

**"RAISE THE FLAG AND LET IT TALK":  
ON THE USE OF EXTERNAL NORMS IN CONSTITUTIONAL DECISION MAKING**

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**"RAISE THE FLAG AND LET IT TALK":  
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*Landmark judgements in 2003 prompted comments that the U.S. Supreme Court had abandoned a tradition of insularity in favour of allowing external norms to inform its internal constitutional deliberations. Viewing these judgements against the backdrop of the Court's prior jurisprudence, this essay finds a willingness to look at foreign law, as well as an unexplained selectivity with regard to the circumstances in which this is deemed to be appropriate. It identifies two threshold criteria for consultation: the presence of similar experiences; and the resolution of questions in accordance with norms derived from a shared commitment to fundamental rights. Even when both criteria are met, the Court is likely to rely only on those external norms that are imbued with internal resonance; that is, on foreign law whose application serves an American vision of what is just.*

Proclamations that an American institution has met its demise inevitably bring to mind Mark Twain, who, on hearing the news in London that he had passed away, scrawled to the *New York Journal*: "The report of my death was an exaggeration."<sup>1</sup> And so it is, perhaps, with news that the U.S. Supreme Court's resistance to foreign law is at an end.

The "once isolationist" Court, recent reports declared, "is going global."<sup>2</sup> Foreign law indeed influenced the two most discussed judgements of 2003: *Lawrence v. Texas*, which overruled precedent to hold that the Constitution forbids criminal punishment of homosexual conduct, and *Gratz v. Bollinger*, which confirmed that the Constitution permits affirmative action to achieve a diverse student body.<sup>3</sup> The uses of external norms may mark a radical and deliberate departure from parochial practice, as reports have suggested, or they may signal little more than a serendipity not soon to be repeated. This essay explores that question. It first discusses the reliance on foreign law in *Lawrence* and *Bollinger*, then situates that reliance within the context of prior Supreme Court consideration of external norms. The 2003 judgements establish the Court's willingness to look beyond U.S. borders when circumstances warrant. But that scarcely settles matters, for what constitutes an appropriate situation remains susceptible to much debate. Two criteria already may be discerned: others must have considered the issue at hand in comparable circumstances; and those other decisions must derive from nations or systems that share with the United States a constitutive commitment to fundamental rights. Relevant norms are thus not truly external. What renders such norms relevant for internal constitutional decision making is the degree to which they resonate with American values and American experience.

1. *Milestone term*

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<sup>1</sup> The handwritten note of May 1897, which the Journal published on June 2, 1897, appears at <http://www.twainquotes.com/Death.html> (visited Aug. 6, 2003) [hereinafter Twainquotes].

<sup>2</sup> Charles Lane, *Thinking Outside the U.S.*, WASH. POST, Aug. 4, 2003, at A13 ("going global"); Tony Mauro, *Once isolationist high court goes global*, THE RECORDER, July 8, 2003, at 7.

<sup>3</sup> *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)); *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (confirming *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978) (opinion of Powell, J.), in course of sustaining law school admissions program); *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003) (confirming *Bakke* yet rejecting methodology used to admit undergraduates).

Reference to foreign law surfaced during oral argument in *Bollinger*, which consolidated complaints that the University of Michigan had violated the equal protection clause of the Fourteenth Amendment to the U.S. Constitution by endeavouring to ensure minority access to undergraduate and law programs. Affirmative action had dogged the U.S. judiciary before and after 1978, the year that a splintered Supreme Court approved the concept but not the means a medical school had used to advance it.<sup>4</sup> During argument in *Bollinger* Justice Ruth Bader Ginsburg steered Solicitor General Theodore Olson beyond this internal jurisprudence. "General," she began,

we're part of a world, and this problem is a global problem. Other countries operating under the same equality norm have confronted it. Our neighbour to the north, Canada, has, the European Union, South Africa, and they have all approved this kind of-they call it "positive"-discrimination. Do we-they have rejected what you recited as the ills that follow from this. Should we shut that from our view at all or should we consider what judges in other places have said on the subject?

Olson, maintaining "that none of those countries has our history," argued that the Court's own pronouncements ought to govern its decision. That did not end the discussion; to the contrary, it prompted Justice Antonin Scalia to ask

whether any of those countries that Justice Ginsburg referred to that have gone down the road of racial preferences, racial entitlements, have ever gotten rid of racial preferences or racial entitlements? ... Has it been the road ultimately to a colour blind society or has it been the road to a society that has percentage entitlements for the various races?

To this mélange of questions, Olson replied, "Sadly, I believe that is correct," and then moved on to another subject.<sup>5</sup>

The ensuing judgements in *Bollinger* placed no overt reliance on external norms; nonetheless, attention to the international arena was evident. Justice Ginsburg's separate opinion underscored that a pivotal holding of the majority-that affirmative action "must have a logical end point"--"accords with the international understanding."<sup>6</sup> Furthermore, the majority opinion by Justice Sandra Day O'Connor grounded its conclusion that government has a compelling interest in diversity on assertions "that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."<sup>7</sup>

Events abroad played an even more central role in *Lawrence*. The Court had stressed the occurrence of "state intervention throughout the history of Western civilisation" when holding, in 1986, that the Constitution's due process guarantee did not bar criminal punishment of intimacy between persons of the same sex.<sup>8</sup> Writing for a majority in *Lawrence*, Justice Anthony M. Kennedy found that this precedent had overlooked two critical developments outside the United States: first, the 1967 repeal by Britain of criminal sodomy laws; and, second, the 1981 holding by the European Court of Human Rights that criminalisation of homosexual activity violated the European Convention on Human Rights.<sup>9</sup> Kennedy observed that "other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct."<sup>10</sup> The Court's decision to overrule its fourteen-year-old precedent hinged on this invocation of the "values we share with a wider civilisation."<sup>11</sup>

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<sup>4</sup> Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

<sup>5</sup> Gratz v. Bollinger, 2003 U.S. TRANS. LEXIS 27,\*23-\*24 (Apr. 1, 2003) [hereinafter *Bollinger* transcript].

<sup>6</sup> *Grutter*, 123 S. Ct. at 2347 (Ginsburg, J., joined by Breyer, J., concurring) (quoting *id.* (O'Connor, J., for the Court, joined by Stevens, Souter, Ginsburg, Breyer) (concluding "that 25 years from now, the use of racial preferences will no longer be necessary"). In support, Justice Ginsburg cited the International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195 [hereinafter CERD], and the Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46), at 193, U.N. Doc. A/34/46.

<sup>7</sup> *Grutter*, 123 S. Ct. at 2330 (citing briefs *amicus curiae* filed by General Motors and others in business community).

<sup>8</sup> Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

<sup>9</sup> Lawrence v. Texas, 123 S. Ct. 2472, 2481 (2003) (Kennedy, J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.) (citing Sexual Offences Act 1967 (UK), § 1, and Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (1981) & 52 (finding violation of European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953)).

<sup>10</sup> *Id.* at 2483.

<sup>11</sup> *Id.*

## 2. *Jurisprudential backdrop*

For *New York Times* reporter Linda Greenhouse, the opinions in *Lawrence* and *Bollinger* heralded "a new attentiveness to legal developments in the rest of the world and to the court's role in keeping the United States in step with them."<sup>12</sup> Others agreed that change was afoot. They found its sources in a variety of factors, not least in the growing penchant of some justices for globe-trotting.<sup>13</sup> The spotlight on novelty tended to cast a shadow on previous resorts to external norms. That was unfortunate, for understanding of the jurisprudential backdrop is essential in overcoming lingering obstacles to the use of such norms.

Even the heralds of change recognised *Lawrence* and *Bollinger* as outgrowths of the year-old decision in *Atkins*, which had overruled precedent to hold that executing a mentally retarded person amounted to cruel and unusual punishment in violation of the Eighth Amendment.<sup>14</sup> Justice John Paul Stevens's opinion for the majority looked chiefly to legislative reform within the United States to limn the constitutional contours governing capital punishment. He remarked on "a much broader social and professional consensus" apparent within the United States and on the fact that, "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."<sup>15</sup> That last point might have been ignored as makeweight were it not for the outcries of dissenters. Justice Scalia bestowed "the Prize for the Court's Most Feeble Effort to fabricate 'national consensus'" on the majority's "appeal (deservedly relegated to a footnote)" to evidence beyond governmental action within the United States. To Scalia, "the practices of the 'world community,' whose notions of justice are (thankfully) not always those of our people," had no bearing.<sup>16</sup> Chief Justice William H. Rehnquist likewise contended that "it is evidence of a national consensus for which we are looking"; therefore, "the viewpoints of other countries simply are not relevant."<sup>17</sup>

Dissenters' position gave no heed to prior reliance on foreign viewpoints. Even before the U.S. Constitution became law, the author of *Federalist* No. 63 had advocated "attention to the judgement of other nations." Such a process would assure that America had "character," that its decisions were "the offspring of a wise and honourable policy." Moreover, external judgements could aid resolution of difficult internal questions, and, he added, "in doubtful cases, particularly where the national councils may be warped by some strong passion or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can be followed."<sup>18</sup> Consistent with this view, the early Court looked with apparent ease to foreign law, that is--to quote Chief Justice John Marshall--to "the law of nations," as demonstrated by "decisions of the Courts of every country, so far as they are founded upon a law common to every country."<sup>19</sup>

Consideration of external norms ebbed as internal jurisprudence grew, yet it did not disappear entirely. Various justices periodically acknowledged that their abhorrence of ancient inquisitional abuse and contemporary totalitarian repression had influenced majority<sup>20</sup> and separate<sup>21</sup> opinions honouring fundamental rights. Balancing this negative

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<sup>12</sup> Linda Greenhouse, *In a Momentous Term, Justices Remake the Law, and the Court*, N.Y. TIMES, July 1, 2003, at A1.

<sup>13</sup> See Tony Mauro, *Court Shows Interest in International Law*, N.Y.L.J., July 14, 2003, at 1 (quoting statements by professors Harold Koh & Curtis A. Bradley that tied attention to foreign practice in *Lawrence* and *Bollinger* to Justices' travel); Lane, *supra* note 2 (quoting professors Koh and John C. Yoo to similar effect).

<sup>14</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002) (overruling *Penry v. Lynaugh*, 492 U.S. 302 (1989)).

<sup>15</sup> *Id.* at 316 n.21 ((Stevens, J., for the Court, joined by O'Connor, Kennedy, Souter, Ginsburg, and Breyer, JJ.) (citing, as evidence of U.S. consensus, briefs from mental health and religious groups, and, as evidence of world opinion, Brief of Amicus Curiae the European Union in Support of the Petitioner in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727 (June 8, 2001), *available at* 2001 WL 648609).

<sup>16</sup> *Id.* at 347 (Scalia, J., joined by Rehnquist, C.J., and Thomas, dissenting).

<sup>17</sup> *Id.* at 325 (Rehnquist, C.J., joined by Scalia and Thomas, JJ., dissenting) (emphasis in original).

<sup>18</sup> THE FEDERALIST No. 63, at 407-08 (Alexander Hamilton or James Madison) (1st Modern Library ed., 1941).

<sup>19</sup> *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 195 (1815) (dispute stemming from wartime capture of ship).

<sup>20</sup> *E.g.*, *In re Oliver*, 333 U.S. 257, 269-71 (1948) (condemning secrecy of Star Chamber and its Spanish and French counterparts while enunciating due process right to public proceedings); *Johnson v. United States*, 333 U.S. 10, 17 (1948) (Jackson, J.) (writing that to permit governmental entry into home without justification "would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law"); *Brown v. Walker*, 161 U.S. 591, 596 (1896) (finding source of Fifth Amendment privilege against self-incrimination in European history of "inquisitorial and manifestly unjust methods of interrogating

reaction was the positive embrace of limits that other nation states had imposed; thus did the Judges Rules of England become one basis for the Court's 1966 ruling that police must give certain warnings before interrogating suspects in custody.<sup>22</sup> Resort to foreign law was most pronounced in cases involving the Eighth Amendment. For forty years the Court had sought the amendment's meaning in "the evolving standards of decency that mark the progress of a maturing society"--standards that might be deduced from external as well as internal practices.<sup>23</sup> But the prevailing opinion in a 1989 capital case rejected the approach.<sup>24</sup> *Atkins's* subtle nod to world opinion thus did not break new ground but, rather, signalled the revival of an interpretive tradition.

Well before *Atkins* some justices had endorsed the resort to foreign practice in statements *ex camera*. Justice O'Connor has been particularly vocal, venturing in 1995 that as the United States "moves toward a more international regime of dispute resolution," its "federalist ideal of healthy dialogue and mutual trust may possibly be adapted to describe the proper relationship between domestic courts and transnational tribunals."<sup>25</sup> Globalisation, she said more recently, leaves no other choice.<sup>26</sup> That sentiment resounded in her reference in *Bollinger* to the demands of the world market.<sup>27</sup> Yet ambivalence lingered. O'Connor stopped short of citing external norms in *Bollinger*, and of those who joined her opinion, only Ginsburg and Justice Stephen Breyer now consult foreign law as a matter of course.<sup>28</sup> As recently as 1997, O'Connor--and Kennedy, who was later to stress external norms in *Lawrence*--joined an opinion that criticised such consultation.<sup>29</sup> Even Stevens, who cited international consensus to contend, post-*Atkins*, that the Court should reconsider precedent sustaining the juvenile death penalty,<sup>30</sup> at times found events abroad of scant relevance. He

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accused persons"); *Boyd v. United States*, 116 U.S. 616, 629 (1886) (linking Fourth Amendment protection against unreasonable searches and seizures to employment of general warrants by Star Chamber).

<sup>21</sup> *E.g.*, *Coleman v. Alabama*, 399 U.S. 1, 15-16 (1970) (opinion of Douglas, J.) (criticising practices he witnessed in Soviet Union), *quoted in Chavez v. Martinez*, 538 U.S. 760, 788 n.2. (2003) (Stevens, J., concurring in part and dissenting in part) (writing that Constitution guarantees against harsh interrogations typical of Star Chamber and fascist Germany); *Oliver*, 333 U.S. at 280 (Rutledge, J., concurring) (mentioning recent "collapse of liberty in Europe and elsewhere" as reason to enforce U.S. Bill of Rights).

<sup>22</sup> *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (relying on Judges' Rules); *see Culombe v. Connecticut*, 367 U.S. 568, 595-98 (1961) (setting forth Court's initial consideration of these Rules). Twenty-two years after *Miranda*, Justice O'Connor again called for examination of other countries' interrogation rules to aid determination of U.S. law. *New York v. Quarles*, 467 U.S. 649, 672-73 (1984) (concurring in part and dissenting in part).

<sup>23</sup> *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (Warren, C.J., for plurality); *see id.* at 102 (Court stated that Eighth Amendment prohibits taking away of citizenship as punishment in part on "virtual unanimity" of "civilised nations of the world").

<sup>24</sup> *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) (Scalia, J., for the Court) (deeming other countries' sentencing practices irrelevant). *See Antonin Scalia, Commentary*, 40 ST. LOUIS U. L.J. 1119, 1121 (1996) (stating that Stanford "retired" consultation of external norms).

<sup>25</sup> Sandra Day O'Connor, *Federalism of Free Nations*, 28 N.Y.U. J. INT'L L. & POL. 35, 41 (1995-1996).

<sup>26</sup> Sandra Day O'Connor, *Keynote Address*, 96 AM. SOC'Y INT'L L. PROC. 348, 349 (2002) (stating that because of globalisation, "[n]o institution of government can afford now to ignore the rest of the world"); *see also* Sandra Day O'Connor, *Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law*, FED. LAW., Sept. 1998, at 20.

<sup>27</sup> *Grutter v. Bollinger*, 123 S. Ct. 2325, 2340 (2003), *supra* note 7 and accompanying text.

<sup>28</sup> Only Justices Breyer and David Souter saw fit to join Ginsburg's discussion in *Bollinger* of international treaties. *Grutter*, 123 S. Ct. at 2347 (Ginsburg, J., joined by Breyer, J., concurring); *Gratz v. Bollinger*, 123 S. Ct. 2411, 2445 (Ginsburg, J., joined by Souter and Breyer, JJ., dissenting). The latter two have advocated consultation of external norms. *See* Stephen Breyer, *Constitutionalism, Privatisation, and Globalisation: Changing Relationships among European Constitutional Courts*, 21 CARDOZO L. REV. 1045 (2000); Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253 (1999).

<sup>29</sup> *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997) (Scalia, J., joined by Rehnquist, C.J., and O'Connor, Kennedy, and Thomas, JJ.) (labelling "inappropriate" dissenters' reference, in case involving U.S. gun control law that enlisted state officers' assistance, to federalism in other countries). *See Diane Marie Amann, A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context*, 45 UCLA L. REV. 1201, 1259-60 n.356 (1998) (setting forth Justices' positions in cases raising consultation issue).

<sup>30</sup> *Patterson v. Texas*, 536 U.S. 984 (2002) (Stevens, J., joined by Ginsburg and Breyer, JJ., dissenting from denial of stay of execution); *cf. Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., joined by Breyer, J., mem. respecting cert. denial) (citing *Pratt v. Attorney General of Jamaica* [1994], 2 App. Cas. 1, 4 All E.R. 769 (P.C. 1993)

declined to extend the privilege against self-incrimination to U.S. testimony that might be used overseas, for example, reasoning that such use "will not have any adverse impact on the fairness of American criminal trials."<sup>31</sup>

In Stevens's comment one hears an unexpected echo of Scalia's insistence, in 1989, that to decide whether executing seventeen-year-old offenders is constitutional, the Court should consider only "*American* conceptions of decency."<sup>32</sup> The passage of time seems not to have allayed Scalia's opposition to the use of external norms. In *Lawrence*, Scalia, joined as in *Atkins* by Rehnquist and by Justice Clarence Thomas, wrote: "Constitutional entitlements do not ... spring into existence, as the Court seems to believe, because *foreign nations* decriminalise conduct." He labelled recourse to "foreign views" a "meaningless," even "[d]angerous," imposition of "foreign moods, fads, or fashions on Americans."<sup>33</sup> Yet all three dissenters have paid attention to external practice on occasion: in the course of holding that the Constitution confers no right to assisted suicide, and in arguing that the Constitution permitted certain constraints on abortion.<sup>34</sup> Rehnquist went so far as to declare not long after his elevation to Chief Justice that since "constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process."<sup>35</sup>

The jurisprudential reality is thus more complex than a first look at *Lawrence* and *Bollinger* would indicate. On the one hand, analysis reveals no seamless history of isolationist decision making. One finds, instead, a receptivity to consulting external norms that has extended over time and, in appropriate circumstances, to every member of the Court. On the other hand, such consultation remains selective, unbounded by any coherent criteria. Particularly in light of the prevailing unfamiliarity with law outside the United States, consultation often seems a happenstance owing only to the fact that amici have briefed external norms.<sup>36</sup> Often such norms receive short shrift without much explanation, as in lower courts' recent dismissals of the view that international humanitarian law might have some bearing on the constitutionality of detention at Guantanamo and elsewhere.<sup>37</sup> The dearth of methodological guideposts opens courts to

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(*en banc*), in call for constitutional review of long and harsh death row conditions). Notably, the post-*Atkins* condemnation of the juvenile death penalty that Souter joined in 2002 omitted discussion of external norms. *Compare In re Stanford*, 537 U.S. 968 (2002) (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ., dissenting from denial of petition for writ of habeas corpus), with *Patterson, supra*. The Supreme Court has decided to reconsider the issue during its October 2004 term. *Roper v. Simmons*, 124 S. Ct. 1171 (2004); *see infra* n.44.

<sup>31</sup> *United States v. Balsys*, 524 U.S. 666, 700 (1998) (Stevens, J., concurring).

<sup>32</sup> *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) (emphasis in original). Stevens joined in the dissent, which discussed other countries' practices at some length. For Brennan's dissent, see text at 389-90.

<sup>33</sup> *Lawrence v. Texas*, 123 S. Ct. 2472, 2495 (2003) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) (quoting *Foster v. Florida*, 537 U.S. 990 n. (2002) (Thomas, J., concurring in denial of certiorari)) (emphasis supplied by Scalia). Dissents in *Bollinger* said nothing about external norms, an omission that may reflect both the diminished emphasis on such norms in *Bollinger*, as well as the partial joinder of Justice Kennedy, whose opinion in *Lawrence* afforded importance to foreign law. Distaste with this method nonetheless may be discerned in three dissenters' allegations that the majority in *Bollinger* had acted in a "faddish" manner. *Grutter*, 123 S. Ct. at 2351, 2360 (Thomas, J., joined by Scalia, J., concurring in part and dissenting in part).

<sup>34</sup> *Washington v. Glucksberg*, 521 U.S. 702, 718 n.16 (1997) (Rehnquist, C.J., joined by O'Connor, Scalia, Kennedy, and Thomas, JJ.) (reviewing suicide laws in Canada, Britain, New Zealand, Australia, and Colombia); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 945 n.1 (1992) (Rehnquist, C.J., joined by White, Scalia, and Thomas, JJ., concurring in part and dissenting in part) (citing abortion rulings in Canada and Germany).

<sup>35</sup> William Rehnquist, *Constitutional Courts--Comparative Remarks* (1989), reprinted in 14 *GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE--A GERMAN-AMERICAN SYMPOSIUM* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., Nomos Verlagsgesellschaft 1993).

<sup>36</sup> *See, e.g.*, Brief *Amici Curiae* Human Rights Advocates and the University of Minnesota Human Rights Centre in Support of Respondents in *Grutter v. Bollinger* and *Gratz v. Bollinger*, O.T. 2002, Nos. 02-241, 02-516 (Feb. 14, 2003), 2003 WL 399226; Brief *Amici Curiae* of Mary Robinson et al. in Support of Petitioners in *Lawrence v. Texas*, O.T. 2002, No. 02-102 (Jan. 16, 2003), available at 2003 WL 164151, cited in *Lawrence*, 123 S. Ct. at 2483; Brief of *Amicus Curiae* the European Union in Support of the Petitioner in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727 (June 8, 2001), available at 2001 WL 648609, cited in *Atkins v. Virginia*, 536 U.S. 304, 317 (2002).

<sup>37</sup> Courts generally limited analysis to a determination that although the Convention (No. III) Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, might impose obligations on the United States with respect to detention in the course of armed conflict, the convention is not justiciable in U.S. courts. *See Rasul v. Bush*, 215 F.

the criticism that foreign practice does not really aid deliberation but merely cloaks otherwise unsupported policy decisions in a guise of constitutional legitimacy.<sup>38</sup>

### 3. *Turning the outside in*

It is beyond dispute that the justices' reliance on external norms often has lacked context. Foreign law has tended to appear as an expendable afterthought, a gratuitous remark on alien practice. Failure to explicate why external norms matter to internal decision making invites an obvious retort: they matter not at all.<sup>39</sup> That, however, is an impossible conclusion. Human activities--information and migration, commerce and crime--have globalised, and courts, like other national institutions, must adapt. Surely outside approval of U.S. decisions is as desirable today as it was at the time of *The Federalist*. Surely, too, the "opinion of the impartial world," to quote that foundational source, might yet guide U.S. courts working to decide unsettled issues.<sup>40</sup> The question is not whether external norms are relevant; it is, rather, under what circumstances an external norm will prove relevant.

The presence of two criteria makes consultation especially appropriate. The first is what Justice Breyer once described as "roughly comparable questions under roughly comparable legal standards."<sup>41</sup> "Comparable questions" may apply, *inter alia*, when an aspect of globalisation looms large. Litigants may be citizens of another country, or the conduct at issue may have occurred offshore, or agents may have pursued an investigation beyond their national borders. Global market pressures may militate in favour of harmonising commercial practices.<sup>42</sup> A second group comprises cases that appear wholly internal but entail experience that a country shares with others. A nation state that suffers a terrorist assault, for instance, likely would benefit from studying how others balanced national security and individual liberty after similar attacks. In a third group are cases that, despite the seeming lack of a transnational component, implicate world opinion. A murder in a heartland hamlet ordinarily piques no outside interest; however, if the offender is under eighteen, a decision to seek capital punishment will provoke international concern.<sup>43</sup> A court within the United States that looks to external law in such circumstances--as some of its counterparts abroad do routinely<sup>44</sup>--may benefit from studying how others have resolved unsettled questions. Its decision, furthermore, likely will attain greater legitimacy by virtue of having paid due respect to the decisions of others, even if it arrives at different

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Supp. 2d 55, 56-57 (D.D.C. 2002), *aff'd sub nom.* *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, *Rasul v. Bush*, No. 03-334, and *Al Odah v. United States*, No. 03-343, 124 S. Ct. 534 (2003); *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036, 1050 (C.D. Cal. 2002), *aff'd*, 310 F.3d 1153, 1156 (9th Cir. 2002), *cert. denied*, 538 U.S. 1031 (2003); *accord Ghorebi v. Bush*, 352 F.3d 1278, 1283 n.7 (9th Cir. 2003) (declining to resolve "serious concerns under international law," yet declaring indefinite detention "at odds with" Third Geneva Convention), *cert. pending*, 72 U.S.L.W. 3568 (Mar. 3, 2004) (No. 03-1245). On the relevance of external norms in enemy combatant cases that were pending before the Supreme Court at the time this article went to press, see Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L L. 263 (2004).

<sup>38</sup> See *Knight v. Florida*, 120 S. Ct. 459, 459 (1999) (Thomas, J., concurring in cert. denial) (seeing in reliance on foreign sources an admission to the lack of "any such support in our own jurisprudence"); see also Lane, *supra* note 2 (quoting Professor Yoo that, in considering foreign law, Court "reveals itself as more interested in making policy than interpreting the fixed texts of the Constitution or statutes").

<sup>39</sup> See Herman Schwartz, *The Internationalisation of Constitutional Law*, 10 HUM. RTS. 10 (Winter 2003) (finding "any effort to import international norms into American constitutional law ... largely a waste of time").

<sup>40</sup> THE FEDERALIST NO. 63, *supra* note 18.

<sup>41</sup> *Knight*, 120 S. Ct. at 464 (Breyer, J., dissenting from cert. denial).

<sup>42</sup> To this end Ginsburg's opinion for the Court in *Eldred v. Ashcroft*, 537 U.S. 186, 196 (2003), joined by Rehnquist, O'Connor, Scalia, Kennedy, Souter, and Thomas, interpreted a statute to bring federal copyright law in accord with practice in the European Union.

<sup>43</sup> The Missouri Supreme Court acknowledged as much when, applying the global consensus criterion in *Atkins*, it held that capital punishment of juveniles violates the U.S. Constitution. *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 405 (Mo. 2003), *cert. granted*, 124 S. Ct. 1171 (2004).

<sup>44</sup> Some national judges are obliged to consider external norms. See, e.g., S. AFR. CONST., art. (39)(1)(b)-(c) (stating that in construing Constitution's Bill of Rights courts "must consider international law" and "may consider foreign law"); Human Rights Act, 1998, c. 48, art. 3(1) (Eng.) (requiring courts to determine compatibility of national legislation with norms in Europe's human rights convention). Even in countries where this is not the case consultation appears more prevalent. See generally, e.g., Paolo G. Carozza, *"My Friend Is a Stranger": The Death Penalty and the Global Jus Commune of Human Rights*, 81 TEX. L. REV. 1031 (2003); Shane S Monks, *In Defence of the Use of Public International Law by Australian Courts*, 22 AUSTR. YBK. INT'L L. 201 (2002).

conclusions. Finally, such a decision may increase the potential for reciprocal treatment by other jurisdictions, desirable in an era of easy travel and increasing interdependence.

The "comparable legal standards" criterion entails the recognition that calling a cited norm "external," though a convenient rhetorical feint, is a misnomer. Norms matter for the very reason that they have some link to an internal milieu. They are not, in fact, outsiders at all. Most pertinent to U.S. constitutional decision making are those norms that derive from a similar constitutive core; or, more precisely, norms that are grounded in the same respect for freedom from undue state interference that animates U.S. constitutional culture. The existence of a fundamental rights tradition thus seems a proper constraint on consultation, by which practice in, say, Zimbabwe--a country widely criticised as a human rights violator--might not be the first to which a court would turn.<sup>45</sup> Still, the criterion of "comparable legal standards" would leave much external practice available for use as persuasive authority. For U.S. law shares its ancestry with national regimes in Europe and their former colonies and with multinational regimes throughout the world. Due process dates to the English king's promise, in 1215, that "[n]o free man shall be taken, or imprisoned, or disseised, or exiled, or in any way destroyed, nor will we go upon him, nor send upon him, except by the lawful judgement of his peers or by the law of the land,"<sup>46</sup> and it finds further support in the provisions of France's 1789 declaration of rights.<sup>47</sup> Liberty and equality norms likewise dominate post-World War II instruments that the United States has endorsed or ratified; for example, the Universal and Inter-American Declarations of Human Rights, the International Covenant on Civil and Political Rights, and treaties outlawing discrimination and torture.<sup>48</sup> Provisions in each document promote values for which U.S. negotiators had pressed.<sup>49</sup> Furthermore, interpretations of these provisions, and of corollaries in some national constitutions, owe much to the rights jurisprudence of the U.S. Supreme Court.<sup>50</sup>

Though seldom articulated, the criterion of shared tradition has motivated the consideration of external practice within the United States and without. It explains the behaviour of Justice Scalia, who frequently has condemned consultation in absolutist terms yet at other times has acceded to it. At the core of his objections rests the charge that a particular norm is un-American, that it does not reflect a common constitutive tradition. In asking, during oral argument in *Bollinger*, if foreign practice in favour of affirmative action aimed for "a colour blind society"--a question to which he expected a negative reply--Scalia hearkened back to Justice John M. Harlan, whose 1896 dissent in *Plessy* became a cornerstone of contemporary American equal protection jurisprudence.<sup>51</sup> It was in a similar vein that Stevens, though

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<sup>45</sup> In a spring 2003 address to the American Society of International Law, which the author attended, Breyer intimated that a Zimbabwe high court decision condemning prolonged stays on death row as "inordinate" punishment--on which he relied in *Knight*, 120 S. Ct. at 463 (Breyer, J., dissenting from denial of cert.) (quoting Catholic Comm'n for Justice and Peace in *Zimbabwe v. Attorney-General* [1993] 1 Zimb. L.R. 239, 240, 269(S) (Aug. 4, 1999))--might not have been an ideal source of persuasive authority.

<sup>46</sup> Magna Carta, ch. 39, *quoted in* WILLIAM SHARP MCKECHNIE, *MAGNA CARTA--A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 375 (2d rev. ed. 1914) (some bracketed insertions omitted). *See* *Den v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855) (linking Fifth Amendment to Magna Carta).

<sup>47</sup> Déclaration des Droits de l'Homme et du Citoyen du 26 août 1789 (adopted by the National Assembly), arts. 7, 10 (setting forth right against arbitrary detention and presumption of innocence), *reprinted in* LIBERTÉS ET DROIT FONDAMENTAUX 41 (Mireille Delmas-Marty & Claude Lucas de Leyssac eds., 1996).

<sup>48</sup> Universal Declaration of Human Rights, adopted Dec. 10, 1948, G.A. Res. 217 A, U.N. GAOR, 3d Sess., U.N. Doc. A/810, at 71 (1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966); American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (Mar. 30-May 2, 1948), Bogota, O.A.S. Off. Rec. OEA/Ser. L/V/I.4 Rev. (1965); Convention Against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, Annex, Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984); CERD, *supra* note 6.

<sup>49</sup> *See generally* MARY ANN GLENDON, *A WORLD MADE NEW* (2001) (describing U.S. role in preparation of international instruments).

<sup>50</sup> *See, e.g.,* Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 IND. L.J. 809, 811-39 (2000) (describing influence of U.S. model of constitutional criminal procedure on developments abroad, and citing foreign decisions that rely on U.S. jurisprudence).

<sup>51</sup> *Compare Bollinger* transcript, *supra* note 5, with *Plessy v. Ferguson*, 163 U.S. 537 (1896) (Harlan, J., dissenting) (rejecting majority's separate-but-equal holding on ground that "[o]ur constitution is colour-blind, and neither knows nor tolerates classes among citizens"), and *Lawrence v. Texas*, 123 S. Ct. 2472, 2487 (2003) (invoking latter clause as reason to accord constitutional protection to intimate, same-sex sexual conduct).

typically attentive to external practice, once deflected concern regarding a trial overseas on the ground that there would be no effect in an American courtroom.<sup>52</sup> In so doing the Justices stood in accord with their peers outside the United States: absent a supranational rule to the contrary, even the courts most receptive to consultation do not consider themselves bound to apply foreign rules. The Supreme Court of Canada, for example, expressly chose in a 1990 hate-speech case to deviate from the U.S. preference for unfettered expression in order "to accentuate a uniquely Canadian vision of a free and democratic society."<sup>53</sup> Courts in Europe and South Africa have analysed opinions of the U.S. Supreme Court, then rejected them or, alternatively, opted to enforce the views of dissenting justices.<sup>54</sup>

The outcomes notwithstanding, these foreign judgements showed that the existence of shared values itself justifies careful assessment of foreign practice. Concurrence on these values has also informed U.S. justices' use of external practice. During oral argument in *Bollinger*, Ginsburg took pains to limit her query to "countries operating under the same equality norm."<sup>55</sup> Moreover, six justices tacitly adhered to the shared-tradition criterion in *Atkins*. The majority's citation to global consensus is traceable to 1958, when Chief Justice Earl Warren prefaced discussion of international sources with the declaration that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man," valued by all who respected "civilised standards."<sup>56</sup> The majority in *Lawrence* followed Warren's lead, treating foreign practice not as an alien curiosity but as an embodiment of values that Americans "share with a wider civilisation."<sup>57</sup>

In sum, proper consultation does not seek guidance outside a nation state's own value system. Rather, it turns the outside in, finding internal resonance with practices that are labelled external.<sup>58</sup> A relevant norm need not govern; its relevance simply renders the norm worth considering. What rule a court will fashion after studying other countries' practices is indeterminate, no less so than the rule it will fashion after studying its own country's history. A court remains free to apply external practice *in toto*, to discard it outright, or to adapt it as appropriate. Use of a relevant norm, moreover, will not invariably serve either a progressive or a conservative agenda. In an 1825 judgement shocking to modern sensibilities, Chief Justice Marshall wrote that the law of nations compelled the Court to return to foreign owners slaves found on seized ships even though the law of nature, and of the United States, forbade the slave trade.<sup>59</sup> Today's international human rights law often is quite expansive, yet sometimes it, too, affords individuals less protection than does existing U.S. law.<sup>60</sup> As seen with respect to assisted suicide, other countries' reluctance to extend certain rights could provide a basis for the Court to cabin its American rights jurisprudence.<sup>61</sup>

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<sup>52</sup> United States v. Balsys, 524 U.S. 666, 700, *supra* note 31.

<sup>53</sup> R. v. Keegstra [1990] 3 S.C.R. 697, 743 (Dickson, C.J.); see Claire L'Heureux-Dubé, *Realising equality in the twentieth century: The role of the Supreme Court of Canada in comparative perspective*, 1J. INT'L CONST. L. 35, 50 (2003) (discussing case).

<sup>54</sup> E.g., Murray v. United Kingdom, REPORTS 1996-I (Eur. Ct. Hum. Rts., 1996) (permitting national court in Europe to draw adverse inferences from interrogee's silence, notwithstanding dissenters' insistence that Griffin v. California, 380 U.S. 609 (1965), compelled contrary holding); State v. Makwanyane, No. CCT 3/94, 57-58 (Const. Ct. S. Afr. June 6, 1995) (embracing dissent in Gregg v. Georgia, 428 U.S. 153, 230 (1976) (Brennan, J.), to hold capital punishment unconstitutional). See also A.L. Sachs, *The Challenges of Post-Apartheid South Africa*, 7 GREEN BAG 2D 63, 69 (2003) (stating, in article by Justice of Constitutional Court of South Africa, that he draws on U.S. opinions, majority and minority, "for their brilliant thought processes and articulation, not for conclusions").

<sup>55</sup> *Bollinger* transcript, *supra* note 5. Her opinions, however, did not explicate why she deemed external norms worth considering. See Grutter v. Bollinger, 123 S. Ct. 2325, 2347 (2003) (Ginsburg, J., concurring); Gratz v. Bollinger, 123 S. Ct. 2411, 2445 (2003) (Ginsburg, J., dissenting).

<sup>56</sup> Trop v. Dulles, 356 U.S. 86, 100 (1958).

<sup>57</sup> *Lawrence*, 123 S. Ct. at 2483.

<sup>58</sup> Cf. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 322 (Clarendon Press 2d ed. 1996) ("Recognising that the United States has promoted and embraced international human rights standards deriving from ours, Justices might yet conclude that a decent respect to the opinions of mankind requires that we look to international standards to illuminate our constitutional values of liberty, equality, property.").

<sup>59</sup> The Antelope, 23 U.S. (10 Wheat.) 66, 119-23 (1825).

<sup>60</sup> Few jurisdictions outside the United States routinely exclude evidence obtained in violation of constitutive laws against government intrusion, and a number interpret freedom of expression in a manner that imposes greater restraint on speakers. See, e.g., Kevin Boyle, *Hate Speech--The United States Versus the Rest of the World?*, 53 ME. L. REV. 487, 493-96 (2001) (comparing U.S. and other countries' free speech standards); Erik J. Luna & Douglas J. Sylvester, *Beyond Breard*, 17 BERKELEY J. INT'L L. 147, 177-79 (describing general absence of exclusionary rules

#### 4. Conclusion

Some months after assuring the New York Journal that he was indeed alive,<sup>62</sup> Mark Twain wrote to a friend that he had falsely been reported as "seriously ill," then "dying," then "dead," but that "it was another man" each time. "As far as I can see, nothing remains to be reported, except that I have become a foreigner," he said, and then concluded, "When you hear it, don't you believe it. And don't take the trouble to deny it. Merely just raise the American flag on our house in Hartford and let it talk."<sup>63</sup> Twain's warning has a bearing on the status of external norms in U.S. constitutional jurisprudence. It is wrong to call the U.S. Supreme Court "isolationist"; the term speaks of some other Court, in some other, less globally aware, era. But it is also wrong to say that insular tendencies are dead, that, in part due to overseas junkets, today's Justices will render unremittingly internationalist judgements. Cases like *Bollinger* and *Lawrence* may portend a new willingness to consult external norms when circumstances warrant, and that willingness, in turn, may foster the development of criteria for such consultation. In a case with a transnational component justices may stand ready to evaluate norms from systems that share the United States' constitutive commitment to individual rights. Yet they retain discretion to shy away from consideration of external norms. Moreover, even when consultation occurs it will not compel a result the Court would not otherwise reach. The Court remains free to ignore, or reject, a norm it deems insufficiently linked to U.S. constitutional culture, in the same way that its counterparts abroad have refused to apply certain of the Court's holdings. To paraphrase Twain: even as they invoke foreign law, justices will continue to raise the American flag and let it do the talking.

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outside United States); Christopher Marquis, *U.S. Chides France on Effort to Bar Religious Garb in Schools*, N.Y. TIMES, Dec. 19, 2003, at A8 (reporting disagreement on extent to which state may limit exercise of religion).

<sup>61</sup> See *Washington v. Glucksberg*, 521 U.S. 702, 718 n.16 (1997), discussed *supra* note 35 and accompanying text.

<sup>62</sup> See *supra* text accompanying note 1.

<sup>63</sup> Letter of Mark Twain to Frank E. Bliss, Nov. 4, 1897, reprinted in *Twainquotes*, *supra* note 1.