Amicus Filings and International Law: Toward a Global View of the United States Constitution

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Over one hundred years ago, the Supreme Court announced that "[i]nternational 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." Since then, and especially since the start of the twenty-first century, international law has appeared in the Supreme Court's opinions in other contexts, not solely in cases involving international law directly. Several opinions rendered since 2002 featured prominent citations to briefs of amici curiae that were based on international law arguments. These briefs referred to international law in order to develop persuasive arguments where American history or precedent was silent or unfavorable as to their authors' desired outcome. For purposes of this Comment, international law encompasses not only treaties, but also the laws of foreign countries, and significant declarations and policy documents of international organizations.

This Comment will explore two topical areas: first, the use and format of amicus filings, and second, the role of international law in persuasive amicus filings. Three major decisions from 2002 and 2003 will anchor this article's discussion: Atkins v. Virginia, Lawrence v. Texas, and Grutter v.
Bollinger. Each of these cases featured significant amicus involvement, and taken together, they signal an important trend in constitutional interpretation.

Constitutional interpretation is the ultimate concern of this Comment. The central issue is whether the United States Supreme Court should consider international law when it determines the meaning and application of the United States Constitution. In other words, is every constitutional issue one where questions of right may depend on international law? And, on a more practical level, since the Court seems receptive to international law arguments in amicus filings, a related issue involves determining the most effective or persuasive way to use international law as an advocacy tool.

I. "MUST BE ASCERTAINED AND ADMINISTERED": HOW SHOULD THE SUPREME COURT DO ITS WORK?

The Supreme Court, sitting at the pinnacle of the American judicial system, often decides cases whose outcomes reach far beyond the lives of the named parties and their immediate interests. In making such important determinations, the Court wisely accepts input from entities other than the parties to a given dispute, including entities that might be involved in similar situations and those whose course of action will be impacted by the Court's decisions. This input comes from amici, friends of the court, who submit detailed briefs supplementing the parties' briefs, often in support of one of the parties, or, more accurately, in support of an outcome that corresponds to the amicus's interests.

At the Supreme Court, the outcome of a case is tantamount to a policy decision, and, for that reason, one author suggests that policy arguments are far more important to the Supreme Court than they are to other courts. The debate about the use of international law in the Court's

8. See Dinah Shelton, The Participation of Nongovernmental Organizations in International Judicial Proceedings, 88 AM. J. INT'L L. 611, 617-18 (1994) (describing the difficulty of ascertaining that all interests affected by a given case will be implicated by the parties' involvement).
[a] traditional function of an amicus is to assert "an interest of its own separate and distinct from that of the (parties)," whether that interest be private or public.
It is "customary for those whose rights (depend) on the outcome of cases . . . to file briefs amicus curiae, in order to protect their own interests."

Id. at 738 (Goldberg, J., dissenting) (alteration in original) (quoting FREDERICK BERNAYS WIENER, BRIEFING AND ARGUING FEDERAL APPEALS 269 (1961)).
decisions, then, is a debate about whether it is legitimate for the Court to make such important policy determinations based on the decisions of foreign courts, the policies of international institutions, or various treaties—whether ratified by the United States or not.\textsuperscript{11}

Prominent scholars argue both in favor of and against the Court’s use of foreign materials. Harold Koh, Dean of Yale Law School and former Assistant Secretary of State for Democracy, Human Rights, and Labor, argues that the Supreme Court has always, and rightly, relied on international sources.\textsuperscript{12} Such reliance is particularly important when American legal rules parallel the rules of other nations, when other nations’ courts apply rules similar to American courts’ rules, and, perhaps most controversially, when an American constitutional provision refers to “community standards” such as unusual punishment or due

\begin{itemize}
\item international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
\item international custom, as evidence of a general practice accepted as law;
\item the general principles of law recognized by civilized nations;
\item judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
\end{itemize}


One author, as part of a case study of the Israeli Supreme Court, notes that several factors converge and encourage courts to consult international materials as sources of law, regardless of whether doing so is part of the court’s governing statute or rules.

First, international agreements have become major factors in the economic and political spheres in an age of globalization. Second, there is an increasing tendency to bring disputes to international tribunals, notably exemplified in the establishment of the International Criminal Court. Third, and more significant to the discussion at hand, national courts are tending to increase their recourse to international instruments, particularly in the context of applying international human rights norms. This may be seen in those countries that are parties to the European Convention on Human Rights, and in those that have adopted constitutions that expressly mention the international law of human rights as a source of inspiration. The process that culminated in the adoption of the European Convention on Human Rights in the English Human Rights Act of 1998 is a prime example.


process of law. Gerald Neuman, Professor of Federal Jurisprudence at Columbia University School of Law, contends that arguments that categorically bar application of international sources "play on exaggerated fears: fear of foreign domination, fear of judicial activism, fear of the unknown." Like Dean Koh, Professor Neuman draws attention to the Court's historically extensive use of international sources.

13. Koh, supra note 12, at 45-46. Dean Koh explains that the Court has long considered foreign nations to be relevant communities for evaluating "community standards" and cites a variety of Eighth Amendment cases as illustrations. Id. Koh also suggests that turning to international precedent is good for international relations by arguing that "for any nation consciously to ignore global standards not only would ensure constant frictions with the rest of the world, but also would diminish that nation's ability to invoke those international rules that served its own national purposes." Id. at 44. The Court breaks down into two groups, according to Dean Koh. First are the proponents of "'nationalist jurisprudence,' exemplified by the opinions of Justices Scalia and Clarence Thomas," and "characterized by commitments to territoriality, extreme deference to national executive power and political institutions, and resistance to comity or international law as meaningful constraints on national prerogatives." Id. at 52. The other camp follows the "more venerable strand of 'transnationalist jurisprudence,' now being carried forward by Justices Breyer and Ginsburg," which recognizes "that one prominent feature of a globalizing world is the emergence of a transnational law, particularly in the area of human rights, that merges the national and international." Id. at 52-53; see also Daniel Bodansky, The Use of International Sources in Constitutional Opinion, 32 GA. J. INT'L & COMP. L. 421, 427-28 (2004) ("The policy interest in avoiding friction with the rest of the world is reflected in the Charming Betsy doctrine, which states that, wherever possible, statutes, and presumably the Constitution as well, should be construed so as to be consistent with international norms.").

The United States Court of Appeals for the Ninth Circuit explained its interpretation of the relationship between international and domestic law by stating that within the domestic legal structure, international law is displaced by "a properly enacted statute, provided it be constitutional, even if that statute violates international law." Those rulings, however, do not suggest that courts should refrain from applying the Charming Betsy principle. Rather, they stand for the proposition that when Congress has clearly abrogated international law through legislation, that legislation nonetheless has the full force of law. Although Congress may override international law in enacting a statute, we do not presume that Congress had such an intent when the statute can reasonably be reconciled with the law of nations.

Kim Ho Ma v. Ashcroft, 257 F.3d 1095, 1114 n.30 (9th Cir. 2001) (citations omitted).

14. Gerald L. Neuman, The Uses of International Law in Constitutional Interpretation, 98 AM. J. INT'L L. 82 (2004). Professor Neuman draws particular attention to Trop v. Dulles, 356 U.S. 86 (1958), as a fundamento of international law's application to the Eighth Amendment. Neuman, supra, at 84. Citing the Trop plurality's emphasis on the dignity of man and the "postwar international emphasis on the principle of human dignity," Professor Neuman notes that the plurality "expressly considered denationalization [as a criminal penalty] . . . in light of contemporary international understandings" and holding that it amounted to cruel and unusual punishment. Id. Professor Neuman cites the United States' "less intense engagement" in international human rights treaties and regimes as one of the main reasons international human rights law has only occasionally appeared directly in U.S. Supreme Court decisions. Id. at 86-87.
T. Alexander Aleinikoff, Dean of the Georgetown Law Center, argues that the use of international law is a sign of a "maturing legal system—one moving toward new understandings of sovereignty and popular sovereignty appropriate to an increasingly interconnected web of transnational legal relations." Conversely, Roger Alford, an associate professor of law at Pepperdine University, argues that consideration of foreign sources—especially when they are misused—impermissibly expands the canon of materials legitimately considered in constitutional evaluation, a canon that historically has encompassed the text, structure, and history of the Constitution, as well as the history of the American people and their national experience. Alford also contends that including foreign sources destabilizes constitutional decisionmaking and ignores the Supremacy Clause.

15. See Neuman, supra note 14, at 84.
16. T. Alexander Aleinikoff, International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate, 98 AM. J. INT'L L. 91, 91 (2004). Dean Aleinikoff suggests that customary international law has always—and properly—been viewed as a tertium quid, neither federal nor state law, but, rather, law to be applied in appropriate cases by federal courts in instances where they otherwise possess jurisdiction. . . . This understanding of [customary international law (CIL)] does not rule out the possibility that federal common law relates to foreign relations; it simply treats that issue as distinct from the question of the status of CIL.

18. Id. According to Professor Alford, "[u]sing international law as an interpretive aid also ignores the Supremacy Clause, which renders all of our laws subject to, and not source material for, our Constitution." Id. at 58. Professor Alford believes that “[t]o the extent that value judgments are a source of constitutional understandings of community standards, in the hierarchical ranking of relative values domestic majoritarian judgments should hold sway over international majoritarian values.” Id. Professor Alford’s concern is that reliance on global standards of decency undermines the sovereign limitations inherent in federalist restraints, limitations born out of respect for the reserved powers of the states to assess which punishments are appropriate for which crimes. To the extent that international majoritarians argue that global standards are relevant notwithstanding their inconsistency with American standards, this view reflects far less respect for federalism concerns than required by the Court.

17. Dean Koh argues in response that “U.S. courts are not deferring to the will of the majority of the world’s peoples instead of deferring to American will; rather, our courts are looking to foreign practice for additional evidence of modern standards of decency in a civilized society.” Koh, supra note 12, at 55 n.89.
18. Perhaps an answer to the subordination of “domestic majoritarian judgments” in general lies in The Federalist:
Seeking a middle ground, Michael Ramsey of the University of San Diego School of Law suggests a set of guidelines for "promoting rigorous use of international materials to define domestic constitutional rights." Professor Ramsey identifies four such guidelines: carefully defining the theories underlying the choice of materials to use and how to use them; not using international sources for selective outcomes; getting the facts right on the sources employed; and avoiding shortcuts to global consensus to help prevent overstatement.

The debate on the propriety of the Court's reliance on international law is heated and embraces a plethora of viewpoints and suggestions. What this debate is missing, and what this Comment endeavors to present, is an evaluation of one method by which the Court is exposed to international law arguments: the amicus brief. Are amicus briefs really just general policy recommendations in disguise, and if they are, should the Court pay them any mind?

This Comment examines the importance of amicus curiae filings at the U.S. Supreme Court, particularly those citing international law. The Comment discusses the relevant rules of amicus filing, as well as several major cases decided in recent terms in which the Justices' opinions reference not only persuasive amicus filings, but also compelling aspects of international law. The Comment then turns to a close analysis of the amicus briefs the Court cited, and proposes guidelines for what constitutes an effective amicus brief. The Comment concludes with an endorsement of the Court's use of international law and of the amicus filing process as an effective advocacy tool for resolving the most significant controversies of American law and society.

The members of the legislature will rarely be chosen with a view to those qualifications which fit men for the stations of judges; and as, on this account, there will be great reason to apprehend all the ill consequences of defective information, so, on account of the natural propensity of such bodies to party divisions, there will be no less reason to fear that the pestilential breath of faction may poison the fountains of justice.

**The Federalist No. 81, at 419 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).**


20. *Id.* at 72-80.

21. Consider the following language: "The analyses presented in the amicus briefs did not depend upon the details of Mr. McCarver's specific case, and resubmitted briefs would not focus on the details of Mr. Atkins' case." Joint Motion of All Amici in *McCarver v. North Carolina*, No. 00-8727, to Have Their *McCarver* Amicus Briefs Considered in This Case in Support of Petitioner at 1, Atkins v. Virginia, 536 U.S. 304 (2002) (No. 00-8452), 2001 WL 1682012.
II. "INTERNATIONAL LAW . . . PRESENTED": THE PROCESS OF FILING AN AMICUS BRIEF AND STUDY OF THREE SIGNIFICANT CASES

This portion of the Comment will serve two purposes. First, it will acquaint the reader with the Rules of the Supreme Court relevant to preparing and filing amicus briefs, and second, it will evaluate three recent decisions in which amicus filings played a significant role. This Comment will address the Rules of the Supreme Court at the merits stage.\textsuperscript{22}

A. Rules of the Supreme Court

Rule 37 of the Rules of the Supreme Court specifically governs amicus filings, and outlines at its outset the purpose of, and limits on, amicus filing:

An \textit{amicus curiae} brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An \textit{amicus curiae} brief that does not serve this purpose burdens the Court, and its filing is not favored.\textsuperscript{23}

The corollary to this rule's provision that the amicus brief address matters not already presented in the parties' briefs is that those who wish to file as amici must familiarize themselves with the arguments advanced

\textsuperscript{22} Discussion of briefs at the certiorari stage is beyond the scope of this Comment. For discussion of briefs at the certiorari stage, see Schweitzer, supra note 10, at 527-30.

\textsuperscript{23} SUP. CT. R. 37.1. Past Supreme Court practice was not so liberal in its acceptance of amicus briefs. In \textit{Northern Securities Co. v. United States}, 191 U.S. 555 (1903), the Court did not give amici leave to file because "[i]t [did] not appear that applicant [was] interested in any other case which [would] be affected by the decision of this case; as the parties [were] represented by competent counsel, the need of assistance [could not] be assumed and consent [was not] given," \textit{id.} at 556. On the importance of the identities of the filers, see Kelly J. Lynch, \textit{Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs}, 20 J. L. & POL. 33, 46-56 (2004). Lynch conducted a survey of seventy former Supreme Court clerks and concluded, among other things, that the identity of the filer can be very important; the Solicitor General was unquestionably the most respected filer. \textit{id.} at 47. Lynch also found that eighty-eight percent of the clerks gave special attention to briefs authored by prominent academics and reputed attorneys. \textit{id.} at 52-54. Note that the brief of Mary Robinson in \textit{Lawrence v. Texas} was authored by Harold Koh, now Dean of the Yale Law School, and the European Union's briefs in \textit{McCarver v. North Carolina} and \textit{Roper v. Simmons} were authored by Richard J. Wilson, a Professor at American University, Washington College of Law. Brief of Amici Curiae the European Union and Members of the International Community in Support of Respondent, \textit{Roper v. Simmons}, 125 S.Ct. 1183 (2005) (No. 03-633); Mary Robinson Brief, supra note 4; Brief of Amicus Curiae the European Union in Support of the Petitioner, \textit{McCarver v. North Carolina}, 532 U.S. 941 (2001) (No. 00-8727) [hereinafter European Union Brief].
by the parties, and must also show the relevance of the material to be submitted to the Court.\textsuperscript{24}

One way the Court ensures that amicus filings will not duplicate the parties' arguments is by requiring that the parties consent to each amicus filing at the merits stage.\textsuperscript{25} However, the Court may grant leave to file even if one or both of the parties withholds consent.\textsuperscript{26} One practitioner suggests that as a general matter, the Court will grant timely motions to file as amicus, and that counsel for the respective parties should consent to most filings as a result of this Court practice.\textsuperscript{27} Another aspect of the rules governing the relationship between parties and amici lies in Rule 37.6, which requires most amici to describe any legal or financial involvement the parties may have had in the preparation of the amicus brief.\textsuperscript{28} The Rules of the Supreme Court provide exacting guidelines for both the conceptual and technical aspects of amicus filing,\textsuperscript{29} and the

\begin{footnotes}
\item[24] See Schweitzer, supra note 10, at 527.
\item[25] Sup. CT. R. 37.3(a). The rule provides that "[a]n amicus curiae brief in a case before the Court for oral argument may be filed if accompanied by the written consent of all parties, or if the Court grants leave to file." Id. Some entities are exempt from filing a motion prior to filing a brief:

No motion for leave to file an amicus curiae brief is necessary if the brief is presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency's authorized legal representative; on behalf of a State, Commonwealth, Territory, or Possession when submitted by its Attorney General; or on behalf of a city, county, town, or similar entity when submitted by its authorized law officer.

Id. R. 37.4.
\item[26] Id. R. 37.3(b). The relevant provision reads:

[When] a party to a case before the Court for oral argument has withheld consent, a motion for leave to file an amicus curiae brief may be presented to the Court. The motion, prepared as required by Rule 33.1 and as one document with the brief sought to be filed, shall be submitted within the time allowed for filing an amicus curiae brief, and shall indicate the party or parties who have withheld consent and state the nature of the movant's interest.

Id.
\item[27] Schweitzer, supra note 10, at 525.
\item[28] Sup. CT. R. 37.6. In the first footnote of a brief, amici must disclose "whether counsel for a party authored the brief in whole or in part and . . . identify every person or entity, other than the amicus curiae, its members, or its counsel, who made a monetary contribution to the preparation or submission of the brief." Id. This rule exempts those entities listed in Rule 37.4 from the disclosure requirements that apply to other amicus filers. Id. See supra note 25 for a list of exempt entities.
\item[29] See Sup. CT. R. 37. For example, page limits for amicus briefs are somewhat shorter than for party briefs; at the merits stage, the limit for an amicus brief is thirty pages, whereas the parties' briefs on the merits may be fifty pages. Id. R. 33.1(g). The amicus brief must include a statement of the interest of the amicus, a summary of the argument, and a conclusion, requirements that differ slightly from the requirements for party briefs. Compare id. R. 37.5 with id. R. 24. Timing is also important
\end{footnotes}
potential filer must be cognizant of the rules at all stages of the filing process.

B. Atkins v. Virginia—A Feeble Effort?

In Atkins v. Virginia, the Court considered the constitutionality of capital proceedings against the mentally retarded, evaluating "whether such executions are 'cruel and unusual punishments' prohibited by the Eighth Amendment to the Federal Constitution." The Court's analysis began by invoking the concept of proportionality, then the Court construed and applied the Eighth Amendment in light of "evolving standards of decency" and concluded that the punishment at issue was excessive.

In order to reach its conclusion, the Court considered a number of factors, the first of which was state and federal legislation relevant to the execution of the mentally retarded. The Court outlined state legislation prohibiting the death penalty for the mentally retarded, and noted that

31. Id. at 307.
32. Id. at 311. Proportionality refers to the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." Id. (alteration in original) (quoting Weems v. United States, 217 U.S. 349, 367 (1910)).
33. Id. at 311-12, 321 (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958)). The Court was not "persuaded that the execution of mentally retarded criminals [would] measurably advance the deterrent or the retributive purpose of the death penalty." Id. at 321. The court also noted that "[a] claim that punishment is excessive "is judged not by the standards that prevailed in 1685...or when the Bill of Rights was adopted, but rather by those that currently prevail." Id. at 311.
34. Id. at 312-13. The Court emphasized that "the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" Id. at 312 (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).
35. Id. at 313-16. The Court did not provide the number of states that had prohibited the practice, but the Chief Justice did so in his dissent:

The Court pronounces the punishment cruel and unusual primarily because 18 States recently have passed laws limiting the death eligibility of certain defendants based on mental retardation alone, despite the fact that the laws of 19 other States besides Virginia continue to leave the question of proper punishment to...sentencing judges or juries familiar with the particular offender and his or her crime.

Id. at 321-22 (Rehnquist, C.J., dissenting).

In the Court's majority opinion, Justice Stevens apparently sought to deemphasize the numerical balance by writing that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change." Id. at 315 (majority opinion).
the practice of executing the mentally retarded was uncommon.\textsuperscript{36} The Court concluded that "[t]he practice . . . has become truly unusual, and it is fair to say that a national consensus has developed against it,"\textsuperscript{37}

The \textit{Atkins} Court bolstered, some might say bootstrapped,\textsuperscript{38} the concept of national consensus in footnote twenty-one, with the proclamation that "[a]dditional evidence makes it clear that this legislative judgment reflects a much broader social and professional consensus."\textsuperscript{39} The Court then cited the amicus briefs of two professional organizations\textsuperscript{40} and referenced the collective statement issued by a number of religious communities, including Christian, Jewish, Muslim, and Buddhist points of view, all condemning the questioned application of the death penalty.\textsuperscript{41} The Court then turned its attention abroad, stating that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."\textsuperscript{42} Thus, the amici brought a wide variety of arguments to the Court's attention, a fact not lost on the dissenting Justices.\textsuperscript{43}

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\item 36. \textit{Id.} at 316. The Court also noted that "even among those States that regularly execute offenders and that have no prohibition with regard to the mentally retarded, only five have executed offenders possessing a known IQ less than 70 since we decided \textit{Penry}.", \textit{Id.} Petitioner in the instant case had an IQ of fifty-nine. \textit{Id.} at 309 & n.5.
\item 37. \textit{Id.} at 316.
\item 38. \textit{See id.} at 326 (Rehnquist, C.J., dissenting).
\item 39. \textit{Id.} at 316 n.21 (majority opinion).
\item 40. \textit{Id.} (citing Brief of American Psychological Ass'n et al. as Amici Curiae in Support of Petitioner, \textit{McCarver} v. North Carolina, 532 U.S. 941 (2001) (No. 00-8727); Brief of the American Ass'n on Mental Retardation et al. as Amici Curiae in Support of Petitioner, \textit{McCarver}, 532 U.S. 941 (No. 00-8727)). The Court focused on the organizations' "official positions opposing the imposition of the death penalty upon a mentally retarded offender." \textit{Id.} The American Association on Mental Retardation's Brief was referenced again when the Court cited the state and national polls included in the brief's Appendix B to illustrate the Court's finding that "polling data shows a widespread consensus among Americans . . . that executing the mentally retarded is wrong." \textit{Id.} at 317 n.21.
\item 41. \textit{Id.} at 316 n.21. The Court highlighted the diversity of religious beliefs represented and noted that "even though their views about the death penalty differ, they all 'share a conviction that the execution of persons with mental retardation cannot be morally justified.'" \textit{Id.} (quoting Brief Amici Curiae of the United States Catholic Conference et al. in Support of Petitioners at 2, \textit{McCarver}, 532 U.S. 941 (No.00-8727)). Note that the amicus briefs for \textit{McCarver}, 532 U.S. 941, \textit{cert. dismissed as improvidently granted}, 533 U.S. 975 (2001), were transferred to the docket for \textit{Atkins}. \textit{Atkins} v. Virginia, 534 U.S. 1053 (2001) (mem.) (granting the motion of amicus filers in \textit{McCarver v. North Carolina} to have their amici curiae briefs considered in support of petitioner in this case).
\item 42. \textit{Atkins}, 536 U.S. at 316 n.21 (citing European Union Brief, \textit{supra} note 23, at 4).
\item 43. \textit{See id.} at 322 (Rehnquist, C.J., dissenting); \textit{id.} at 347-48 (Scalia, J., dissenting).
\end{footnotes}
Chief Justice Rehnquist reacted sharply.\textsuperscript{44} The Court's willingness "to place weight on foreign laws, the views of professional and religious organizations, and opinion polls in reaching its conclusion" troubled the Chief Justice.\textsuperscript{45} Regarding the Court's application of foreign law, he wrote that although "some of [the Court's] prior opinions have looked to 'the climate of international opinion,' . . . [the Court has] since explicitly rejected the idea that the sentencing practices of other countries could 'serve to establish the first Eighth Amendment prerequisite, that [a] practice is accepted among our people.'"\textsuperscript{46} The Chief Justice stressed the importance of evaluating the Eighth Amendment in terms of a \textit{national} consensus.\textsuperscript{47}

As biting as Chief Justice Rehnquist's assessment of the Court's work was, Justice Scalia went further. After excoriating the Court for its interpretation of data on state legislative action and statistics on the "infrequency" with which mentally retarded individuals were executed, Justice Scalia wrote that "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,' and respondents to opinion polls."\textsuperscript{48} Citing his own dissent in a prior case, Justice Scalia reiterated his view that the only relevant consensus for Eighth Amendment analysis is an American consensus.\textsuperscript{49}

\begin{itemize}
  \item \textsuperscript{44} The Chief Justice wrote that the Court's assessment of legislative judgment "more resembles a \textit{post hoc} rationalization for the majority's subjectively preferred result rather than any objective effort to ascertain the content of an evolving standard of decency." \textit{Id.} at 322 (Rehnquist, C.J., dissenting).
  \item \textsuperscript{45} \textit{Id.} The Chief Justice stressed the importance of legislative determinations, as well as those of sentencing juries, as the "sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment." \textit{Id.} at 324. He found consultation of other sources "antithetical to considerations of federalism." \textit{Id.} at 322.
  \item \textsuperscript{46} \textit{Id.} at 325 (final alteration in original) (citations omitted).
  \item \textsuperscript{47} \textit{Id.} ("For if it is evidence of a \textit{national} consensus for which we are looking, then the viewpoints of other countries simply are not relevant.").
  \item \textsuperscript{48} \textit{Id.} at 347 (Scalia, J., dissenting).
  \item \textsuperscript{49} \textit{Id.} at 348. Justice Scalia wrote in \textit{Atkins} that "'[w]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.'" \textit{Id.} (quoting Thompson v. Oklahoma, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting)). In \textit{Thompson}, the Court considered whether an individual who committed a capital crime at the age of fifteen could be subject to the death penalty. \textit{Thompson}, 487 U.S. at 818-19. The majority in \textit{Thompson}, in the process of finding that "the Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense," \textit{id.} at 838, referred to international law, as presented to the Court in an amicus brief from Amnesty International, \textit{id.} at 831 n.34.
\end{itemize}
Ultimately, six Justices found substantial reason to hold that the mentally retarded were exempt from the death penalty,\textsuperscript{50} while three Justices preferred a more narrow inquiry into whether the Eighth Amendment barred such application.\textsuperscript{51} Regardless of the outcome, one cannot read this opinion without noticing the importance of the amicus briefs and the prominent debate about foreign jurisprudence and international social norms those briefs sparked.

C. Grutter v. Bollinger—A Logical End Point?

Grutter v. Bollinger,\textsuperscript{52} a case that drew 108 amicus filings,\textsuperscript{53} required the Court to determine "whether the use of race as a factor in student admissions by the University of Michigan Law School . . . [was] unlawful."\textsuperscript{54} The Court, per Justice O'Connor joined by four of her colleagues, with two separate concurrences, ultimately upheld the law school's admissions program.\textsuperscript{55}

Arriving at that conclusion required the Justices to revisit Regents of University of California v. Bakke, where Justice Powell's opinion elucidated the Court's holding that "a 'State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.'"\textsuperscript{56} Based on Justice Powell's opinion in Bakke, Justice O'Connor prefaced her analysis of the Michigan law school's admissions practices by recalling that government-imposed racial classifications are subject to strict scrutiny and therefore must be "narrowly tailored to further compelling governmental interests."\textsuperscript{57} With little elaboration, Justice O'Connor announced that the Court would defer to the law school's

\textsuperscript{50} Atkins, 536 U.S. at 321. Justice Stevens wrote the majority's opinion and was joined by Justices O'Connor, Kennedy, Souter, Ginsberg, and Breyer. \textit{id.} at 305.

\textsuperscript{51} Id. at 324. The dissenters were Chief Justice Rehnquist, Justice Scalia, and Justice Thomas. \textit{id.} at 305.

\textsuperscript{52} 539 U.S. 306 (2003).

\textsuperscript{53} There were seventy briefs filed in support of affirmance, \textit{id.} at 311-13 n.*, twelve briefs filed in support of reversal, \textit{id.} at 310-11 n.*, and twenty-six briefs in support of neither party, \textit{id.} at 313-14 n.*.

\textsuperscript{54} \textit{id.} at 311.

\textsuperscript{55} \textit{Id.} at 310, 343-44. The majority's precise finding was that "the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body." \textit{Id.} at 343.

\textsuperscript{56} \textit{Id.} at 322-33 (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978)). Justice O'Connor addressed Bakke only to make the point that Justice Powell's opinion in Bakke "approved the university's use of race to further only one interest: 'the attainment of a diverse student body.'" \textit{Id.} at 323-25 (quoting Bakke, 438 U.S. at 311).

\textsuperscript{57} \textit{Id.} at 326.
educational judgment about the importance of diversity and on that basis found the governmental interest to be compelling.\(^\text{58}\) Citing the respondents' brief, Justice O'Connor distinguished the law school's interest in and goal of obtaining a "critical mass" of minority students from a straightforward quota, stating that if the law school's approach were merely percentage-based, it would have been patently unconstitutional.\(^\text{59}\) Support for the "critical mass" model came from several amici with diverse relationships to the case.\(^\text{60}\) These amici stressed the importance of student body diversity, not only for its academic benefits, but especially for its significance in preparing future business professionals and the military officer corps.\(^\text{61}\)

Continuing the Equal Protection analysis, Justice O'Connor evaluated whether the law school's program was narrowly tailored.\(^\text{62}\) Referencing Justice Powell's \textit{Bakke} opinion, she described a narrowly tailored use of race in admissions as one that is flexible and individualized.\(^\text{63}\) Justice O'Connor found that the law school's program was flexible and individualized and bore the hallmarks of a narrowly tailored plan in which race was "used in a flexible, nonmechanical way."\(^\text{64}\) Additionally, Justice O'Connor found that the law school's "critical mass" program was not merely a disguised quota.\(^\text{65}\) Finally, she emphasized that "race-conscious admissions policies must be limited in time."\(^\text{66}\)

\(^{58}\) \textit{Id.} at 328.

\(^{59}\) \textit{Id.} at 329-30 (citing \textit{Bakke}, 435 U.S. at 307). The law school's goal was to "enroll a critical mass of minority students... not simply 'to assure... some specified percentage of a particular group.'" \textit{Id.} at 329 (citation omitted). This was a critical distinction because the Court had previously held that "'[r]acial balance is not to be achieved for its own sake.'" \textit{Id.} at 330 (quoting \textit{Richmond v. J.A. Croson Co.}, 488 U.S. 469, 507 (1989)). Unlike a quota, a "critical mass is defined by reference to the educational benefits that diversity is designed to produce." \textit{Id.}

\(^{60}\) \textit{Id.} at 330-31 (citing briefs submitted by the American Educational Research Association, 3M, General Motors, and Julius W. Becton, Jr.).

\(^{61}\) \textit{Id.}

\(^{62}\) \textit{Id.} at 333-34.

\(^{63}\) \textit{Id.} at 334. Justice O'Connor's precise wording described a narrowly tailored use of race in a university's admissions program as "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." \textit{Id.} (quoting \textit{Bakke}, 438 U.S. at 317).

\(^{64}\) \textit{Id.}

\(^{65}\) \textit{Id.} at 335-36 ("The Law School's goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota.").

\(^{66}\) \textit{Id.} at 342. Without setting a deadline, Justice O'Connor suggested that the "durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." \textit{Id.} She took the law school "at its word that it would... terminate its race-conscious admissions program as soon as practicable." \textit{Id.} at 343.
In concurrence, Justices Ginsburg and Breyer seized upon the importance of ending race-conscious programs once their purpose has been accomplished, rather than simply determining whether such programs are tolerable. The first paragraph of the concurrence cited the "international understanding of the office of affirmative action." The concurrence then cited The International Convention on the Elimination of All Forms of Racial Discrimination, which the United States ratified in 1994. The Convention "endorses special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms." The Justices did not cite an amicus brief for the international law sources upon which they relied, but the brief of Human Rights Advocates and the University of Minnesota Human Rights Center advanced precisely the argument the concurring Justices adopted. Perhaps these amici were simply targeting Justice Ginsburg's conviction that "comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights."

Subsequent portions of this Comment address Justices' extrajudicial statements on international law. For purposes of familiarity with the Court's opinions in this case, it is sufficient to acknowledge that Justice Ginsburg turned to international law in her concurrence, and that amici urged the Justices to do exactly that. Although the Court's use of amicus filings is perhaps less apparent in _Grutter_ than it was in _Atkins_,

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67. See _id._ at 344-46 (Ginsburg, J., concurring).
68. _Id._ at 344.
69. _Id._
71. Brief Amici Curiae Human Rights Advocates and the University of Minnesota Human Rights Center in Support of Respondents at 16, _Grutter_, 539 U.S. 306 (Nos. 02-241, 02-516) [hereinafter Human Rights Advocates Brief] ("[A]s a means to ensure compliance with... treaty obligations, ... courts... should seek guidance from the Civil and Political Covenant in interpreting United States laws. Similarly, courts could seek the same interpretive guidance from Race Convention provisions. Failure to do so will undermine the United States [sic] credibility as a State Party to these, as well as other treaties.").
72. Ruth Bader Ginsburg & Deborah Jones Merritt, _Affirmative Action: An International Human Rights Dialogue_, 21 CARDOZO L. REV. 253, 282 (1999). Justice Ginsburg elaborated by writing that "[w]e are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups." _Id._
73. _Grutter_, 539 U.S. at 344 (Ginsburg, J., concurring).
74. See, e.g., Human Rights Advocates Brief, _supra_ note 71, at 16.
the Grutter docket was replete with amicus briefs, and the briefs’ arguments appeared in the concurring Justices’ opinion.

D. Lawrence v. Texas—Dangerous Dicta?

In Lawrence v. Texas, the Court evaluated “the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.” The Court was presented with three separate questions in its review: whether the Texas statute violated the Fourteenth Amendment’s Equal Protection Clause, whether conviction under the Texas statute violated petitioners’ “vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment,” and whether the Court should overrule Bowers v. Hardwick. The Court did not address the first question, beginning its analysis of the case by considering the Bowers question and the related due process inquiry.

In Bowers, the Court framed the issue as whether there was a fundamental right to engage in consensual sodomy, and then said that “[p]roscriptions against that conduct have ancient roots.” In reevaluating the historical basis of the Bowers decision, the Lawrence Court, per Justice Kennedy, twice cited the amicus brief of the American Civil Liberties Union en route to the conclusion that the “historical grounds relied upon in Bowers...are not without doubt and, at the very least, are overstated.” Justice Kennedy's opinion then cited a decision of the European Court of Human Rights decided approximately five years before Bowers, in which that court found that laws proscribing consensual homosexual conduct were invalid under the European Convention on Human Rights. Justice Kennedy went on to note that the European precedent was binding on some forty-five nations, and “at odds with the premise in Bowers that the claim put forward was

75. See supra note 53.
77. 539 U.S. 558 (2003).
78. Id. at 562. The Court noted that the statute defined the proscribed conduct as “'(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object.’” Id. at 563 (citing Tex. Penal Code Ann. § 21.01(1) (Vernon 2003)).
79. Id. at 564.
80. Id.
82. Lawrence, 539 U.S. at 568, 570.
83. Id. at 571.
84. Id. at 573 (citing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. 52 (1981)).
insubstantial in our Western civilization."85 After describing the case as one involving adults consenting to "sexual practices common to a homosexual lifestyle," the Court held that such individuals' "right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."86

Justice O'Connor, concurring in the judgment, took a different approach to resolving the issue; she based her opinion on the Equal Protection Clause rather than the Due Process Clause because she did not wish to join the Court in overruling Bowers.87 Justice O'Connor noted that the Texas law "treat[ed] the same conduct differently based solely on the participants,"88 that it was "directed toward gay persons as a class,"89 and that it affected an "array of areas outside the criminal law."90 Justice O'Connor concluded that where the basis for a law is moral disapproval of a class and its conduct, the law is contrary to the Constitution.91

85. Id. By extension, Justice Kennedy found that "Bowers was not correct when it was decided, . . . is not correct today[,] . . . [and] ought not to remain binding precedent." Id. at 578.

86. Id. at 578. Justice Kennedy also noted that "[o]ther nations . . . have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct." Id. at 576 (citing Mary Robinson Brief, supra note 4, at 11-12).

87. Id. at 579 (O'Connor, J., concurring).

88. Id. at 581.

89. Id. at 583.

90. Id. at 584 (explaining that as a result of the law, "being homosexual carries the presumption of being a criminal").

91. Id. at 585. Justice O'Connor wrote that “[a] law branding one class of persons as criminal based solely on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review.” Id. Justice O'Connor also noted that "Texas [could not] assert any legitimate state interest . . . such as national security or preserving the traditional institution of marriage." Id. It seems that in so doing, Justice O'Connor left open the issue of whether laws proscribing homosexual marriage might survive an Equal Protection challenge. This question became particularly important during the 2004 elections:

 Proposed state constitutional amendments banning same-sex marriage . . . defin[ing] marriage as between only a man and a woman, passed overwhelmingly in . . . 11 states, clearly receiving support from Democrats and independents as well as Republicans. Only in Oregon and Michigan did the amendment receive less than 60 percent of the vote.

In dissent, Justice Scalia criticized the Court for failing to perform the correct due process analysis. He found that, as a result of this failure, the Court overruled Bowers without addressing its central legal conclusion, an outcome that Justice Scalia found inconsistent with the notion of stare decisis. Justice Scalia's criticism consisted of restating the requirements for the recognition of a fundamental right or a constitutional entitlement. Going further, Justice Scalia argued that constitutional entitlements certainly do not "spring into existence, as the Court seems to believe, because foreign nations decriminalize conduct."

Justice Scalia concluded that "[t]he Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since 'this Court . . . should not impose foreign moods, fads, or fashions on Americans.'"

The Lawrence decision, like others before it, featured prominent filing and use of amicus briefs, a divided Court, and reference to and criticism of the reference to international law. It is a good starting point for this Comment's advancement of a typology of amicus briefs involving international law, and the application of international law in several amicus briefs whose arguments apparently persuaded the Court, and thus were persuasive policy advocacy pieces.

III. AMICUS BRIEFS FROM SIGNIFICANT SUPREME COURT CASES: A CATEGORIZATION AND ANALYSIS

This segment of the Comment evaluates the various types of amicus briefs submitted to the Court. The first step in this analysis is to explore

92. Lawrence, 539 U.S. at 586 (Scalia, J., dissenting) ("[N]owhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right' under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy were a 'fundamental right.'").

93. Id. at 586-87.

94. Id. at 593-98. Justice Scalia wrote that "an 'emerging awareness' is by definition not 'deeply rooted in this Nation's history and tradition[s],' as [the Court has] said 'fundamental right' status requires." Id. at 598 (first alteration in original). Justice Scalia extended his concept of a fundamental right by stating that "[c]onstitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions." Id.

95. Id. at 598.

96. Id. (quoting Foster v. Florida, 537 U.S. 990, 990 n. (2002) (alteration in original)). Justice Scalia concluded his dissent by commenting 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." Id. at 602. He also discussed the "homosexual agenda," the role of the judiciary, and homosexual marriage, among other topics. Id. at 602-05.

97. See, e.g., id. at 576-77.
the categorization of several different types of briefs. Thereafter, this Comment will consider the briefs submitted in the cases discussed above in light of the briefs’ categorization.

A. Types of Briefs

Dan Schweitzer, Supreme Court Counsel of the National Association of Attorneys General, has identified nine types of amicus briefs, four of which are relevant to this Comment’s analysis: the “practical implications” brief, the “different legal argument” brief, the “amplify one issue” brief, and the “historical background” brief.

Schweitzer describes the “practical implications” brief as one that “illuminate[s] the real-world consequences of the case.” The “different legal argument” brief alerts the Court to a legal argument other than those made by the parties. The “amplify one issue” brief is one that extends an argument already advanced by one of the parties. Finally, in the “historical background” brief the amicus expounds upon the “historical roots of the law or practice under review.” Of course, not every amicus brief limits itself to one type of content, but rather might strengthen its argument by utilizing different types of reasoning. After all, the purpose of the amicus brief is to bring relevant material to the attention of the Court, and the amicus developing an argument based on international law may find several ways to articulate its policy concerns.

The next step in this Comment’s analysis is to evaluate how the successful, which is to say, cited, briefs in the cases discussed above fit into this typology and whether one type of brief is a better fit than others for a particular type of case.

B. Atkins and Amplification

In Atkins v. Virginia, the Court cited the amicus brief of the European Union for its illustration of evolving standards of decency regarding the execution of the mentally retarded. That brief’s argument reflects the European Union’s belief that “[t]here is growing international consensus

98. Schweitzer, supra note 10, at 531-538.
99. Id. at 531-32. Schweitzer also characterizes this type of brief as a “Brandeis” brief, in reference to a brief filed by Louis Brandeis in Muller v. Oregon, 208 U.S. 412 (1908). Schweitzer, supra note 10, at 532. This brief may acquaint the Court with “more detailed information than the party and ... reference a wider variety of sources.” Id.
100. Schweitzer, supra note 10, at 534.
101. Id. at 535.
102. Id. at 536.
103. See id. at 531.
Amicus Filings and International Law

against the execution of persons with mental retardation."\textsuperscript{105} The first part of the European Union's argument describes the worldwide status of the death penalty generally, as well as its scarce application to the mentally retarded specifically.\textsuperscript{106} The second part of the argument describes the "body of norms and standards that prohibit the execution of the mentally retarded."\textsuperscript{107} The brief concludes with a strong condemnation of the United States' policy regarding the death penalty and the reminder that "the United States is also a member of the community of nations, and with regard to the execution of mentally retarded defendants, the United States stands apart from that community as one of the last remaining nations . . . still executing mentally retarded persons."\textsuperscript{108} This reminder underscores the brief's implicit argument that the practices of the international community are relevant to the Eighth Amendment inquiry into "evolving standards of decency."\textsuperscript{109}

The European Union's brief functions as issue amplification; Atkins's brief mentioned only that "on the world-wide stage, the few jurisdictions in the United States that continue to execute mentally retarded persons now stand all but alone."\textsuperscript{110} In addition to amplifying the evolving standards issue, the European Union's brief provided a historical description of international efforts to accord legal protections to the mentally retarded, as well as a description of the history of international censure of the American practice of executing the mentally retarded.\textsuperscript{111}

It is reasonable to categorize this brief as a historical background brief

\textsuperscript{105} European Union Brief, \textit{supra} note 23, at 2. Evidence of this proposition lies in the statement that "since 1995 only three countries in the world are reported to have carried out executions of mentally retarded defendants." \textit{Id.}

\textsuperscript{106} \textit{Id.} at 10-15. The brief cites the Treaty of Amsterdam, which is binding on all the E.U. member states. \textit{Id.} at 11. Ratification of the treaty is required for states joining the European Union, and includes "a declaration stating that the death penalty is no longer applied in any EU member state." \textit{Id.} Additionally, forty-three states in Europe, including those of the European Union, have joined the Council of Europe, where "[m]embership . . . is conditioned upon abolition of or a moratorium on the death penalty." \textit{Id.} at 11-12. Moreover, "in a 2001 report of the Secretary General of the United Nations, only Togo reported that its law would allow the death sentence to be imposed on persons who are mentally retarded." \textit{Id.} at 12 (citing United Nations Commission on Crime Prevention and Criminal Justice Report of the Secretary-General, Capital Punishment and Implementation of Safeguards Guaranteeing Protection of Those Facing the Death Penalty, \textsection 105 U.N. Doc. E/CN.15/2001/10 (2001)).

\textsuperscript{107} \textit{Id.} at 16. European Union Brief, \textit{supra} note 23, at 11. The norms cited are distilled from the actions and policy of the United Nations and other bodies, such as the Parliamentary Assembly of the Council of Europe and the Organization of American States. \textit{Id.} at 16-18.

\textsuperscript{108} \textit{Id.} at 22.

\textsuperscript{109} \textit{Id.} at 22-23.

\textsuperscript{110} Brief for Petitioner at 40, Atkins v. Virginia, 536 U.S. 304 (2002) (No. 00-8452).

\textsuperscript{111} European Union Brief, \textit{supra} note 23, at 10-13, 18-22.
because of its explanation of the development of rules on the mentally retarded.\textsuperscript{112} The brief also explained the ongoing forms of censure to which the United States was subject in various international organizations as a result of allowing the execution of the mentally retarded.\textsuperscript{113} Thus the brief has a practical implications emphasis insofar as it describes the consequence, namely the continuing disapproval of other nations, of maintaining the status quo.\textsuperscript{114} This multifaceted approach apparently served the amicus's purpose well.

The European Union's statement of interest is noteworthy; it shows that the E.U. is opposed to the death penalty generally, not merely in the context of the mentally retarded: "The abolition of the death penalty contributes to the enhancement of human dignity and the progressive development of human rights."\textsuperscript{115} The European Union continues to work toward abolition of the death penalty, both at home, through the European Charter of Fundamental Rights, and in the United States, through its amicus filings in this and other death penalty cases.\textsuperscript{116}

\begin{thebibliography}{116}
\bibitem{112} See Schweitzer, \textit{supra} note 10, at 536.
\bibitem{113} European Union Brief, \textit{supra} note 23, at 19-22.
\bibitem{114} See Schweitzer, \textit{supra} note 10, at 531-32.

An assessment of the relationship between Europe and the United States, and the importance of their historical bonds and political future, was made by Helmut Schmidt, former Chancellor of the Federal Republic of Germany, in a 2003 address at the German Historical Institute in Washington, D.C. Schmidt's remarks, though politically focused, also serve as a justification for American courts' use of European practice to clarify American Constitutional questions. Schmidt said that:

\textquote{Good neighborly relations and cooperation between America and Europe need to be maintained. Whether American or European, we stand upon the shoulders of common ancestors such as Montesquieu, Rousseau, and Voltaire, and all of us follow in the footsteps of the American Federalist Papers. The basic principles of democracy and human rights were created in America, England, Holland, France, and other European countries as the result of mutual collaboration. It was a long process that evolved slowly. . . . Both Europeans and Americans have inherited the same enormous wealth of insights into culture and civilization. It is desirable to remind the public of our common roots.}


\bibitem{115} European Union Brief, \textit{supra} note 23, at 1. It should not escape notice, as evidence of the policy-driven nature of this amicus filing, that the petitioner's name appeared only in the case captions within the brief; neither the petitioner's name nor specific details of his case appeared at any other point in the European Union Brief. \textit{See id.}

C. Grutter v. Bollinger and Applicable Treaty Standards

In a jointly filed brief, Human Rights Advocates and the University of Minnesota Human Rights Center stressed that prohibiting the University of Michigan’s Law School from considering diversity factors would be “contrary to the United States’ treaty obligations which are . . . part of the Law of the Land under the Supremacy Clause of the United States Constitution.”\textsuperscript{117} The amici argued that, as signatory to both the International Convention on the Elimination of All Forms of Racial Discrimination (Race Convention) and the International Covenant on Civil and Political Rights, it was imperative that the United States follow its treaty obligations.\textsuperscript{118} According to the Race Convention, special treatment of minorities is acceptable for the narrow purpose of “securing adequate advancement of certain racial or ethnic groups . . . requiring such protection as may be necessary in order to ensure such groups . . . equal enjoyment or exercise of human rights or fundamental freedoms.”\textsuperscript{119} After citing Supreme Court precedent endorsing a race-based preference program as a remedy for discrimination, the amici stated flatly that “[a] prohibition of affirmative action programs will directly conflict with the obligation of the United States as a party to the Race Convention.”\textsuperscript{120} Amici concluded their brief by arguing that “as a means to ensure compliance with the treaty obligations, the courts of this country should seek guidance” from such treaties when interpreting United States laws.\textsuperscript{121} Perhaps more important to these amici, the broad goal of eradicating gender and racial discrimination, embodied in treaty law to which the United States is a party, is advanced by the Court’s consideration of those treaties.\textsuperscript{122}

The Human Rights Advocates amicus brief, like the European Union brief described above, involved several different types of arguments or constructions. In large part, the brief argued the practical implications of

\begin{itemize}
  \item “[n]o one shall be condemned to the death penalty, or executed.” Charter of Fundamental Rights, supra, art. 2 para. 2. The Charter also provides that “[n]o one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.” Id. at art. 19, para. 2.
  \item Id. at 3-4.
  \item Id. at 10. Amici also advanced the argument, regarding affirmative action programs, that “treaty obligations themselves can constitute a compelling state interest to justify the establishment of such programs.” Id. at 9.
  \item Id. at 16.
  \item Id. at 15-16.
\end{itemize}
treaty law to which the United States is party. It also made a different legal argument than the parties made; the respondents relied on wholly separate arguments in their brief, entirely passing over treaty law. In this case, the amicus’s focus on a different argument and source of law seems to have been prescient and helpful; elements of the amicus filing appear tacitly in the opinion of the concurring Justices, and the principle of affirmative action was reaffirmed and harmonized with equal protection concerns.

D. Lawrence v. Texas: The Promotion of Freedom Worldwide?

*Lawrence v. Texas* saw the filing of numerous amicus briefs on both sides, but one in support of the petitioners is noteworthy for the identity its filers and its usage of international law. Mary Robinson, former United Nations High Commissioner for Human Rights and former President of the Republic of Ireland, joined five human rights advocacy organizations to argue that the Supreme Court “should not decide in a vacuum whether criminalization of same-sex sodomy between consenting adults violates constitutional guarantees of privacy and equal protection.” The amici reminded the Court of “Chief Justice

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123. See id. at 10.

124. See id.; Brief for Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241). The respondents’ brief argued that the diversity goal of the law school was a compelling state interest in and of itself, and that the law school’s admissions policies were narrowly tailored to achieve that goal. Id. at 12. The respondents’ brief focused on American precedent as well as the facts presented in the prior litigation of the case. See id. at 17-21, 38-49.

125. See Grutter, 539 U.S. at 343; id. at 344-45 (Ginsburg, J., concurring).


127. Id. at 561 n.*.

128. Mary Robinson Brief, supra note 4, at 2. The other amici describe themselves as follows:

*Amnesty International* is an international human rights organization established in 1961 to promote a world in which every person enjoys the human rights enshrined in the Universal Declaration of Human Rights. . . .

*Human Rights Watch*, the largest U.S.-based international human rights organization, was established in 1978 to report on violations of human rights worldwide.

*Interights*, a London-based international human rights organization, was established in 1982 to provide leadership in the legal protection of human rights worldwide.

*The Lawyers Committee for Human Rights*, based in New York City, has worked since 1978 in the United States and abroad to create a secure and humane world by advancing justice, dignity, and respect for the rule of law.

*Minnesota Advocates for Human Rights*, founded in 1983, is the largest Midwest-based non-governmental organization engaged in international human rights work.

Id. at 1.
Rehnquist's 1989 admonition that "now that constitutional law is solidly grounded in so many [foreign] countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process." With the Chief Justice's remarks as a foundation, the amici stressed that "[l]egal concepts like 'privacy,' 'liberty,' and 'equality' are not U.S. property, but have global meaning."

The amici recited three theories of privacy the Texas statute violated: decisional privacy, relational privacy, and zonal privacy. Each of these theories of privacy had been used in the decisions or policies of foreign tribunals or international organizations to protect the privacy rights of

On the significance of collaboration in filing, see Lynch, supra note 23, at 56-65. The former Supreme Court clerks Lynch surveyed expressed general favor for collaboration on amicus filings, but some also noted that collaboration might cause the ultimate filing to be "'stripped down'" and fail to reflect the details of each separate party's favored arguments. Id. at 59-60. The results of Lynch's survey also suggest that the names of the collaborators, and not their number, would draw more attention. Id. at 61.

129. Mary Robinson Brief, supra note 4, at 5-6 (quoting William H. Rehnquist, Constitutional Courts—Comparative Remarks (1989), in GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM 412 (Paul Kirchhof & Donald P. Kommers eds., 1993) (alteration in original) (emphasis omitted)). The Chief Justice explained:

When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.

Id. at 6 n.7.

130. Id. at 8. The amici then stated that the "Court can use the experience of nations that share its common constitutional genealogy as laboratories to test workable social solutions to our common constitutional problems." Id. The concept of using states as laboratories arose in Justice Brandeis' dissent in New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), when he argued that states in this nation could serve as such laboratories, id. Justice Breyer specifically introduced the concept of using other nations' experiences for empirical guidance when he wrote of several European countries that "their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem—in this case the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent governmental entity." Printz v. United States, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

131. Mary Robinson Brief, supra note 4, at 9-18. The amici describe decisional privacy in terms of "the most intimate and personal choices a person can make... choices central to personal dignity and autonomy." Id. at 9 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)). Relational privacy deals with the nature of family relationships, and the amici contended that same-sex couples could form relationships akin to traditional notions of family. Id. at 14-15. Zonal privacy regards the Court's "heightened protection to activities that occur within the home." Id. at 15.
same-sex couples. The amici concluded their brief with the argument that "international and foreign court decisions have invalidated sodomy laws for expressing an irrational animus and prejudice that denies a politically unpopular group equal treatment." This argument had two components: (1) Sodomy laws are based in "irrational animus and prejudice; and (2) impermissible discrimination based on sexual orientation" results from such laws. Both components of the argument had been shown by international and foreign law to violate "fundamental global principles of equal treatment."

The Mary Robinson brief fits into several categories. First, it makes copious historical references to decisions of foreign courts and international bodies, drawing attention to the parallels to American decisions. It also makes a different legal argument from the petitioner's brief; the petitioner made no reference to international law or foreign law as a justification for either a fundamental rights-based or equal protection challenge to the Texas statute. The decision in this case depended not on the equal protection grounds the Mary Robinson brief advanced, but on a kind of fundamental rights model; only Justice O'Connor relied on the Equal Protection Clause to invalidate the Texas statute. Nevertheless, the amici's policy interests were advanced by the

132. Id. at 8-18.

133. Id. at 18. This argument borrowed the wording of the Supreme Court's decision in Romer v. Evans, in which the Court "struck down a Colorado constitutional amendment forbidding legal protection of sexual conduct between same-sex partners, in part because the law 'imposed a broad and undifferentiated disability on a single named group.'" Id. (quoting Romer v. Evans, 517 U.S. 620, 632 (1996)). The Mary Robinson Brief also referenced Justice Scalia's dissent in Thompson v. Oklahoma, in which he wrote about a practice "so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores but, text permitting, in our Constitution as well." Id. at 7-8 (quoting Thompson v. Oklahoma, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting)). The brief's linkage of international materials to the language of prior American cases reinforces the amici's contention that international law is compatible with the Supreme Court's way of making decisions. See id. at 29-30.

134. Id. at 18.

135. Id. at 18-29. The point of the argument is that virtually every international human rights treaty and every democratic country's constitution contain provisions guaranteeing the right to equal protection of the laws. Since the 1970s, international and foreign courts have increasingly come to recognize that these provisions bar discrimination based not only on race, sex, and religion, but sexual orientation as well. In addition, both international courts and treaty bodies have ruled that various treaties' equal protection provisions cover sexual-orientation discrimination.

Id. at 23.

136. Id. at 3-8, 18-29.

137. See id. at 2; Brief of Petitioner, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102).

138. Lawrence, 539 U.S. at 578-79; id. at 579-85 (O'Connor, J., concurring).
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decision, and a strong equal protection argument for same-sex rights may be germane to later cases.

IV. "QUESTIONS OF RIGHT"

The remainder of this Comment addresses how the potential amicus, as a policy advocate, can attempt to guide the Court’s reasoning and whether it is appropriate for the Court to allow the policy arguments of non-parties to influence its decisions.

A. Evolving Standards

Michael Ramsey counsels that the consideration and application of international law by the Supreme Court be rigorous and careful. Arguably, the threshold for such consideration, or at least Ramsey’s first suggested criterion for rigorous application of international law, is careful articulation of a theory as to which materials to utilize and how to use them. By articulating such a theory at the outset, amici and the Court prevent the use of international materials to achieve selective outcomes, or the use of international materials solely for rights-enhancing results. Like the articulation of a theory of relevance, careful attention to all the facts ensures that the application of international law does not impede careful inquiry into all potentially relevant sources of information, which, by extension, might lead one to a false conclusion of “consensus.”

Ramsey’s argument is persuasive only to the extent one accepts its foundations: that international law must involve “sustained widespread custom followed out of a sense of legal obligation”; that the only legitimate means of interpreting the Constitution have “longstanding roots”; and that the Supreme Court’s mode of adjudication must always involve a “unifying theory” with respect to the materials it does consult. Where, as in the Court’s Eighth Amendment jurisprudence, a challenged practice is measured against “evolving standards of decency,” it is counterproductive for the Court to restrict itself to outdated and unavailing methods of decisionmaking. While longstanding roots are certainly evidence of pedigree, perhaps “new understandings of sovereignty and popular sovereignty” rightly encourage the court to

139. See Ramsey, supra note 19, at 69-70.
140. Id. at 72.
141. Id. at 76.
142. See id. at 77-79.
143. See id. at 79-80.
144. See id. at 71-72.
consider different arguments from different sources.\textsuperscript{145} When American history or precedent is silent or inconclusive the Court does not deny certiorari simply because the case is not readily solved by extant domestic means. The unifying theory that allows consideration of international materials alongside traditional, domestic materials, is the belief that international law, in all its manifestations, is or can be part of our law.\textsuperscript{146}

\textbf{B. Amicus Advocacy}

While a rigorous and principled application of international law is desirable, one cannot forget that the role of the amicus curiae is to bring relevant matters to the attention of the Court.\textsuperscript{147} There are two levels of relevance: matters relevant to the policy interests of the amicus,\textsuperscript{148} and matters the Court deems relevant to the outcome of a given case.\textsuperscript{149}

\textsuperscript{145} Aleinikoff, \textit{supra} note 16, at 91. Aleinikoff suggests (with considerable refinement) that Congress provide for challenges to “federal statutes and executive branch actions that violate [customary international law].” \textit{Id.} at 101. Such an action would reflect a move to embrace the international norms “hammered out through more than two centuries of debate, adjudication, and at times force of arms—[that] strike the appropriate balance between rights and governmental powers in the domestic sphere.” \textit{Id.}

\textsuperscript{146} See Koh, \textit{supra} note 12, at 43 & n.1. Constitutional jurisprudence has developed over time in a variety of ways, as highlighted by Stanley Katz, a Lecturer at the Woodrow Wilson School of Public and International Affairs at Princeton University. Stanley N. Katz, \textit{A New American Dilemma?: U.S. Constitutionalism vs. International Human Rights}, 58 U. MIAMI L. REV. 323, 338 (2003). He wrote that

[c]onstitutional practice changes, and with it the way the republic governs itself must change. There is no logical reason American constitutional tradition could not embrace international human rights ideals—no built-in structural resistance exists. But in fact, the tradition has failed us when it comes to human rights.

Thus, I simply want to suggest that our textualism is a sort of anchor to windward, inhibiting innovation, especially when constitutional changes trigger atavistic political responses. Textualism impels us to question, and sometimes to challenge, innovations that might otherwise be much easier to accept. The textualist tradition is more instinctive than rational, and makes it very hard to gain constitutional acceptance for ideas and practices that are rooted neither in the text nor found in our lived traditions. Insofar as human rights are concerned, textualism interacts with both Washingtonian fears of “foreign entanglement” and Anti-Federalist resistance to the aggrandizement of the government in Washington at the time of the Constitution’s ratification.

\textit{Id.} at 338-39.

\textsuperscript{147} \textit{SUP. CT. R.} 37.

\textsuperscript{148} See Schweitzer, \textit{supra} note 10, at 531.

\textsuperscript{149} See Lynch, \textit{supra} note 23, at 36; Schweitzer, \textit{supra} note 10, at 531. Emphasizing the importance of and difficulties associated with writing to a particular judge or bench, one author wrote that “[l]ike other litigators, civil rights groups advocates look at judges, and assess what they will find persuasive. International law has not fit that criteria. Indeed, some litigators have been concerned that citations to international law would signal an essential weakness in their case under domestic law.” Martha S. Davis,
Each amicus who files a brief ought to consider the policy it seeks to advance and then determine which international materials best serve that goal. In presenting those materials, overstatement is tempting, but avoidable. Consider the Mary Robinson brief discussed above. Rather than simply stating that a global consensus or universal movement exists regarding the right of same-sex couples to engage in sodomy, the amici stated that “[o]ther nations with similar histories, legal systems, and political cultures have already answered these questions in the affirmative.” Similarly, in the European Union brief discussed above, the amicus, though referencing some United Nations sources of a less persuasive nature, also wrote emphatically and extensively about the European Union and its member states, the Council of Europe and its member states, and jurisdictions in the Western Hemisphere generally.

Determining the ultimate relevance of international materials is the Court’s province and depends upon the nature of the case. Where “evolving standards of decency” are at issue, international materials from jurisdictions most like the United States have helped the Court, as Justice Blackmun suggested they should. Where equal protection


150. See Ramsey, supra note 19, at 72-73. One organization that has been particularly successful at using international law in domestic courts is the Center for Constitutional Rights (CCR), based in New York. CCR is a non-profit legal and educational organization dedicated to protecting and advancing the rights guaranteed by the U.S. Constitution and the Universal Declaration of Human Rights.

CCR uses litigation proactively to advance the law in a positive direction, to empower poor communities and communities of color, to guarantee the rights of those with the fewest protections and least access to legal resources, to train the next generation of constitutional and human rights attorneys, and to strengthen the broader movement for constitutional and human rights.

CTR. FOR CONSTITUTIONAL RIGHTS, ABOUT CCR, http://www.ccr-ny.org/v2/about/mission_vision.asp (last visited Nov. 4, 2005). CCR pioneered human rights advocacy using the Alien Tort Claims Act (ATCA, also known as the “Alien Tort Statute”): “[i]n 1980, our Filártiga v. Peña-Irala [case] created a right to sue for human rights violations occurring anywhere in the world under the then-obscure Alien Tort Claims Act.” See id. For more on the ATCA, including the Supreme Court’s most recent opinion regarding its scope and uses, see infra note 165.

151. Mary Robinson Brief, supra note 4, at 2.

152. See Ramsey, supra note 19, at 78 (criticizing the European Union’s Brief’s reliance on a U.N. study that depended on voluntary responses because most respondents did not allow the death penalty for anyone, and because the study’s authors did not undertake any independent investigations).


154. Harry A. Blackmun, The Supreme Court and the Law of Nations, 104 YALE L.J. 39, 48 (1994). The reason was plain to Justice Blackmun, who wrote that “[i]f the substance of the Eighth Amendment is to turn on the ‘evolving standards of decency’ of
the civilized world, there can be no justification for limiting judicial inquiry to the opinions of the United States." \textit{Id.}

The debate about use of international sources in Eighth Amendment decisionmaking played itself out among the Justices in \textit{Stanford v. Kentucky}, 492 U.S. 361 (1989), overruled in part by \textit{Roper v. Simmons}, 125 S.Ct. 1183 (2005). For a discussion of \textit{Roper}, see \textit{infra} note 165. In \textit{Stanford}, the issue was whether "imposition of the death penalty on those who were juveniles when they committed their crimes falls within the Eighth Amendment's prohibition against 'cruel and unusual punishments.'" \textit{Stanford}, 492 U.S. at 368. Amici had briefed the Court on the international law bases for concluding that juveniles should not be subject to the death penalty. \textit{E.g.}, Brief of the Office of the Capital Collateral Representative for the State of Florida as Amicus Curiae in Support of Petitioner at 19, \textit{Stanford}, 492 U.S. 368 (No. 87-5765), 1988 WL 1026340. In an opinion announcing the Court's judgment, Justice Scalia tersely stated that it is American conceptions of decency that are dispositive, rejecting the contention of petitioners and their various \textit{amici} (accepted by the dissent) that the sentencing practices of other countries are relevant. While "[t]he practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well," they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people. \textit{Stanford}, 492 U.S. at 369 n.1 (alteration in original) (citations omitted).

In his dissent, Justice Brennan wrote that "[o]ur judgment about the constitutionality of a punishment under the Eighth Amendment is informed, though not determined, by an examination of contemporary attitudes toward the punishment, as evidenced in the actions of legislatures and of juries. The views of organizations with expertise in relevant fields and the choices of governments elsewhere in the world also merit our attention as indicators whether a punishment is acceptable in a civilized society." \textit{Id.} at 383-84 (Brennan, J., dissenting) (citations omitted). Justice Brennan regarded the weight of international practice against execution of juveniles as substantial, repeatedly citing an amicus brief from Amnesty International, as well as treaty law the United States had signed or ratified:

Many countries, of course—over 50, including nearly all in Western Europe—have formally abolished the death penalty, or have limited its use to exceptional crimes such as treason. Twenty-seven others do not in practice impose the penalty. Of the nations that retain capital punishment, a majority—65—prohibit the execution of juveniles. Sixty-one countries retain capital punishment and have no statutory provision exempting juveniles, though some of these nations are ratifiers of international treaties that do prohibit the execution of juveniles. Since 1979, Amnesty International has recorded only eight executions of offenders under 18 throughout the world, three of these in the United States. The other five executions were carried out in Pakistan, Bangladesh, Rwanda, and Barbados. In addition to national laws, three leading human rights treaties ratified or signed by the United States explicitly prohibit juvenile death penalties. Within the world community, the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disapproved. \textit{Id.} at 389-90 (citations omitted) (footnotes omitted).
concerns are implicated, the Court has been unwilling to cite international sources, but at least one Justice has recognized the importance of America's international heritage and the history of countries that inform its legal system. The current formulation of fundamental rights jurisprudence may not easily lend itself to incorporation of foreign concepts, but there may nevertheless be reason to look to the history and practice of other jurisdictions and analyze their concepts of fundamental rights, particularly if doing so evidences a strong consistency or contrast between the United States and other similar countries. The amicus who can incorporate references to

155. See, e.g., Romer v. Evans, 517 U.S. 620, 635 (1996) (deciding, without reference to international law, that a portion of Colorado’s Constitution was unconstitutional for violating the Equal Protection Clause by “classif[y]ing homosexuals not to further a proper legislative end but to make them unequal to everyone else”).

156. Malinski v. New York, 324 U.S. 401, 413-14 (1945) (Frankfurter, J., concurring) (“The safeguards of ‘due process of law’ and ‘the equal protection of the laws’ summarize the history of freedom of English-speaking peoples running back to Magna Carta and reflected in the constitutional development of our people.”).

157. See Washington v. Glucksburg, 521 U.S. 702, 720-21 (1997). One of the major difficulties in applying international law to a fundamental rights question is the method by which the Court analyzes such a question:

Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, “deeply rooted in this Nation’s history and tradition,” and “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed.” Second, we have required in substantive-due-process cases a “careful description” of the asserted fundamental liberty interest. Our Nation’s history, legal traditions, and practices thus provide the crucial “guideposts for responsible decisionmaking,” that direct and restrain our exposition of the Due Process Clause. As we stated recently in Flores, the Fourteenth Amendment “forbids the government to infringe . . . ‘fundamental’ liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”

Id. (alterations in original) (citations omitted).


Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court’s decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived
treaties the United States has ratified might be in the best position of all because, subject to reservations entered by the Senate upon ratification, a ratified treaty is true international law, binding upon the United States through the Supremacy Clause. 159

The true test of relevance is in each Justice’s decision, and, for that reason, the Court is right to accept policy suggestions from its amici. The amicus process presents a forum for the expression of beliefs and arguments on all sides of an issue; strident defenders of traditional

is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

It is this outlook which has led the Court continuingly to perceive distinctions in the imperative character of Constitutional provisions, since that character must be discerned from a particular provision’s larger context. And inasmuch as this context is one not of words, but of history and purposes, the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This “liberty” is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

Id. (citations omitted).

In contrast, one scholar defines a fundamental right, in the broadest sense of that term, in terms of its features.

Fundamental rights protected by positive legal regimes commonly exhibit three features. First, their embodiment in positive law gives their enforcement a legitimating basis in political consent. Second, their normative power does not derive solely from their enactment as positive law. Third, as legal rules they operate in an institutional context. These aspects not only characterize fundamental rights, but also exert influence on their interpretation.


159. U.S. CONST. art. VI, cl. 2. The American Civil Liberties Union, as amicus curiae in the case of Johnson v. California, 125 S. Ct. 1141 (2005), an equal protection challenge to California’s policy of segregating prisoners by race for the first sixty days of incarceration, relied on the United States’ treaty obligations in its brief. Id. at 1144; Brief of Amicus Curiae American Civil Liberties Union et al. in Support of Petitioner at 10 n.2, Johnson, 125 S.Ct. 1141 (No. 03-636), 2004 WL 1248855.

The American Civil Liberties Union emphasized that

[t]he application of the most exacting scrutiny to state-imposed racial segregation is also consistent with this nation’s obligations under the International Convention on the Elimination of All Forms of Racial Discrimination which provides, “States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.” The United States ratified the Convention in 1994.

Id. (citations omitted).
jurisprudence are amici just as much as progressives advocating that the United States import practices from abroad. It is for the Justices, individually and as a bench, to determine which arguments are persuasive and which arguments should not be countenanced.

160. For example, Schweitzer has identified a “surprising source” brief as one that is powerful “because [it is] written by entities that one would expect to be supporting the other side of this case.” Schweitzer, supra note 10, at 534. Perhaps an adaptation of this “surprising source” classification would be the use of international law in an amicus filing from an amicus who would not be expected to rely on international law to advance its arguments, such as the Heritage Foundation or the Christian Coalition.

161. Several Supreme Court Justices have endorsed looking abroad for guidance. Justice Blackmun wrote that “[i]nternational law can and should inform the interpretation of various clauses of the Constitution, notably the Due Process Clause and the Eighth Amendment prohibition against cruel and unusual punishments.” Blackmun, supra note 154, at 45. Justice Breyer has also spoken on the utility of comparative jurisprudence, including his observations that

some of my colleagues believe that comparative analysis is “inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.” But comparative use of foreign constitutional decisions will not lead us blindly to follow the foreign court. As I have said before—“we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem . . . .” Ultimately, I believe the “comparativist” view that several of us have enunciated will carry the day—simply because of the enormous value in any discipline of trying to learn from the similar experience of others.


Similarly, Justice O'Connor has asked why does information about international law matter so much? Why should judges and lawyers who are concerned about the intricacies of ERISA, the Americans with Disabilities Act, and the Bankruptcy Code care about issues of foreign law and international law? The reason, of course, is globalization. No institution of government can afford now to ignore the rest of the world.


[i]nternational law, which is the expression of agreement on some basic principles of relations between nations, will be a factor or a force in gaining a greater consensus among all nations concerning some basic principles of their relations with one another. It can be and it is a help in our search for a more peaceful world.

Acting in accord with international norms may increase the chances for development of broader alliances or at least silence [sic] support from other nations.

Sandra Day O'Connor, Supreme Court Associate Justice Remarks at a Dedication Ceremony of the Eric Hotung International Law Center Building at Georgetown University (Oct. 27, 2004). Justice O'Connor's statement implicates at least two reasons to consider international law in domestic contexts. The first is her reference to international law as a tool to govern the relations between nations; the second is her acknowledgement
C. The Next Steps

Since the cases described above, the Supreme Court's docket has continued to include cases inviting amicus submission. At least three amici filed briefs outlining the international basis for prohibiting the death penalty under certain circumstances in *Roper v. Simmons*, a case challenging the constitutionality of the death penalty for individuals who were under the age of eighteen when they committed capital crimes. In that "acting in accord with international norms" might have some political utility for the United States in its relations with other countries. See id.

The expressed opinions of Justices Rehnquist, see *supra* note 129, Ginsburg, see *supra* note 72, Breyer, see *supra*, and O'Connor, see *supra*, beg the question of how, or whether, the Court will apply international sources to constitutional questions not directly implicating international law once the composition of the bench changes.


At oral argument in *Roper*, Justice Kennedy pointed out to petitioner's counsel that there was very substantial demonstration that world opinion is—is against this, at least as interpreted by the leaders of the European Union. Does that have a bearing on what's unusual? Suppose it were shown that the United States was one of the very, very few countries that executed juveniles, and that's true. Does that have a bearing on whether or not it's unusual?


Petitioner's counsel replied that "[t]he decision as to Eighth Amendment should not be based on what happens in the rest of the world. It needs to be based on the mores of—of American society." Id.

Respondent's counsel, while discussing the Eighth Amendment's "evolving standards of decency" jurisprudence, argued that this is a standard ... that looks to evolving standards of moral decency that go to human dignity. And in that regard, it is ... notable that we are literally alone in the world even though 110 countries in the world permit capital punishment for one ... crime or another, and yet every one—every one formally renounces it for juvenile offenders.

Id. at 28.

Ultimately, the Court held that the Eighth Amendment did not permit the imposition of the death penalty on individuals who were under eighteen-years-old at the time they committed an otherwise capital crime. *Roper*, 125 S.Ct. at 1194. The final section of Justice Kennedy's opinion for the Court described the "stark reality that the United States is the only country in the world that continue[d] to give official sanction to the juvenile death penalty." Id. at 1198. Justice Kennedy acknowledged the delicacy of applying international law by observing that "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own
Sosa v. Alvarez-Machain, international law played an extensive role in the briefing, not least because the case involved the Alien Tort Statute, a much debated grant of jurisdiction to the federal courts for "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." And in Republic of Austria v.
Altmann, amici supported both petitioner and respondent, as the Court considered whether an individual could sue a foreign sovereign for incidents occurring before the enactment of the Foreign Sovereign Immunities Act or before the United States adopted the "restrictive theory" of sovereign immunity.

Is the next step in applying international law to constitutional decisions limited to cases involving international law directly? Or, as in the cases discussed in this article, is international law a relevant factor in construing the Eighth and Fourteenth Amendments? Might a creative amicus filer find international support for claims involving other constitutional provisions, or are some provisions so "American" they defy ready comparison to other systems of jurisprudence? Might an

Justice Scalia’s concurring opinion is noteworthy for its elegant exposition of federal common law and the role of the federal judiciary, the latter of which he summarized by writing that

[w]e Americans have a method for making the laws that are over us. We elect representatives to two Houses of Congress, each of which must enact the new law and present it for the approval of a President, whom we also elect. For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law.

Id. at 2776 (Scalia, J., concurring).

The case drew some mainstream media attention, including a Washington Post editorial endorsing the court’s narrow decision:

[T]he justices emphasized that judges should allow suits under the Alien Tort Statute only when international law is as clear about the matters being raised today as it was in the 18th century about piracy and attacks on ambassadors. Moreover, the court rightly restricted the use of nonbinding international legal instruments in assessing what norms of conduct are clearly established as international law.


167. Id. at 680 n.*.

168. Id. at 681. Respondent sued the Republic of Austria to force it to return six Gustav Klimt paintings that were allegedly stolen by the Nazis. Id. at 680.

Prior to the Nazi invasion of Austria, the paintings had hung in the palatial Vienna home of respondent’s uncle, Ferdinand Bloch-Bauer, a Czechoslovakian Jew and patron of the arts. Respondent claims ownership of the paintings under a will executed by her uncle after he fled Austria in 1938. She alleges that the Gallery obtained possession of the paintings through wrongful conduct in the years during and after World War II.

Id. at 680-81.

169. Illustrating the difficulties in answering this question, Professor Ramsey suggests that “the United States is an outlier in protecting rights that few other societies recognize.” Ramsey, supra note 19, at 76. This appears to mean that international sources might be used to justify restriction of rights. Although there does not appear to be a readiness on the part of amici to utilize international sources this way, Ramsey suggests that “[i]f we are serious about the project of using international materials, we must ‘take the bitter with the sweet,’ and use international materials to contradict, not merely confirm, our own view of
international consensus that differs markedly from American practice serve not as endorsement of that other practice, but as a reinforcement of the United States' unique history and the culture that flows from it? The answers to these questions lie only in the future creativity of amicus filers and the docket the Supreme Court elects to hear. Nevertheless,

An interesting mention of international practices appeared with respect to the Sixth Amendment right to counsel in *United States v. Wade*, 388 U.S. 218 (1967). There, the Court evaluated "whether courtroom identifications of an accused at trial are to be excluded from evidence because the accused was exhibited to the witnesses before trial at a post-indictment lineup . . . in the absence of the accused's appointed counsel." *Id.* at 219-20. In evaluating that question, Justice Brennan, writing for the Court, noted that many other nations surround the lineup with safeguards against prejudice to the suspect. In England the suspect must be allowed the presence of his solicitor or a friend. Germany requires the presence of retained counsel; France forbids the confrontation of the suspect in the absence of his counsel; Spain, Mexico, and Italy provide detailed procedures prescribing the conditions under which confrontation must occur under the supervision of a judicial officer who sees to it that the proceedings are officially recorded to assure adequate scrutiny at trial.

*Id.* at 238 n.29 (citation omitted).

Perhaps the clash between an American constitutional right and international law is best illustrated by the Second Amendment. One author asserts that small arms gun control is the subject of recent international focus and law. The right to bear arms carries a unique significance in American law and culture and now faces the possibility of conflict with international gun control. Left unchecked, international gun control will compromise a fundamental human right as viewed by U.S. citizens and much of the government. This discussion explains the United Nations recent efforts of international global gun control and demonstrates how it conflicts with the American right to bear arms.


In *United States v. Morrison*, 529 U.S. 598 (2000), one amicus filing stood out for its use of international law supporting "the constitutionality of 42 U.S.C. § 13981 [a section of the Violence Against Women Act of 1994], which provide[d] a federal civil remedy for the victims of gender-motivated violence," *id.* at 601-02, 605. Brief Amici Curiae on Behalf of International Law Scholars and Human Rights Experts in Support of Petitioners, *Morrison*, 529 U.S. 598 (Nos. 99-0005, 99-0029), 1999 WL 1037253. The Court noted that Congress explicitly identified the sources of federal authority on which it relied in enacting § 13981. It said that a "Federal civil rights cause of action" is established "pursuant to the affirmative power of Congress . . . under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I [the Commerce Clause] of the Constitution."

*Id.* at 607 (first two alterations in original) (quoting 42 U.S.C. § 13981(a)).
Nevertheless, the Court “reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local.” Id. at 617-18 (citing United States v. Lopez, 514 U.S. 568 (1995)). The Court also found that “[s]ection 13981 is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias,” id. at 626, and thus, the federal civil remedy envisioned was not constitutionally appropriate under the Fourteenth Amendment, id. at 627.

The Morrison docket featured several amicus filings, including one from international law scholars and human rights experts, authored in part by an attorney from the Center for Constitutional Rights. Brief Amici Curiae on Behalf of International Law Scholars and Human Rights Experts in Support of Petitioners, supra. For a discussion of the Center for Constitutional Rights, see supra note 150. The brief’s summary of argument read:

Congress has unquestioned authority to enact legislation to meet both international treaty and customary law obligations, and need not state the sources of its authority for legislation to be valid. U.S. ratification of the International Covenant on Civil and Political Rights (ICCPR), and other treaties, empowers Congress to enact legislation implementing the treaty. The text of the treaty, in conjunction with subsequent unanimous and binding interpretations by the international community, make clear that the ICCPR requires the U.S. to provide protection from gender-based violence from both private persons and public officials. Moreover, that the Executive Branch has confirmed this view in international proceedings is entitled to great deference.

In addition, the emergence in customary international law of a clear norm recognizing women’s right to live free of gender-based violence, provides additional constitutional authority for the enactment of the federal civil rights cause of action at issue in this case. Under Article III, section 2, clause 1 of the Constitution, the federal courts have authority over all cases arising under the “laws of the United States” which include customary international law. In particular, Congress has authority to enact VAWA [Violence Against Women Act] under both the Define and Punish Clause and under its power under the Necessary and Proper Clause to enact legislation enabling the federal courts to exercise its Article III jurisdiction over violations of customary international law.

It is also well-settled and fundamental to the US constitutional system that, whenever possible, domestic law should be interpreted so as to enable the U.S. to fulfill its international obligations. This principle strongly supports an interpretation of both the Commerce Clause and Section 5 of the Fourteenth Amendment that would confirm Congressional authority to enact VAWA and similar implementing legislation.

Brief Amici Curiae on Behalf of International Law Scholars and Human Rights Experts in Support of Petitioners, supra, at 2. The brief proved unavailing, as the Court struck down the statute in a 5-4 decision, Morrison, 529 U.S. at 627, but the arguments the brief advanced, chiefly that international law could provide the basis for Congressional enactments, may yet carry the day.

172. One commentator suggests that the Court will continue its trend toward embracing international materials because

[globalization has now so pervaded our national culture and identities that a court that consistently ignores international precedents and experiences when considering human rights issues, even if merely for their persuasive or moral weight, risks irrelevancy. Historically, the United States judicial system has not
any advocate with an interest in advancing its policy objectives through amicus filing should consider the careful application of international sources, in the typology described above, as a means of securing potentially outcome-altering votes when the opinions are issued.

V. CONCLUSION

Amicus filings are useful advocacy tools in the most important cases that come before the Supreme Court. Amicus briefs serve the purpose of familiarizing the Court with the interests affected by a given case and filing an amicus brief is tantamount to a vote on the policy the Court should adopt. Amicus briefs citing international sources have resonated with some of the Justices in several cases, and likely will continue to do so. International law is both relevant and important for amici to consider in their advocacy and for courts to consider in their decisions. Many questions of right may depend upon the effective use of international law and it is only through practice that our legal system will grow accustomed to its ever-expanding and ever-changing boundaries.

ignored, but responded, to such threats to its legitimacy. Based on that history, it would be remarkable if a response to the changes marked by globalization and the breakdown of the dichotomy between national and international human rights law were not in the offing. Davis, supra note 149, at 421.

On a broader note regarding the importance of globalization to the traditional conception of the state and, by extension, its institutions, Professor Louis Henkin suggests that for those who care about human rights, the need is to work to make the state system more human rights-friendly, even in the age of globalization, even taking globalization into account. Human rights advocates must learn to use the state system against threats posed by various forms of globalization (in addition to those presented by governmental abuses). I do not consider globalization to be beyond or outside the state system. Some sovereign states singly, several of them together, or all of them together through international institutions, can bend the globals to their will, and they can do so for human rights purposes. Globalization does not relieve states of responsibility for the human rights of people subject to their jurisdiction. The state is required to ensure those human rights which it is able to protect. It cannot encourage or condone violations.

Louis Henkin, That “S” Word: Sovereignty, and Globalization, and Human Rights, Et Cetera, 68 FORDHAM L. REV. 1, 7-8 (1999). Professor Henkin’s suggestion is one of the most powerful reasons to support inclusion of international materials in American jurisprudence: the state must protect the rights of those people under its jurisdiction.