. Certainly, these legal positions should have no direct impact on American law or in judicial determinations, but they may well have something to teach. He now concluded that a global consensus was set against the practice. “A recent study

⁹⁸ *Ibid.*, at 626-627.

⁹⁹ *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

¹⁰⁰ Florida Supreme Court, 990 So. 2d 1058 (2008).

¹⁰¹ *Graham v. Florida*, 560 U.S. 48 (2010), at 61, 64.

concluded that only 11 nations authorize life without parole for juvenile offenders under any circumstances; and only two of them, the United States and Israel, ever impose the punishment in practice.”¹⁰²

But this was not all. He also cited the United Nations Convention on the Rights of the Child, published in 1989, which every nation in the world had ratified except for the United States and Somalia. According to Kennedy, the Convention prohibits “the imposition of ‘life imprisonment without possibility of release . . . for offences committed by persons below eighteen years of age.’ He concluded that in light of this factor, as he himself had put it in *Roper*, “‘the United States now stands alone in a world that has turned its face against’ life without parole for juvenile nonhomicide offenders.”¹⁰³ Because the overwhelming weight of the international community opposed such a practice, the United States should meet its moral and political standard. “The Court has treated the laws and practices of other nations and international agreements as relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world’s nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court’s rationale has respected reasoning to support it.”¹⁰⁴

One wonders what Scalia would say about Kennedy’s persistence in citing foreign law and international law and conventions. But this time, he was silent. Justice Clarence Thomas, an originalist like Scalia, addressed the issue, although he lacked flair and humor of his colleague and confined his comments about Kennedy’s citations to a mere footnote “because past opinions explain at length why such factors are irrelevant to the meaning of our Constitution or the Court’s discernment of any longstanding tradition in *this* Nation.”¹⁰⁵ This was not his first foray into the breach of battle regarding the use of foreign law. In 1999, for example, he criticized petitioners in a case involving the cruelty of having to sit 20 or more years on death row when they cited practices in India, Zimbabwe, and the European Court of Human Rights.¹⁰⁶ And then in 2002, he argued that his Court’s Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans.”¹⁰⁷

Thomas now made two points. First, he noted the study Kennedy drew on to determine that the United States was only one of two countries that actually engaged in the practice. But, Thomas argued, the study also showed quite clearly that many countries have on their books the penalty for juvenile offenders, even if judges rarely pronounced the sentence. “Second, present legislation notwithstanding, democracies around the world remain free to adopt life-without-parole sentences for juvenile offenders tomorrow if they see fit. Starting today, ours can count itself among the few in which judicial decree prevents voters from making that choice.”¹⁰⁸

Gay and lesbian rights: The *Lawrence* decision (2003)

¹⁰² *Ibid.*, at 80. The study is Michelle Leighton and Constance de la Vega, “Sentencing Our Children to Die in Prison:” *Global Law and Practice*, *University of San Francisco Law Review* 42 (2007) 4, accessed October 29, 2018, <https://ssrn.com/abstract=1277524>.

¹⁰³ *Graham*, at 81. The *Roper* citation is from *Roper v. Simmons*, at 576.

¹⁰⁴ *Ibid.*, at 81.

¹⁰⁵ *Ibid.*, at 113, note 12, Thomas dissenting.

¹⁰⁶ *Knight v. Florida*, 528 U.S. 990, at 989, Thomas concurring in the denial of *certiorari*.

¹⁰⁷ *Foster v. Florida*, 537 U.S. 990, at 989 (2002), Thomas again concurring in the denial of *certiorari*.

¹⁰⁸ *Graham*, at 114.

In Houston, Texas, officers of the Harris County Police Department entered a private residence after responding to reports of a weapons disturbance. They entered an apartment where some of the officers claimed that they observed the resident, John Geddes Lawrence, and another man, Tyron Garner, engaging in private consensual sodomy. The police testimony was confused and confusing: of the four officers on the scene, one claimed the two men were engaged in anal sex, another claimed oral sex, but two stated they saw nothing of the sort.¹⁰⁹ In any event, Lawrence and Garner were eventually convicted of violating Texas law, which made it a crime to engage in “deviate sexual intercourse, namely anal sex, with a member of the same sex (man).” The law specifically defined “deviate sexual intercourse” as “any contact between any part of the genitals of one person and the mouth or anus of another person; or the penetration of the genitals or the anus of another person with an object.”¹¹⁰

The two men claimed the statute violated the equal protection clause of the Fourteenth Amendment. After the court rejected their argument, it fined them each \$200 and assessed court costs of \$141.25. On appeal, the Texas Court of Appeals, sitting *en banc*, also rejected their federal constitutional arguments based both on the equal protection and due process clauses of the Fourteenth Amendment and affirmed their convictions.¹¹¹ That court’s decision was based largely on a 1986 Supreme Court decision, *Bowers v. Hardwick*, 478 U.S. 186 (1986), when the US Supreme Court upheld Georgia’s anti-sodomy law. Lawrence and Garner then appealed to the Supreme Court.

The major questions before the Court were whether the police, in invading their privacy in the exercise of their liberty, violated the due process clause of the Fourteenth Amendment and whether the justices should reconsider and even overrule *Bowers*. There were two additional questions for the Court: first, whether the law violated the equal protection clause of the Fourteenth Amendment because it addressed the sexual relationships only between men, not between men and women; and second, whether it made a difference that many state legislatures had repealed their laws against sodomy since 1986 when the Court decided *Bowers*.

The Court decided in a six to three decision that the Texas law violated the Fourteenth Amendment. This time, as in *Roper*, Justice Anthony Kennedy, not Breyer, led the majority’s opinion for the Court.¹¹² He ruled that the law unconstitutionally invaded Lawrence and Garner’s privacy decisions, a form of liberty protected by the due process clause. And he ruled that because *Bowers* was mistakenly decided, it was thus overruled. He noted that the gay and lesbian community was a threatened minority community in America and thus needed greater constitutional protections from the tyranny of the majority.

As had Breyer in *Atkins* and himself in *Roper*, Kennedy again cited foreign law and international conventions, to Scalia’s continued and continuing dismay. When in 1988 President Ronald Reagan nominated Kennedy to the Court, most observers noted that he would bolster the Court’s conservative flank. And most of the time, he did, but he parted company with his

¹⁰⁹ The definitive analysis is by law professor Dale Carpenter, *Flagrant Conduct: The Story of Lawrence v. Texas, How a Bedroom Arrest Decriminalized Gay Americans* (New York: Norton, 2012), esp. 61-104. Carpenter notes that the officers were anti-gay (*ibid.*, 99-100) and speculates that the case may have been “cooked up” by gay activists to challenge anti-sodomy laws (*ibid.*, 89-96).

¹¹⁰ Texas penal code, Penal Code, §21.06

¹¹¹ Typically, federal appellate courts initially hear cases with a three-judge panel. When sitting *en banc*, all the judges on the court rehear the appeal, including the original three.

¹¹² Stephen C. McCaffrey, “There’s a Whole World Out There: Justice Kennedy’s Use of International Sources,” *McGeorge Law Review* 44 (2014): 201-210, accessed Dec. 15, 2018, <https://scholarlycommons.pacific.edu/mlr/vol44/iss1/9>.

conservative colleagues on issues regarding gay and lesbian rights. Here, he took comfort in citing foreign law and international norms. This does not mean, like Breyer, he was an advocate for the doctrine of the living constitution necessarily nor was he a follower of Scalia's beloved originalism. He argued that a judge must approach each dispute that comes before the Court on its own ground and determine whether any provision of the Constitution will appropriately resolve it.

In a concurrence, Sandra Day O'Connor joined the majority, focusing on the law's singling out only homosexual, and not heterosexual, sodomy as a violation of the Fourteenth Amendment's equal protection clause. The dissent, unsurprisingly, was led by Antonin Scalia, along with his fellow originalist, Clarence Thomas, as well as Chief Justice Rehnquist who was not an originalist either.

Kennedy first attacked *Bowers* on the grounds that it simplistically held that all homosexual couples want is to have the freedom to engage in sexual conduct with members of their own sex. Justice Byron White, who wrote for the Court in *Bowers*, argued that historically during the Constitution's long history, states had long criminalized such conduct and he saw no reason for the Court to intervene to change that. Kennedy responded that "to say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." More important for Kennedy was that not only the Texas law, but every state statute like it in the United States, is designed to control personal relationships in the privacy of their own home between consenting adults, which the liberty component of the due process clause protects under the Fourteenth Amendment. "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."¹¹³

He grounded his position on the publication in 1955 by the American Law Institute when it issued its Model Penal Code, opposing "criminal penalties for consensual sexual relations conducted in private."¹¹⁴ He noted that many states soon followed and designed their laws in conjunction with the new code. This was the beginning of a new national consensus, the same argument that he had made in *Roper* and Breyer in *Atkins*. In 1961, all 50 states had laws criminalizing sodomy, but now, he argued, "the 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which four enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private. The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances."¹¹⁵

Kennedy then moved onto Scalia's great bugaboo: foreign law and international conventions. He noted that in his *Bowers* concurrence, Chief Justice Warren Burger had made "sweeping references . . . to the history of Western civilization and to Judeo-Christian moral and ethical standards," which failed to account for what Kennedy called "other authorities pointing in an opposite direction."¹¹⁶ And just what were these "other authorities?" First, he said, in 1957, a British parliamentary committee recommended that Britain repeal its laws punishing homosexual

¹¹³ *Lawrence v. Texas* 539 U.S. 558, at 567 (2003).

¹¹⁴ *Ibid.*, at 572.

¹¹⁵ *Ibid.*, at 573.

¹¹⁶ *Ibid.*, at 572.

conduct. Because of this recommendation, Parliament in 1963 issued the Wolfenden Report of the Committee on Homosexual Offenses and Prostitution. Named for Sir John Wolfenden, who led the committee, the committee clearly sought to determine how it was that so many gay members of Parliament had been charged with criminal offenses.¹¹⁷ Ten years later, the British Parliament enacted most of the recommendations.

Kennedy cited what he considered to be an important decision by the European Court of Human Rights in a case similar to *Bowers* and to this case. A gay man in Northern Ireland challenged a law that prohibited him from engaging in consensual sex with another man. Police had arrested him in his home and feared that the authorities would prosecute him. The European Court of Human Rights “held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.”¹¹⁸ Moreover, while the court’s decision was definitive for these nations, it was consistently upheld after it was first decided in 1981: “The European Court of Human Rights has followed not *Bowers*, *Kennedy* argued, “but its own decision in *Dudgeon v. United Kingdom*.¹¹⁹ He noted that “other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.”¹²⁰

Scalia’s response was not only testy, but fumingly hot. He thought it was as clear as day that if the people of Texas wanted, for moral or political or social reasons, to have a law prohibiting sodomy between two consenting male adults or anyone else, they had a perfect right to have it. The role of the Court was not to place a moral guidepost to block the citizenry. After all, there was no difference between this law and laws prohibiting fornication, bigamy, adultery, adult incest, bestiality, and obscenity. But the Court’s majority denies this, and why? For one simple reason: the justices who voted to overturn the law have

largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. . . . It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive.¹²¹

¹¹⁷ Brian Lewis, *Wolfenden's Witnesses: Homosexuality in Postwar Britain* (London: Palgrave Macmillan, 2016), and Matt Houlbrook, *Queer London: Perils and Pleasures in the Sexual Metropolis, 1918-1957* (Chicago: University of Chicago Press, 2005).

¹¹⁸ *Lawrence v Texas*, at 573. The case is *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981), ¶52.

¹¹⁹ *Ibid.*, at 577. Kennedy cited several cases based on *Dudgeon: P.G. & J.H. v. United Kingdom*, App. No. 00044787/98, ¶56 (Eur. Ct. H.R., Sept. 25, 2001); *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (1993); *Norris v. Ireland*, 142 Eur. Ct. H.R. (1988).

¹²⁰ *Ibid.*, at 576-577.

¹²¹ *Ibid.*, at 602, Scalia, dissenting.

There is, therefore, no need to cite irrelevant foreign law or European judicial decisions because the citizens themselves have spoken. Indeed, he said, the standard to establish a right as fundamental, as established by the Court itself, has to be based on whether a law or practice is “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”¹²² For Scalia, America’s laws and traditions firmly establish that the states may criminalize homosexual acts at will.

To avoid any attack on him personally that he was writing out of prejudice, Scalia insisted that he has “nothing against homosexuals, or any other group, promoting their agenda through normal democratic means.” He stated that he would not want states to criminalize homosexual acts nor forbid them from doing so. He would simply leave it to the democratic process. Projecting into the future, he mused what might be next before the Court: will other challenged personal relationships come before the justices, something like same-sex marriage? Kennedy said no, but Scalia? He just says, “Do not believe it.”¹²³

It turned out Scalia’s prediction was correct. Ten years later, the Court decided whether same-sex marriage was also a fundamental right. In 2013, the issue of same-sex marriage reached the Court in two cases, one involving a federal law, known as the Defense of Marriage Act or DOMA, the other an amendment to the California constitution stating that the state recognized only marriages between one man and one woman.

In 1996, Congress passed DOMA that also recognized marriage as the union of one man and one woman. DOMA was an amendment to the “Dictionary Act,” a measure that identified over 1,000 federal programs, including social security survivors’ benefits, filing joint tax returns, and non-payment of estate taxes for a surviving spouse. Section 3 denied all these federal benefits to same-sex couples. President Bill Clinton signed the law but once out of office opposed it on constitutional grounds. President Barack Obama supported it until 2011 when he announced that the Department of Justice would no longer defend it in court, but his administration would continue to enforce it.

Meantime, voters in California in 2008 added an amendment to the state constitution via an initiative called Proposition 8 or Prop 8. The amendment provided that “only marriage between a man and a woman is valid or recognized in California.” Opponents immediately mounted a challenge to the amendment on equal protection grounds. In 2009, Alameda County denied Kristin Perry and her partner, Sandra Stier, a marriage license because they were a same-sex couple. The same was true of a same-sex male couple in Los Angeles County. Both couples challenged the law in federal district court as a violation of the Fourteenth Amendment’s Equal Protection Clause. That court agreed and overturned Prop 8. The judge, Vaughn Walker, placed an injunction on its enforcement. The injunction stated that California officials “in their official capacities, and all persons under [their] control or supervision . . . are permanently enjoined from applying or enforcing Article I, Section 7.5 of the California Constitution.”¹²⁴ Section 7.5 is the amendment banning same-sex marriages.

Governor Jerry Brown declined to appeal Walker’s decision because he agreed with it. Instead, the original supporters of Prop 8, led by Dennis Hollingsworth, intervened. The United

¹²² Ibid., at 593. Scalia was citing the standard as laid down in *Moore v. East Cleveland*, 431 U.S. 494 (1977).

¹²³ Ibid., at 603-604.

¹²⁴ *Perry, et al. v. Schwarzenegger, et al.* Federal District Court for Northern California, No. C 09-2292 VRW, 136 (2010).

States Court of Appeals for the Ninth Circuit affirmed Judge Walker’s decision but placed a stay on the injunction, pending a final decision from the Supreme Court.¹²⁵

The question in the DOMA case was different from the California case in that it involved only one section of the law. In 2007, Edith Windsor and Thea Clara Spyer were married in Ontario, Canada. Two years later, Spyer died, leaving her entire estate to Windsor who was then faced with a federal inheritance tax bill of over \$363,000. A surviving spouse in an opposite-sex marriage would not have had to pay any tax. The Internal Revenue Service rejected Windsor’s exemption claim because of DOMA.

In 2011, New York State legalized same-sex marriages and Windsor filed suit in federal district court against the IRS demanding a refund. That court overturned DOMA on grounds that it violated the equal protection of the laws as incorporated into the Due Process Clause of the Fifth Amendment.¹²⁶

Because the Obama administration, like Governor Brown in California, declined to defend the law, the Republican leadership of the House of Representatives, the Bipartisan Legal Advisory Group or BLAG, intervened. Five leaders of House Republicans led by Speaker of the House John Boehner argued the case for DOMA. The United States Court of Appeals for the Second Circuit affirmed the lower court decision to overturn the act. At this point, even with the law overturned at the circuit court level, the Justice Department appealed to the Supreme Court, arguing that the final decision on the law must come from the nation’s highest court.

In its decision, the Supreme Court focused only on Section 3’s denial of federal benefits to same-sex couples. In a five to four ruling, Justice Anthony Kennedy, writing for the Court, held that BLAG had standing because the Second Circuit required the IRS to issue a refund with interest. He then ruled that the denial of federal benefits to same-sex married couples violated the due process clause of the Fifth Amendment as it incorporated the equal protection of the laws.¹²⁷ The federal government must therefore offer all benefits to same-sex married couples in those states that recognized such marriages just as it does to opposite-sex ones. And then, just two years later, the Court faced head-on the issue of same-sex marriage as a constitutional right.

Same-sex marriage: The *Obergefell* case (2015)

The case involved four states--Michigan, Kentucky, Ohio, and Tennessee--all of which defined marriage as a union between one man and one woman. Fourteen same-sex couples and two men whose same-sex partners were deceased filed suits in Federal District Courts in their home States, claiming that state officials violated the Fourteenth Amendment by denying them the right to marry or to have marriages lawfully performed in another State given full recognition. Each District Court ruled in petitioners’ favor, but the Sixth Circuit consolidated the cases and reversed.¹²⁸

¹²⁵ *Perry, et al. v. Schwarzenegger, et al.*, United States Court of Appeals for the Ninth Circuit, 18-15292 (2010).

¹²⁶ *Windsor v. United States*, 833 F. Supp. 2d 394 (SDNY 2012). In 1954, the Court created and used the principle of “reverse incorporation” meaning that the due process clause of the Fifth Amendment incorporates the equal protection clause of the Fourteenth Amendment and applies it to the United States. See *Bolling v. Sharpe*, 347 U.S. 497 (1954), reaffirmed in *Adarand* in 1995.

¹²⁷ *United States v. Windsor*, 570 U.S. 744 (2013).

¹²⁸ *Obergefell v. Hodges*, Sixth Circuit, No. 14-556, slip op. at 25 (U.S. June 26, 2015).

The Supreme Court, voting five to four, overruled the Sixth Circuit, and held that the Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State. Justice Kennedy, who wrote the opinion of the Court, had not dealt with international convention or foreign law when he ruled in the *Windsor* decision. Writing for four others, Kennedy addressed marriage from a historical point of view, citing, among other sources, the Chinese philosopher Confucius and the Roman philosopher and legal scholar Cicero. He concluded that “it is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.”¹²⁹ Moreover, he decried the stance taken by Sir William Blackstone, in his *Commentaries on the Laws of England*, when he addressed the law of coverture, namely male-dominated society, setting the stage for the understanding that marriage could be between one man and one woman with the man controlling the strings. Ultimately, he went on, “as society began to understand that woman have their own equal dignity, the law of coverture was abandoned.”¹³⁰

Scalia’s response was to ignore these non-American sources and focus only on Kennedy’s attempt to turn the Constitution into an elastic document that could be bent and spread out however a majority on the Court wished: “what really astounds is the hubris reflected in today’s judicial Putsch. The five Justices who compose today’s majority are entirely comfortable concluding that every State violated the Constitution for all of the 135 years between the Fourteenth Amendment’s ratification and Massachusetts’ permitting of same-sex marriages in 2003.”¹³¹

Even more, he ridiculed Kennedy and his opinion, including his writing style. It is necessary to set out the entire rant to see the whole flavor of his dissent. The quotations Scalia cites come from Kennedy’s opinion for the Court.

The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality.” (Really? Who ever thought that intimacy and spirituality [whatever that means] were freedoms? And if intimacy is, one would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie. Expression, sure enough, *is* a freedom, but anyone in a long-lasting marriage will attest that that happy state constricts, rather than expands, what one can prudently say.) Rights, we are told, can “rise ... from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.” (Huh? How can a better informed understanding of how constitutional imperatives [whatever that means] define [whatever that means] an urgent liberty [never mind], give birth to a right?) And we are told that, “in any particular case,” either the Equal Protection or Due Process Clause “may be thought to capture the essence of a right in a more accurate and comprehensive way,” than the other, “even as the two Clauses may converge in the identification and definition of the right.” (What say? What possible “essence” does substantive due process “capture” in an “accurate and comprehensive way”? It stands for nothing whatever, except those freedoms and entitlements that this Court *really* likes. And the Equal Protection Clause, as employed today, identifies nothing

¹²⁹ *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), at 2594.

¹³⁰ *Ibid.*, at 2595.

¹³¹ *Ibid.*, at 2629, Scalia dissenting.

except a difference in treatment that this Court *really* dislikes. Hardly a distillation of essence. If the opinion is correct that the two clauses “converge in the identification and definition of a right,” that is only because the majority’s likes and dislikes are predictably compatible.) I could go on.¹³²

Thankfully, he did not go on.

Lessons learned

What, then, have we learned from this survey? First, the use of foreign law and international norms have long been part of constitutional interpretation. Beginning even with Jefferson’s words in the Declaration of Independence, many justices of the United States Supreme Court have not only learned a great deal from other nations’ practices and jurisprudence but have also clearly used it in their own decision making.

Second, Scalia’s originalism certainly informed his animus against citing foreign sources when adjudicating cases in American courts. The same holds true for Justice Clarence Thomas, an originalist currently on the Court, but it is far too early to determine the role two other originalists, now also on the Court, will play, namely Justices Neil Gorsuch and Brett Kavanaugh. Surely, for most originalists, the sole meaning of the earliest provisions of the Constitution have their roots in the English common law. Therefore, it is perfectly appropriate to cite English sources, such as use of the thought of Sir William Blackstone or Lord Camden. But to go farther than that is to undermine the original understanding of these provisions at the time they were drafted and ratified.

Third, those who reject originalism, and they need not only be progressive or liberal jurists, look to as many sources as possible to seek the means toward making just and equitable decisions. This is true of both Breyer (a progressive) and Kennedy (a conservative) and we could add to this list several other liberal and conservative justices, such as Ruth Bader Ginsburg (liberal¹³³) and Sandra Day O’Connor (conservative¹³⁴). The United States does not exist in a vacuum. It is, like it or not, part of a world community that requires its leaders at all levels of government and in positions of authority-executive, legislative, or judicial-to understand how the rest of the world works, how the rest of the world thinks about matters that may even have a direct impact on United States law and Constitution.

¹³² *Ibid.*, at 2630.

¹³³ “From the birth of the United States as a nation, foreign and international law influenced legal reasoning and judicial decisionmaking. Founding fathers, most notably, Alexander Hamilton and John Adams, were familiar with leading international law treatises, the law merchant, and English constitutional law. And they used that learning as advocates in legal contests,” “A Decent Respect for the Opinions of [Human]kind: The Value of a Comparative Perspective in Constitutional Adjudication,” Address before the International Academy of Comparative Law, American University, July 30, 2010, accessed Nov. 1, 2018, at https://www.supremecourt.gov/publicinfo/speeches/viewsspeech/sp_08-02-10.

¹³⁴ *Roper*, at 604, O’Connor, dissenting: “I disagree with Justice Scalia’s contention that foreign and international law have no place in our Eighth Amendment jurisprudence. Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency.”