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A Speculation on Enlightenment Roots, Foreign Law, and Fundamental Rights

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A SPECULATION ON ENLIGHTENMENT ROOTS, FOREIGN LAW, AND FUNDAMENTAL RIGHTS

Anthony S. Winer[†]

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In recent years, members of the United States Supreme Court have included references to foreign law and international law in several opinions interpreting the Federal Constitution. Some members of the Court, political figures, and commentators view this development as problematic.

One of the problems that critics have with this practice pertains especially to comparative references to foreign law. Critical observers maintain that there is no adequate principled basis for distinguishing one country from another. They imply that there is nothing to prevent a court from citing the laws of repressive countries, as well as the laws from more freedom-loving

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countries, in this comparative endeavor. I label such critiques the “jurisdictional selection objection.”¹ With this objection in mind, critics reject the comparative enterprise altogether. They would generally prefer that courts stick to home-grown sources and precedents when interpreting the Federal Constitution.

Recent comments by prominent legal and political actors illustrate the jurisdictional selection objection. At a public speech designed to support the Supreme Court candidacy of Harriet Miers, Attorney General Alberto Gonzales complained about the use of foreign law in U.S. constitutional interpretation.² He maintained that “[i]f an American judge wants to find a law consistent with his or her personal opinion, it can be found.”³ In stating this complaint, General Gonzales referred to remarks made by Chief Justice (then Judge) John Roberts during his confirmation hearings for the Supreme Court. The Chief Justice compared the use of foreign law in U.S. constitutional interpretation to “looking over the crowd and picking out one’s friends.”⁴

This Article focuses on one area of federal constitutional law that had its share of controversy even before the question of foreign and international analysis recently came to the fore:⁵ the

1. This phrase was coined by Professor Winer for the purpose of discussing any argument criticizing the practice of referencing foreign legal sources in constitutional interpretation on the asserted basis that it allows an unfettered choice as to which jurisdiction’s authorities to select.

2. Mark Sherman, *Attorney General: Justices Are Wrong to Cite International Law*, THE ASSOCIATED PRESS, Oct. 19, 2005, <http://www.law.com/jsp/article.jsp?id=1129626313552> (on file with author).

3. *Id.*

4. *Id.*

5. There is a significant distinction between foreign law and international law. For present purposes, the phrase “foreign law” refers to the law of any national or sub-national legal system other than that of the United States. Accordingly, a reference to French law or Chinese law, for example, would be a reference to foreign law. On the other hand, for present purposes, “international law” refers to the multilateral legal system that orders relations among states. The primary elements of this legal system, more broadly called “public international law,” are formal written treaties and customary rules of state behavior. Cf. JAMES R. FOX, *DICTIONARY OF INTERNATIONAL AND COMPARATIVE LAW* 157, 211 (1997) (definitional entries for international law and municipal law, respectively). The distinction is important, because the system of public international law is quite separate from individual systems of national domestic (often called municipal) law. Commentators complaining about the current Supreme Court practices discussed in this Article may be criticizing the Court’s references to either type of source. This Article, however, will generally use the phrase foreign law, since the jurisdictional selection objection pertains chiefly to the question of which country’s law (which “foreign law”) should be consulted in any particular context.

issue of how to identify fundamental rights under the substantive components of the Due Process and Equal Protection Clauses. I suggest that the law of certain foreign jurisdictions, perhaps some more than others, may be helpful in addressing the identification of fundamental rights. Further investigation might show that foreign states whose political and philosophical histories formed part of the European Enlightenment are appropriate sources of comparison. If so, the history of a foreign jurisdiction's relationship to the European Enlightenment would provide a principled basis for choosing which foreign law is appropriately referenced when analyzing this feature of the U.S. Constitution.

I. RECENT USE OF FOREIGN LAW IN FEDERAL CONSTITUTIONAL INTERPRETATION

One of the earliest references to foreign law in constitutional interpretation, at least with the Court in more or less its present configuration, occurred in Justice Breyer's dissent in *Printz v. United States*.⁶ In that 1997 case, the Court considered the constitutionality of the Brady Handgun Violence Prevention Act.⁷ Specifically, the Act required regulated firearms dealers in every state to forward certain prescribed forms to their local chief law enforcement officers, or "CLEOs."⁸ The Act also required the CLEOs to make "reasonable efforts" . . . to determine whether the sales reflected in the forms [were] lawful."⁹ The Act authorized the CLEOs to grant waivers of a federally prescribed five-day waiting period for handgun purchases when they had "no reason to believe that the purchases would be illegal."¹⁰

The Court, per Justice Scalia, viewed this situation as one in which the state-government CLEOs were being "pressed into federal service."¹¹ The Court struck down this aspect of the Act, holding that "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or their political subdivisions, to

6. 521 U.S. 898 (1997).

7. *Id.* at 902; *see* Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified at 18 U.S.C. § 922 (2000)).

8. *Printz*, 521 U.S. at 904.

9. *Id.*

10. *Id.* at 904-05. The preceding description of the pertinent Brady Act provisions corresponds to 18 U.S.C. § 922(y)(3) and is discussed in the Court's opinion. *Id.*

11. *Printz*, 521 U.S. at 905.

administer or enforce a federal regulatory program.”¹² The Court arrived at this result, in substantial part, out of concern for the “inviolable sovereignty”¹³ of the States and the necessity of the “[p]reservation of the States as independent political entities.”¹⁴

Justice Breyer, in his dissent (joined by Justice Stevens), took issue with the majority’s assertion that allowing the federal government to direct local law enforcement officers in this way would compromise the independence of the States.¹⁵ Breyer seems to be of the opinion that allowing the States themselves to enforce the Brady Act provisions would respect state sovereignty more than asking federal officers to perform the same tasks obtrusively within the States.¹⁶ To bolster his assertion, Justice Breyer referred to the structural regimes in Switzerland, Germany, and the European Union.¹⁷ These “federal systems,” he maintained, “all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations or decrees enacted by the central ‘federal’ body.”¹⁸

Justice Breyer allowed that “[o]f course, we are interpreting our own Constitution,” but he maintained that the experience of these other governmental regimes might “cast an empirical light on the consequences of different solutions to a common legal problem.”¹⁹ Reaction to this use of foreign law for comparative constitutional interpretation was somewhat muted, perhaps because the reference was merely in a two-Justice dissent.²⁰

This was not the situation, however, with the next major use of foreign law for constitutional comparison by the Court. Five years later, in *Atkins v. Virginia*,²¹ the Court’s majority opinion, rather than a mere dissent, referenced foreign legal sources. Even in

12. *Id.* at 935.

13. *Id.* at 918-19 (quoting THE FEDERALIST No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)).

14. *Id.* at 919.

15. *Id.* at 976 (Breyer, J., dissenting).

16. *Id.* at 976-77 (“[A] system [of local enforcement] interferes less, not more, with the independent authority of the ‘state,’ member nation, or other subsidiary government, and helps to safeguard individual liberty as well.”).

17. *Id.* at 976.

18. *Id.*

19. *Id.* at 977.

20. The majority opinion in *Printz* did acknowledge this aspect of Justice Breyer’s dissent but only in a footnote. *Id.* at 921 n.11 (majority opinion) (“We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.”).

21. 536 U.S. 304 (2002).

Atkins, which involved the constitutionality of the execution of mentally retarded offenders, the majority's reference was limited to a footnote.²² Justice O'Connor, writing for the majority, noted that during the sixteen years leading up to the *Atkins* decision, eighteen states and the federal government had passed statutes exempting the mentally retarded from capital punishment.²³ She further noted that "even in those States that allow the execution of mentally retarded offenders, the practice is uncommon."²⁴ The majority concluded that the execution of the mentally retarded "has become truly unusual, and it is fair to say that a national consensus has developed against it."²⁵

In this context, the Court dropped a footnote intending to buttress the idea that such a national consensus had developed.²⁶ The footnote referenced amicus briefs filed by the American Psychological Association, the U.S. Catholic Conference, the American Association on Mental Retardation, and others.²⁷ In one sentence out of the six composing the footnote, the Court quoted an amicus brief submitted by the European Union and stated that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."²⁸

Despite the relatively minor character of this footnoted, single-sentence observation, the dissenting opinion of Chief Justice Rehnquist (joined by Justices Scalia and Thomas) devoted the majority of two paragraphs to refuting the references made to other countries.²⁹ Chief Justice Rehnquist stated that he "fail[ed] to see . . . how the views of other countries regarding the punishment of their citizens provide[d] any support for the Court's ultimate determination."³⁰ He added that "if it is evidence of a *national* consensus for which we are looking, then the viewpoints of other countries simply are not relevant."³¹

In the year following the *Atkins* opinion, references to foreign

22. *Id.* at 316 n.21.

23. *Id.* at 313-15.

24. *Id.* at 316.

25. *Id.*

26. *Id.* n.21.

27. *Id.*

28. *Id.*

29. *See id.* at 324-25 (Rehnquist, C.J., dissenting).

30. *Id.*

31. *Id.* at 325.

law finally appeared in the full text of a majority opinion in *Lawrence v. Texas*,³² although the references were somewhat fleeting. *Lawrence v. Texas* is best known as the case in which the Court overruled *Bowers v. Hardwick*,³³ the 1986 Supreme Court case that sustained a state statute criminalizing homosexual sodomy against a due process challenge. The *Lawrence* Court, in an opinion written by Justice Kennedy, emphasized that the *Bowers* Court had relied in part on the point that “for centuries there have been powerful voices to condemn homosexual conduct as immoral.”³⁴ Justice Kennedy’s opinion noted that this “condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family.”³⁵

In overturning *Bowers*, the *Lawrence* Court declared that “our laws and traditions in the past half century,” rather than those of earlier eras, “are of most relevance here.”³⁶ The Court observed that these laws and traditions “show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”³⁷ Furthermore, the majority insisted that the *Bowers* Court, seventeen years earlier, should have acknowledged this “emerging recognition.”³⁸ In support of this point, the Court cited several legal developments that occurred prior to the *Bowers* decision, including the release of the American Law Institute’s Model Penal Code in 1955 and patterns of non-enforcement of state criminal sodomy statutes.³⁹

To further substantiate the prior existence of this “emerging recognition,” the Court referenced two developments from foreign jurisdictions. The first was the 1957 Wolfenden Report, commissioned to advise the British Parliament.⁴⁰ The Report

32. 539 U.S. 558 (2003).

33. 478 U.S. 186 (1986).

34. 539 U.S. at 571.

35. *Id.*

36. *Id.* at 571-72.

37. *Id.* at 572.

38. *Id.*

39. *Id.* at 572-73. The Model Penal Code “did not recommend or provide for ‘criminal penalties for consensual sexual relations conducted in private.’” *Id.* at 572 (quoting MODEL PENAL CODE § 213.2 cmt. 2 (1980)).

40. *Id.* at 572-73 (citing *The Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution* (1963) (reprinting COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, 1957 (London: HM Stationery Office,

recommended the repeal of laws punishing homosexual conduct, and Parliament adopted this recommendation ten years later.⁴¹ The second reference was to the 1981 decision of the European Court of Human Rights in the case of *Dudgeon v. United Kingdom*.⁴² The *Lawrence* Court noted that in *Dudgeon*, the European Court determined that the laws of Northern Ireland forbidding consensual homosexual conduct within the home violated the European Convention on Human Rights.⁴³

Justice Scalia's dissenting opinion (joined by Chief Justice Rehnquist and Justice Thomas) criticized these references to foreign law.⁴⁴ Justice Scalia complained that "[c]onstitutional entitlements do not spring into existence . . . because *foreign nations* decriminalize conduct."⁴⁵ He also criticized the Court's discussion of foreign views as meaningless, even dangerous, dictum.⁴⁶

Three days before issuing the *Lawrence* opinion, the Court issued the much-awaited affirmative action opinions in *Grutter v. Bollinger*⁴⁷ and *Gratz v. Bollinger*.⁴⁸ The *Grutter* decision contained a foreign reference that was far less significant, as it came in a concurring opinion, rather than in the majority opinion as in *Lawrence*.⁴⁹ *Grutter* involved the admissions policy at the University of Michigan Law School, which aspired to "achieve that diversity which has the potential to enrich everyone's education,"⁵⁰ and which reflected the law school's "longstanding commitment" to "racial and ethnic diversity."⁵¹

In an opinion written by Justice O'Connor, the Court held that the law school had a compelling interest in attaining a diverse student body⁵² and that the law school's admissions policy bore the

1957) and the British Sexual Offenses Act, 1967, § 1 (Eng.)).

41. *Id.* at 572-73.

42. *Id.* at 573 (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. 52 (1981)).

43. *Id.*

44. *Id.* at 598 (Scalia, J., dissenting).

45. *Id.*

46. *Id.* Justice Scalia identified this dictum as "dangerous" because "this Court . . . should not impose foreign moods, fads, or fashions on Americans." *Id.* (quoting *Foster v. Florida*, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring)).

47. 539 U.S. 306 (2003).

48. 539 U.S. 244 (2003).

49. *Grutter*, 539 U.S. at 344 (Ginsburg, J., concurring).

50. *Id.* at 315 (citation omitted).

51. *Id.* at 316 (citation omitted).

52. *Id.* at 328.

hallmarks of a plan narrowly tailored to advance that interest.⁵³ The Court thus concluded that the Equal Protection Clause⁵⁴ did not prohibit the law school's use of race in admissions pursuant to its policy.⁵⁵ Nevertheless, Justice O'Connor's opinion warned in its closing paragraphs that "race-conscious admissions policies must be limited in time."⁵⁶ Accordingly, the Court majority delineated its expectation that "[twenty-five] years from now, the use of racial preferences will no longer be necessary to further the interest approved today."⁵⁷

Justice Ginsburg, in a four-paragraph concurring opinion joined by Justice Breyer,⁵⁸ focused mainly on indications that racial minority students still suffer substantial disadvantages in educational opportunities.⁵⁹ In the first of those four paragraphs, however, she noted that the twenty-five-year end point specified in the majority opinion "accords with the international understanding of the office of affirmative action."⁶⁰ In so doing, she cited provisions of two international multilateral treaties:⁶¹ the International Convention on the Elimination of All Forms of Racial Discrimination,⁶² which the United States has signed and ratified, and the Convention on the Elimination of All Forms of Discrimination against Women,⁶³ which the United States has signed but not ratified. Justice Ginsburg cited provisions in each of these anti-discrimination treaties that support the idea that affirmative action measures should be short-lived and

53. *Id.* at 334.

54. U.S. CONST. amend. XIV, § 1.

55. *Grutter*, 539 U.S. at 337.

56. *Id.* at 342. A durational limitation reflects the danger of racial classifications, which must be employed no more broadly than the compelling interest demands. *Id.*

57. *Id.* at 343.

58. *Id.* at 344-46 (Ginsburg, J., concurring).

59. *Id.* Justice Ginsburg pointed out that in the 2000-2001 school year, 71.6% of African-American children and 76.3% of Hispanic children in the public school system attended schools in which minorities made up a majority of the student body. *Id.* at 345. The educational resources available to schools in predominantly minority communities lag far behind those available to other public schools. *Id.*

60. *Id.* at 344.

61. *Id.*

62. *Id.* (citing International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195, 5 I.L.M. 352).

63. *Id.* (citing Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33).

impermanent.⁶⁴

In the 2005 case of *Roper v. Simmons*,⁶⁵ the Court included the most extensive discussion of foreign sources that has yet appeared in a majority opinion for the purposes of constitutional interpretation.⁶⁶ In *Roper*, the Court held that “[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of [eighteen] when their crimes were committed.”⁶⁷ In the main body of the opinion, the Court wrote that the death penalty, because it is the most severe punishment, must be reserved for a narrow category of crimes and offenders.⁶⁸ The Court then determined that juveniles have diminished culpability for their crimes because of their relative lack of maturity, undeveloped sense of responsibility, vulnerability to negative influences and outside pressures, and incompletely formed character.⁶⁹ Furthermore, the Court determined that the penological justifications of retribution and deterrence applied to juveniles with lesser force than to adults.⁷⁰ Accordingly, the Court concluded that the death penalty is disproportionate punishment

64. *Id.* (“[S]pecial and concrete measures to ensure the adequate development and protection of certain racial groups . . . shall in no case entail . . . unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.” (quoting International Convention on the Elimination of All Forms of Racial Discrimination art. 2(2), *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195, 218, 5 I.L.M. 352, 355)); *id.* (“[T]emporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination, [but] shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.” (quoting Convention on the Elimination of All Forms of Discrimination against Women art. 4(1), Dec. 18, 1979, 1249 U.N.T.S. 13, 16, 19 I.L.M. 33, 37)).

65. 125 S. Ct. 1183 (2005).

66. Professor Alford has recently published an essay focused specifically on the use of foreign sources in *Roper*. His somewhat ironic discussion of what he terms “international equipoise” sounds to a substantial degree in the jurisdictional selection objection. He suggests, however, that the full range of constitutional rights should be subject to comparative analysis. Roger P. Alford, *Roper v. Simmons and Our Constitution in International Equipoise*, 53 UCLA L. REV. 1, 21-27 (2005); *see also* references to other critiques by Professor Alford *infra* text accompanying notes 135-148. Additionally, Professor Ernest Young has recently addressed the problem of foreign law in *Roper*, although in ways that do not necessarily affect what is said in this Article. *See* Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005).

67. 125 S. Ct. at 1200.

68. *Id.* at 1194-95.

69. *Id.* at 1195.

70. *Id.* at 1196.

for offenders under eighteen.⁷¹

Having reached this conclusion, however, the Court went on to survey certain authorities culled from foreign and international law.⁷² Justice Kennedy, writing for the majority, began this discussion by asserting that “the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”⁷³ While acknowledging that “[t]his reality does not become controlling,”⁷⁴ the Court was plainly moved by it. The Court then referred to four international conventions that prohibit or sharply disfavor execution of juveniles, including the United Nations Convention on the Rights of the Child.⁷⁵

The Court next noted that “only seven countries other than the United States have executed juvenile offenders since 1990,” but that since then, each of the other countries “has either abolished capital punishment for juveniles or made public disavowal of the practice.”⁷⁶ The Court next put special emphasis on the experience of the United Kingdom regarding this subject “in light of the historic ties between our countries and in light of the Eighth Amendment’s own origins”⁷⁷ in the 1689 English Declaration of Rights.⁷⁸ The Court determined that although the United Kingdom has abolished the death penalty completely, “decades before it took this step, it recognized the disproportionate nature of the juvenile death penalty.”⁷⁹ Finally, the Court concluded that “[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for

71. *Id.* at 1198.

72. *Id.* at 1198-1200.

73. *Id.* at 1198.

74. *Id.*

75. *Id.* at 1199. The Court noted that the United Nations Convention on the Rights of the Child has been ratified “by every country in the world . . . save the United States and Somalia.” *Id.* (citing United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448 (1990)). The other three conventions cited by the Court were the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368, the American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 146, 9 I.L.M. 763, and the African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990). 125 S. Ct. at 1199.

76. 125 S. Ct. at 1199. The seven other countries listed by the Court are Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. *Id.*

77. *Id.*

78. *Id.* (citing 1 W. & M., c. 2, § 10 (1770)).

79. *Id.*

our own conclusions.”⁸⁰

The majority opinion of the Court in *Roper* is not the only portion of the decision that notably addresses the use of foreign law in analyzing the U.S. Constitution. The two dissenting opinions in *Roper* criticize the majority’s use of foreign sources. However, the dissenting opinions by Justices O’Connor⁸¹ and Scalia⁸² are miles apart in terms of tone and perspective.

Justice O’Connor begins by clarifying that she “agree[s] with much of the Court’s description of the general principles that guide our Eighth Amendment jurisprudence.”⁸³ In the bulk of her opinion’s eleven pages, however, she maintains that no national consensus within the United States has emerged against the capital punishment of seventeen-year-old offenders.⁸⁴ Only two of these eleven pages are devoted to the Court’s treatment of foreign or international sources,⁸⁵ and the Court gets off fairly lightly at Justice O’Connor’s hands. Although she concedes that “there has been a global trend in recent years towards abolishing capital punishment for under-[eighteen] offenders,” her view that there is no widespread agreement within the United States prevents her from assigning a “confirmatory role” to that international consensus.⁸⁶ She nevertheless explicitly insists that she “disagree[s] with Justice Scalia’s contention that foreign and international law have no place in our Eighth Amendment jurisprudence.”⁸⁷ Justice O’Connor softens her criticism of the majority’s approach by acknowledging that “the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus.”⁸⁸ However, since she finds no American consensus, this particular opinion does not seem an appropriate one for the confirmatory role of foreign or international sources.

Justice Scalia, on the other hand, sees no need to embark on such a softened approach. Approximately five of the fourteen

80. *Id.* at 1200.

81. *Id.* at 1206-17 (O’Connor, J., dissenting).

82. *Id.* at 1217-30 (Scalia, J., dissenting).

83. *Id.* at 1206 (O’Connor, J., dissenting).

84. *E.g., id.* (“Although the Court finds support for its decision in the fact that a majority of the States now disallow capital punishment of [seventeen]-year-old offenders, it refrains from asserting that its holding is compelled by a genuine national consensus.”).

85. *Id.* at 1215-16.

86. *Id.* at 1215.

87. *Id.* (citations omitted).

88. *Id.* at 1216.

pages of his dissent are devoted to his criticism of the majority's use of foreign and international sources.⁸⁹ Most of these pages are devoted to a frontal attack on the use of foreign and international sources in constitutional interpretation generally, quite divorced from the context of juvenile execution.⁹⁰ Justice Scalia asserts that a significant number of foreign nations do not employ an evidentiary exclusionary rule as does the United States,⁹¹ do not "insist on the degree of separation between church and state that this Court requires,"⁹² and are less apt to allow for "abortion on demand" than the United States.⁹³ These observations are illustrations of the jurisdictional selection objection, because his point suggests that if the Justices in the majority chose the law of different foreign jurisdictions in different contexts, they would get results that were less popular or less palatable to those Justices. By emphasizing these differences between foreign and U.S. law, Justice Scalia seems to suggest that a weakness of a foreign-source approach is the fortuity of which foreign countries' laws are chosen for reference. His criticism is, to that extent, based on the jurisdictional selection objection.

II. EXTERNAL COMMENTARY ON COMPARATIVE CONSTITUTIONAL ANALYSIS BY MEMBERS OF THE COURT

Among the most prominent external commentators on the Court's use of foreign law in constitutional interpretation are members of the Court themselves.

At the 2003 Annual Meeting of the American Society of International Law (ASIL), Justice Stephen Breyer declared that "foreign experience is often important" to the work of the Supreme Court.⁹⁴ In his presentation, he outlined five kinds of experiences out of which his perception of the usefulness of foreign law arises.⁹⁵ Specifically, he noted: (1) many domestic legal questions directly implicate foreign or international law; (2) for an increasing

89. *Id.* at 1225-29 (Scalia, J., dissenting).

90. *See id.*

91. *Id.* at 1226-27 (referring to United States evidentiary rules forbidding the use of evidence obtained by illegal means).

92. *Id.* at 1227.

93. *Id.*

94. Stephen Breyer, *Keynote Address*, 97 AM. SOC'Y INT'L L. PROC. 265, 265 (2003).

95. *Id.* at 265-67.

number of issues, including constitutional issues, the decisions of foreign courts offer helpful points of comparison; (3) foreign jurisdictions offer helpful materials apart from formal court decisions, such as Council of Europe guidelines on the application of precedents from the European Court; (4) foreign judges offer valuable perspectives on institutional matters, such as overcrowded dockets and mediation programs; and (5) traditional public international law issues arise in the course of the Court's daily work.⁹⁶ These comments illustrate Justice Breyer's support for using foreign sources to interpret the U.S. Constitution.

Two years later, Justice Ruth Bader Ginsburg expressed her support of using international sources in constitutional interpretation in her address before the ASIL Annual Meeting.⁹⁷ As an initial matter, Justice Ginsburg noted a symmetry in comparative constitutional discourse: "[i]f U.S. experience and decisions can be instructive to systems that have more recently instituted or invigorated judicial review for constitutionality, so we can learn from others now engaged in measuring ordinary laws and executive actions against charters securing basic rights."⁹⁸ In this vein, she declared that the U.S. judicial system "will be the poorer . . . if we do not both share our experience with, and learn from, legal systems with values and a commitment to democracy similar to our own."⁹⁹

Justice Ginsburg reviewed aspects of U.S. constitutional history, and she suggested that foreign and international law played a significant role in the founding of the republic and the text of the Constitution.¹⁰⁰ She referenced the passages of the Declaration of Independence according "a decent Respect to the Opinions of Mankind" and soliciting the scrutiny of "a candid world" for the actions of the fledgling state.¹⁰¹ She also emphasized that the Constitution granted Congress the power to "define and punish . . . Offenses against the Law of Nations,"¹⁰² and that the framers considered that "the new nation would be bound by 'the law of

96. *Id.*

97. Ruth Bader Ginsburg, *Keynote Address: The Value of a Comparative Perspective in Constitutional Adjudication*, 99 AM. SOC'Y INT'L L. PROC. (forthcoming 2005), available at <http://www.asil.org/events/AM05/ginsburg050401.html>.

98. *Id.* para. 2.

99. *Id.* para. 3.

100. *Id.* para. 6-11.

101. *Id.* para. 8.

102. *Id.* para. 11 (quoting U.S. CONST. art. I, § 8, cl. 10).

Nations'"¹⁰³ She drew attention to the famous *Charming Betsy* canon, first declared by Chief Justice John Marshall, to the effect that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."¹⁰⁴

Conversely, Justice Antonin Scalia articulated his opposition to the use of foreign sources in constitutional interpretation in his keynote address at the 2004 Annual Meeting of the ASIL.¹⁰⁵ Justice Scalia stated that in his view "modern foreign legal materials can *never* be relevant to an interpretation of—to the meaning of—the U.S. Constitution."¹⁰⁶ He further offered three reasons why he expected the Court's use of foreign law in constitutional interpretation to accelerate.¹⁰⁷ First, he maintained that the "living Constitution' paradigm . . . prevails on the Court" and suggested that those who espoused this view, "living constitutionalists," are illegitimately writing new constitutional provisions.¹⁰⁸ If one is frankly involved in the process of writing a new constitution, he complained, "there is no reason foreign materials should not be used along with all others."¹⁰⁹

Second, he asserted that the modern Court will continue to use foreign law to support its "living-constitution decisions" because it supplies "*something* concrete to rely upon," maintaining that "logical analysis" would not be a concrete basis for such reliance.¹¹⁰ Finally, he argued that Court majorities would find it attractive to use foreign law because "it vastly increases the scope of their discretion."¹¹¹

Probably the most detailed published discussion by any Supreme Court Justice regarding the use of foreign sources to interpret U.S. constitutional law is actually the transcript of a debate between Justices Scalia and Breyer.¹¹² This debate took

103. *Id.* para. 11.

104. *Id.* para. 12 (quoting *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804)).

105. Antonin Scalia, *Keynote Address: Foreign Legal Authority in the Federal Courts*, 98 AM. SOC'Y INT'L L. PROC. 305 (2004).

106. *Id.* at 307.

107. *Id.* at 308-09.

108. *Id.* at 308.

109. *Id.*

110. *Id.* at 308-09.

111. *Id.*

112. See Justice Antonin Scalia & Justice Stephen Breyer, U.S. Association of Constitutional Law Discussion: Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005), <http://www.wcl.american.edu/seclc/founders/2005/>

place on January 13, 2005 at the American University Washington College of Law and was presented by the U.S. Association of Constitutional Law.¹¹³ The discussion, moderated by Professor Norman Dorsen of the New York University Law School,¹¹⁴ is notable for its depth and the extent to which it allowed each Justice to fully state his position on this issue.

In the debate, Justice Scalia provided several arguments against the use of foreign sources, though many of his arguments were variations on the jurisdictional selection objection.¹¹⁵ Three examples suffice. Early in the discussion, Scalia complained that the majority decision in *Lawrence* cited “foreign law—not all foreign law, just the foreign law of countries that agreed with the disposition of the case. But we said not a whisper about foreign law in the series of abortion cases.”¹¹⁶ He then asked, “[W]hat is the criterion for citing [foreign law]? That it agrees with you? I don’t know any other criterion to bring forward.”¹¹⁷ In these comments, he maintained that the Court used those rulings of foreign law with which its members agreed, rather than embarking on a principled examination of all foreign law or at least without a principled basis for choosing which foreign law to reference and which law to de-emphasize or ignore.¹¹⁸

He emphasized the same point later with particular reference

050113.cfm (follow “Press release and full transcript” hyperlink).

113. *Id.*

114. Professor Dorsen is also the founding president of the U.S. Association of Constitutional Law.

115. During this January 2005 discussion, Justice Scalia voiced two other arguments against the use of foreign sources in this context that were not variants of the jurisdictional selection objection. The first was that “one of the difficulties of using foreign law is that you don’t understand what the surrounding jurisprudence is.” Scalia & Breyer, *supra* note 112. That is, it is difficult, if not impossible, to accurately understand foreign laws unless one is operating within the same legal culture from which it emanates, and most U.S. judges and justices are not. Accordingly, the use of foreign law by U.S. judges and justices may often be a misapplication of foreign law. Second, Justice Scalia insists that the U.S. Constitution, to the limited extent it should reflect the current views of any population, should “keep up to date with the views of the American people,” as opposed to the views of foreign populations or authorities. *Id.* This point might simply be paraphrased as the assertion that the U.S. Constitution is meant to govern and apply to a distinctly American political and legal culture, and therefore, foreign influences in interpreting it are inappropriate simply by virtue of their not being American.

116. *Id.*

117. *Id.*

118. *Id.*

to European law. He allowed that:

[I]t was true that throughout all of Europe, it was unlawful to prohibit homosexual sodomy. The [C]ourt did not cite the rest of the world. It was easy to find out what the rest of the world thought about it. I cited in my dissent the rest of the world was equally divided.¹¹⁹

This comment is based on the jurisdictional selection objection: Justice Scalia maintained in effect that there is no principled way to consider favorable European legal sources without giving equal consideration to other legal sources from other countries.

The other participants in the debate also acknowledged the jurisdictional selection objection. At one point Justice Breyer himself conceded that in one of his opinions he may have made a “tactical error in citing a case from Zimbabwe—not the human rights capital of the world.”¹²⁰ This concession sounded in the jurisdictional selection objection, because he acknowledged that the choice of which foreign country’s law to reference can have serious implications for the quality of one’s argument, and he seemed to concede that the choice of country is a matter essentially of discretion.

Indeed, even the moderator, Professor Dorsen asked a question of Justice Breyer that presented the jurisdictional selection objection. He stated: “I’m not sure I see many citations to East Asian courts, to South American courts, to Islamic courts. And is it a fair criticism that there’s a certain selectivity that is substantively or result-oriented in the ways foreign references are considered by you and those who agree with you?”¹²¹ Thus, throughout this debate, which is one of the most thorough published discussions by Supreme Court Justices on this subject, one of the primary arguments stated in apprehension of the use of foreign law is the jurisdictional selection objection.

III. COMPARATIVE CONSTITUTIONAL INTERPRETATION AS VIEWED BY OTHER COMMENTATORS

Academic commentators, like members of the Supreme Court, have varying views of the suitability of foreign law for interpreting the Constitution. Among the most influential is Harold Hongju Koh, currently the Dean of Yale Law School and a former President

119. *Id.*

120. *Id.*

121. *Id.*

of the ASIL. The *American Journal of International Law* (AJIL) prominently stated some of his views in a 2004 symposium, which also contained other essays discussed in the following paragraphs of this Article.¹²²

Professor Koh's symposium article emphasized the historical pedigree of foreign and international law in early opinions of the U.S. Supreme Court.¹²³ He referenced the *Charming Betsy* canon discussed above¹²⁴ and attached importance to John Marshall's statement in *McCulloch v. Maryland* that the supremacy of the federal union within the scope of its powers would be a "proposition [that] could command the universal assent of mankind."¹²⁵ He maintained that Marshall's early opinions "expressly promoted the implicit or explicit internalization of international law into U.S. domestic law"¹²⁶ and that "at the beginning of the republic, U.S. courts drew no sharp line between international and foreign law."¹²⁷

In Professor Koh's view, the Court has used foreign and international precedents to interpret the Constitution in three contexts: (1) when "parallel rules" are involved; that is, when U.S. legal rules seem parallel to those of other countries;¹²⁸ (2) when "empirical light" seems to exist; that is, when the experiences of other countries cast empirical light on the consequences of different solutions to common legal problems;¹²⁹ and (3) when "community standards" are material to adjudication; that is, when certain constitutional restrictions, such as "cruel and unusual" and "due process of law," are interpreted in the context of community values.¹³⁰

Other academic commentators have supported such references to foreign and international law. In an article appearing

122. Harold Hongju Koh, *International: Law as Part of Our Law*, 98 AM. J. INT'L L. 43 (2004).

123. *Id.*

124. *Id.* at 44; see *supra* text accompanying note 104 (describing Justice Ginsburg's later reference to the *Charming Betsy* canon in her 2005 address to the American Society of International Law).

125. Koh, *supra* note 122, at 45 (quoting *McCulloch v. Maryland*, 17 U.S. 316, 405-07 (1918)).

126. *Id.* at 44.

127. *Id.* at 45.

128. *Id.*

129. *Id.* at 46.

130. *Id.* at 45-46 (quoting *Printz v. U.S.*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting)).

in the same AJIL symposium described above,¹³¹ Professor Gerald Neuman used historical Supreme Court opinions and constitutional provisions to defend the nexus between U.S. constitutional interpretation, on the one hand, and international and foreign law, on the other.¹³² Other commentators reporting favorably on the practice include Professors Sanford Levinson¹³³ and David Law.¹³⁴

Academic perspectives are not unanimous in favor of foreign and international references, to say the least. Among the most active challengers is Professor Roger Alford.¹³⁵ In his contribution to the 2004 AJIL symposium,¹³⁶ Professor Alford warned that the use of international precedents “could have the unintended consequence of undermining rather than promoting numerous constitutional guaranties.”¹³⁷ Initially, he argued that using international sources could be “countermajoritarian”¹³⁸ and could dangerously elevate international sources over constitutional restraints, thereby defeating the asserted supremacy of the Constitution over international law.¹³⁹

The main thrust of Professor Alford’s critique, however, seems

131. Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT’L L. 82 (2004).

132. *Id.* at 82-84. Professor Neuman stated that “[i]n the late nineteenth and early twentieth centuries, after the Civil War had vindicated the Union’s claim to nationhood, the Supreme Court repeatedly invoked international law doctrines and writers in support of its elaboration of powers inherent in national sovereignty.” *Id.* at 82-83. Neuman also described Supreme Court references to foreign and international law in construing the Treaty Clause (U.S. CONST. art. II, § 2, cl. 2), the Thirteenth Amendment, the Eighteenth Amendment, and other constitutional provisions. *Id.* at 82-84.

133. Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 TEX. INT’L L.J. 353, 355 (2004) (“[T]here ought to be no country, most certainly including our own, that should regard its own instantiated commitment to social justice or human rights as absolutely pristine, in need of no wisdom that might be provided by external sources.”).

134. David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 659 (2005) (“To expound a constitution—any constitution—is to draw upon and contribute to a body of principle, practice, and precedent that transcends jurisdictional boundaries. Commonalities emerge across jurisdictions because constitutional law develops within a web of reciprocal influences . . .”).

135. Roger P. Alford is an Associate Professor of Law, Pepperdine University School of Law. Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT’L L. 57, 69 n.1 (2004).

136. *Id.* at 57.

137. *Id.* at 58.

138. *Id.* at 58-61.

139. *Id.* at 61-64.

to be that the use of international sources tends to be “haphazard,”¹⁴⁰ because practitioners of this method are “relying only on those materials that are readily at [their] fingertips”¹⁴¹ and “selective,”¹⁴² in the sense that “international sources are proposed for comparison only if they are viewed as rights enhancing.”¹⁴³

These last two arguments, particularly the second, are variants of the jurisdictional selection objection. As explained, the jurisdictional selection objection is the argument that there is no principled way to decide which countries from which to draw precedent.¹⁴⁴ It asserts that a comparative analysis could just as easily draw on legal precedents from comparatively oppressive as well as comparatively progressive regimes.¹⁴⁵ Accordingly, if analysts using comparative methods subjectively choose only precedents from rights-enhancing jurisdictions, they are simply advancing their own policy preferences without a principled basis for doing so.¹⁴⁶

In a later article, Professor Alford examined the use of foreign and international sources under four constitutional theories: originalism, natural rights, majoritarianism, and pragmatism.¹⁴⁷ He suggested that “the use of contemporary foreign and international laws and practices to interpret constitutional guarantees is ill-suited under most modern constitutional theories.”¹⁴⁸ Implicit in his suggestion was a criticism of a perceived lack of coherence for comparative constitutional interpretation that is also consistent with his earlier criticism sounding in the jurisdictional selection objection.

In another article included in the 2004 AJIL symposium,¹⁴⁹ Professor Michael Ramsey demurred on the ultimate question of whether reference to foreign sources was desirable in interpreting

140. *Id.* at 64-67.

141. *Id.* at 64.

142. *Id.* at 67-69.

143. *Id.* at 67.

144. *See supra* note 1 and accompanying text.

145. *Id.*

146. In advancing his “selective use” argument, Professor Alford seems to focus on the policy-based selection of particular precedents, perhaps within particular foreign jurisdictions, rather than policy-based selection of the jurisdictions themselves. Alford, *supra* note 135, at 67-69. But his policy-based argument fairly implies the jurisdiction-based objection as well.

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

148. *Id.* at 712.

149. Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT’L L. 69 (2004).

the U.S. Constitution.¹⁵⁰ Instead, he asked: “[I]f we are to undertake a serious project of using international materials in this way, what would that project look like?”¹⁵¹ He arrived at four “guidelines” for developing a “principled approach:” (1) there must be a neutral theory as to which international materials are relevant and how they should be used; (2) analysts and commentators must be willing to “take the bitter with the sweet;” using international materials to constrict as well as expand rights; (3) there must be rigorous empirical inquiry about international practices; and (4) hasty shortcuts to world consensus must be avoided.¹⁵²

The first of these guidelines, as described by Professor Ramsey, is in part a statement of the jurisdictional selection objection. He even described a portion of his argument on this point in terms of jurisdictional selection. He noted that Mary Robinson, a former U.N. Commissioner of Human Rights, submitted a brief to the U.S. Supreme Court for its consideration¹⁵³ in *Lawrence v. Texas*.¹⁵⁴ He noted that at one point the Robinson brief explained that in various foreign jurisdictions sodomy was no longer a criminal offense.¹⁵⁵ Ramsey then maintained, however, that “[w]ithout a theory as to why (for example) Israel’s practice matters and India’s does not, the brief’s citation of Israel and not India cannot be justified.”¹⁵⁶ This illustrates a clear statement of the jurisdictional selection objection as previously defined.

IV. THE JURISDICTIONAL SELECTION OBJECTION CONSIDERED

I offer two primary responses to the jurisdictional selection objection. The first responds to a general complaint to the use of foreign or international sources that is non-substantive and is easily dismissed.¹⁵⁷ The other is that the objection does state a legitimate concern.¹⁵⁸

150. *Id.* at 69.

151. *Id.*

152. *Id.* at 69-70.

153. *Id.* at 70.

154. 539 U.S. 558 (2003).

155. Ramsey, *supra* note 149, at 72 (discussing Brief for Mary Robinson et al. as Amici Curiae Supporting Petitioners, *Lawrence*, 539 U.S. 558 (No. 02-102), 2003 WL 164151).

156. *Id.* at 73.

157. *See infra* Part IV.A.

158. *See infra* Part IV.B.

A. Dismissing an Initial Objection

One complaint intended to bolster the jurisdictional selection objection is non-substantive and should be dismissed immediately. The complaint is that merely because the use of foreign law presents the judge or justice with a choice of which jurisdiction to consult, it is somehow illegitimate to consult foreign law in general. This was the objection voiced by Chief Justice Roberts during his Senate confirmation hearings for Chief Justice.¹⁵⁹ Although this objection has surface appeal to some, it is inadequate.

Judges and justices must frequently choose among different legal sources to reference. State court judges and justices frequently cite the courts of other states, not for binding precedent but for persuasive authority.¹⁶⁰ Federal courts may cite decisions of other federal courts (or even state courts) outside their geographic circuits, again not for binding precedent but for persuasive impact.

Both federal and state court judges and justices may cite other types of sources, such as treatises on economics, history, or political science, even though they have no binding legal effect.¹⁶¹ In each such instance, the judge or justice chooses among a virtually limitless selection of sources, precisely on the basis of which sources are most persuasive. The mere fact that the judge or justice makes a selection is not any more suspect when the selection is among foreign sources than when it is among domestic ones.

It may be that in these circumstances a better judicial opinion will also acknowledge any opposing authority from state court,

159. See *supra* text accompanying note 4 (describing Chief Justice Roberts's reported assertion comparing the use of foreign law in U.S. constitutional interpretation to "looking over the crowd and picking one's friends").

160. This point was made, for example, by moderator Norman Dorsen during the debate between Justices Scalia and Breyer referred to earlier. Scalia & Breyer, *supra* note 112 (suggesting that a U.S. court can look at the opinions of a foreign court for the persuasiveness of its opinions, "just as a New York court might look at a Montana decision and be influenced not by the result . . . but by the cogency of the arguments").

161. The frequency with which U.S. federal courts cite authorities in the field of economics when deciding anti-trust issues, for example, should require no citation. It is true that the use of political science sources created a stir among some when *Brown v. Board of Education*, 347 U.S. 483 (1954), was decided. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1476 n.12 (2d ed., The Foundation Press, Inc. 1988) (1978) ("The Court's reliance on social science evidence, as well as the reliability of the evidence itself, has been severely criticized."). Nevertheless, scruples in this regard have been long-since resolved, at least to judge by the published opinions of a significant portion of the American judiciary.

federal court, or academic authority of equivalent stature. It may well be that a better opinion will do that no less with respect to foreign authority than domestic authority. But simply the assertion that better opinions acknowledge countervailing authority does not mean that the choice of persuasive authority to begin with should never be made.

B. The Realistic Jurisdictional Selection Issue

Notwithstanding the non-substantive complaint described above, the jurisdictional selection objection does state a legitimate issue. Merely because the exercise of a choice is not per se inappropriate does not mean that all choices made will necessarily be equally appropriate. There are indeed many countries in the world with organized legal systems. It seems warranted to presume that the precedents of not all foreign jurisdictions will be equally relevant to all issues in all cases. There must be principled bases for deciding which jurisdictions are suitable for citation in given circumstances and which are not.

A central point to note about this conundrum is that there is no reason that the same basis for selection should necessarily pertain to all circumstances. The recent Supreme Court opinions that have cited foreign precedent dealt with a variety of constitutional provisions and values, from federalism,¹⁶² to the Eighth Amendment proscription of cruel and unusual punishment,¹⁶³ to the right of privacy under the Due Process Clauses.¹⁶⁴ Each of these provisions involves different constitutional values and, even in the domestic sphere, attracts its own distinct sets of precedents.

It seems quite possible that the extent and character of foreign

162. *E.g.*, *Printz v. United States*, 521 U.S. 898 (1997) (holding unconstitutional portions of the Brady Handgun Violence Prevention Act that required state governments to implement a federal program); *see supra* notes 6-20 and accompanying text.

163. *E.g.*, *Roper v. Simmons*, 125 S. Ct. 1183 (2005) (holding that the Eighth and Fourteenth Amendments forbid imposition of the death penalty on persons who committed their crimes before the age of eighteen); *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the execution of mentally retarded criminals is excessive punishment restricted by the Constitution); *see also supra* text accompanying notes 21-31, 65-93.

164. *E.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding unconstitutional a Texas statute criminalizing "deviate sexual intercourse" with another person of the same sex); *see also supra* text accompanying notes 32-46.

references could and should vary according to which constitutional provisions are at issue. In any event, the examination of one such issue under review, to the exclusion of others, would seem justified as a tentative step towards the resolution of the jurisdictional selection objection, at least for that issue. Perhaps if warranted at a later point in time, such a resolution for that issue can serve as a basis for resolving a broader set of issues. For present purposes, however, it must suffice to suggest a way in which reference to the laws of certain types of particular countries can be legitimately preferred over the laws of others in addressing one specific issue in U.S. constitutional law.

V. THE EUROPEAN ENLIGHTENMENT, THE U.S. CONSTITUTION, AND FUNDAMENTAL RIGHTS

The United States Constitution was an outgrowth of the cultural and political forces of its time. This point is commonly conceded, though prominent commentators tend to emphasize roots in the specifically British common law and constitutional tradition.¹⁶⁵ The point suggested here is much broader. Many of the ideas reflected in the U.S. Constitution were developed during the immediately preceding generations by the writers of the European Enlightenment.¹⁶⁶ It is important to recognize that fact and accord it substantial weight when analyzing the U.S. Constitution.

The contents of the Enlightenment and its beginning and

165. *E.g.*, FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 12-13 (1985) (emphasizing the impact of “the historical ‘rights of Englishmen’” on American law); Scalia & Breyer, *supra* note 112 (Justice Scalia asserts that “foreign law is irrelevant with one exception: Old English law, because phrases like ‘due process,’ the ‘right of confrontation’ and things of that sort were all taken from English law”); *see also, e.g.*, RETT R. LUDWIKOWSKI & WILLIAM F. FOX, JR., *THE BEGINNING OF THE CONSTITUTIONAL ERA* 7 (1993) (“Most of the provisions in the 1787 Constitution and the 1791 Bill of Rights have antecedents in either British or state government documents, as well as in the Constitution’s immediate predecessor, the Articles of Confederation.”).

166. The Enlightenment has been defined as “a philosophic movement of the [eighteenth] century characterized by an untrammelled but frequently uncritical use of reason, a lively questioning of authority and traditional doctrines and values, a tendency toward individualism, and an emphasis on the idea of universal human progress and on the empirical method in science.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 754 (Philip Babcock Gove ed., 1993); *see also* 1 PETER GAY, *THE ENLIGHTENMENT: AN INTERPRETATION: THE RISE OF MODERN PAGANISM* 3-27 (1966) (discussing the philosophies of the Enlightenment that formed many of the views of American political thinkers).

ending points are not universally agreed upon.¹⁶⁷ However, for present purposes this Article will define the phrase “European Enlightenment” as collectively describing the work of a significant number of prominent philosophers and political theorists who, from the early seventeenth century through the late eighteenth century (approximately 200 years), had a profound effect on the political and social development of modern Western Civilization.¹⁶⁸

Among the concepts developed by these singular thinkers were various refinements on a contractarian theory between the individual and the State,¹⁶⁹ the importance of individual autonomy and fulfillment both to the individual and to the State,¹⁷⁰ the

167. Professor Gay addressed the differing views of beginning and ending points for the Enlightenment, finally deciding upon what he considered dates that the most “traditional” historical approaches would discern: the hundred-year period between 1689 and 1789. 1 GAY, *supra* note 166, at 17. Others also date the Enlightenment from shortly before the end of the seventeenth century. See, e.g., Werner Schneiders, *Reason, in* ENCYCLOPEDIA OF THE ENLIGHTENMENT 1125 (Michel Delon, et al. eds., 2001) (“From the beginning of the *Aufklärung*—that is, around 1690—German philosophers conceived their mission as one of enlightenment or as an improvement of understanding.” (internal quotations omitted)). However, my focus is on the genealogy of the U.S. Constitution, and in my opinion, the philosophical antecedents require a longer period of reference. Beginning the Enlightenment in the early seventeenth century allows for the inclusion of Descartes, for example, whose influence on Locke is clear and whose work played a key role in developing the tension between rationality and empiricism. E.g., RICHARD TARNAS, *THE PASSION OF THE WESTERN MIND* 335 (1991) (“Locke, however, attempted a partial solution to such problems by making the distinction (following Galileo and Descartes) between primary and secondary qualities—between those qualities that inhere in all extended material objects as objectively measurable, like weight and shape and motion, and those that inhere only in the subjective human experience of those objects, like taste and odor and color.”). There seems to be less disagreement about the ending point, although it might be said that this is less material. Michel Delon, *Representations of Enlightenment, in* ENCYCLOPEDIA OF THE ENLIGHTENMENT, *supra*, at 461 (“[T]he [modern] critical attitude implies avoiding the choice between being inside or being outside [the Enlightenment]. Enlightenment man [civilization] is ever at the edge.”).

168. Cf. Delon, *supra* note 167, at 462 (“[C]ontemporary authors are contributing to the continuous displacement of the frontier between the Enlightenment and the non-Enlightenment—in other words, they are contributing to the transformation and redefinition of the Enlightenment itself.”).

169. E.g., Dietrich Berding & Diethelm Klippel, *Social Contract, in* ENCYCLOPEDIA OF THE ENLIGHTENMENT, *supra* note 167, at 1240-43 (generally describing the idea of a social contract as one of the major elements of the European Enlightenment). In particular, “Thomas Hobbes, who is considered the father of modern social contract theory, used the concept to justify absolutism. On the other hand, a liberal version of the theory, usually associated with John Locke and Jean-Jacques Rousseau, did emerge.” *Id.* at 1240-41.

170. E.g., Didier Deleule, *Liberalism, in* ENCYCLOPEDIA OF THE ENLIGHTENMENT, *supra* note 167, at 768 (“Meanwhile in the social and economic realms, the

importance of reason (as opposed to faith or superstition) as a basis for the acceptance of principles of social ordering,¹⁷¹ and the centrality of skepticism and doubt to the necessary task of correcting the superstitions and prejudices of earlier ages.¹⁷² Among the most celebrated of these intellects¹⁷³ were Thomas Hobbes (1588–1679),¹⁷⁴ René Descartes (1596–1650),¹⁷⁵ John Locke (1632–1704),¹⁷⁶ the Baron de Montesquieu (1689–1755),¹⁷⁷ David Hume (1711–1776),¹⁷⁸ Jean-Jacques Rousseau (1712–1778),¹⁷⁹ and

individual acquired new prominence, coming to embody initiative and a certain taste for entrepreneurship—a practice that had its roots in individual self-interest and adopted the goal of the maximum satisfaction of that same self-interest, thereby promoting, in the complex play of social relations initiated in this way, what became known as the common good. In this regard, the function of the state was defined as guaranteeing this ‘natural’ individual disposition . . .”). As explained in *Liberalism*, “[t]he common basis of political and economic liberalism is indeed the individual: the state, having once been master over individuals, was required to place itself at their service and become their tool.” *Id.* at 769 (citation omitted).

171. *E.g.*, Schneiders, *supra* note 167, at 1125-26 (discussing the place of reason in particular connection with the German Enlightenment, or *Aufklärung*); *see also* Suzanna Sherry, *The Sleep of Reason*, 84 *GEO. L.J.* 453, 455-57 (1996) (discussing Enlightenment concepts of reason).

172. *E.g.*, Babara De Negroni, *Doubt, Scepticism and Pyrrhonism*, in *ENCYCLOPEDIA OF THE ENLIGHTENMENT*, *supra* note 167, at 392 (“[T]he Enlightenment *philosophes* regarded doubt as the only means of radically challenging the prejudices that upbringing and society have inculcated in us and the illusions that constantly deceive us For Enlightenment thinkers, doubt was primarily a critical tool that made it possible to denounce errors, prejudices, the illusions to which men fall victim, and the machinations employed in order to dominate them more effectively.”).

173. In the substance of many of their ideas, there could be as much that divided some of these writers from one another as united them. Nevertheless, they were all active and renowned during this period, and they all played a role in the development of the ideas involved.

174. *See generally* FRANK M. COLEMAN, *HOBBS AND AMERICA: EXPLORING THE CONSTITUTIONAL FOUNDATIONS* (1977) (providing support for the theory that Hobbes is the “true ancestor of American constitutionalism”).

175. *See generally* Steven D. Smith, *Recovering (From) Enlightenment?*, 41 *SAN DIEGO L. REV.* 1263 (2004) (discussing generally the work of Descartes during the Enlightenment period).

176. *See generally* LOCKE’S MORAL, POLITICAL AND LEGAL PHILOSOPHY (J.R. Milton ed., 1999) (providing a collection of essays analyzing the philosophies of John Locke); ROGERS M. SMITH, *LIBERALISM AND AMERICAN CONSTITUTIONAL LAW* (1985) (discussing the writings of John Locke and his contribution to early American political ideas).

177. *See generally* ANNE M. COHLER, *MONTESQUIEU’S COMPARATIVE POLITICS AND THE SPIRIT OF AMERICAN CONSTITUTIONALISM* (1988) (acknowledging Montesquieu’s work as having a direct influence on the shape of the U.S. Constitution).

178. *See generally* KNUD HAAKONSSON, *THE SCIENCE OF A LEGISLATOR: THE NATURAL JURISPRUDENCE OF DAVID HUME AND ADAM SMITH* (1981) (providing an

Immanuel Kant (1724–1804).¹⁸⁰

Many of the framers were aware of most of these writers. Several of them were cited in *The Federalist Papers* and in other works of direct relevance to the Constitution's establishment.¹⁸¹ While certain of these individuals were not explicitly named by the framers in the process of drafting the Constitution, the impact of their ideas was a substantial basis for concepts reflected in constitutional text and structure.

The impact of Montesquieu's ideas on the separation of powers for the framers is well known. The authors of *The Federalist Papers* referenced his work repeatedly, at one point anointing him with the encomium, "[t]he celebrated Montesquieu."¹⁸² The work of John Locke, emphasizing the importance of personal property rights, is reflected in the Fifth Amendment Due Process and Takings Clauses and elsewhere in the constitutional text. The basic idea of a social contract, initially elaborated upon by Hobbes and then refined (to somewhat different effects) by Locke and Rousseau, underlies the very concept of a written constitution as a pact among its framers, the broader contemporary society, and succeeding generations.¹⁸³ Even when the framers did not

overview of Hume's theory of justice).

179. See generally STEVEN JOHNSTON, ENCOUNTERING TRAGEDY: ROUSSEAU AND THE PROJECT OF DEMOCRATIC ORDER (1999) (discussing the work of Rousseau and his contributions to western political thought).

180. See generally ALLEN D. ROSEN, KANT'S THEORY OF JUSTICE (1993) (discussing the main elements of Kant's political philosophy and describing Kant as one of the founders of classical liberalism).

181. Montesquieu is cited numerous times in *The Federalist Papers*. THE FEDERALIST No. 9, at 52 (Alexander Hamilton) (Jacob E. Cooke ed., Wesleyan Univ. Press 1961); THE FEDERALIST No. 43 (James Madison), *supra*, at 291-92; THE FEDERALIST No. 47 (James Madison), *supra*, at 324. Hume is cited only once. THE FEDERALIST No. 85 (Alexander Hamilton), *supra*, at 594 n.*. However, the influence of Hume is reported to be significant. MCDONALD, *supra* note 165, at 7 (stating that Hamilton and Madison quoted or paraphrased Hume without acknowledgment). Similarly, the work of John Locke was elemental to many of the ideas expressed in *The Federalist Papers*. *Id.* (affirming that Locke's theories of contract and natural-rights were reiterated without mention of their origin).

182. THE FEDERALIST No. 78 (Alexander Hamilton), *supra* note 181, at 523 n.*. Not all references to Montesquieu in *The Federalist Papers* are equally laudable but all evince his influence.

183. The relationship between the European Enlightenment and the U.S. Constitution has been particularly connected with respect to the growth of liberalization in Europe and America. *E.g.*, Dietrich Berding & Diethelm Klippel, *Natural Law and the Rights of Man*, in ENCYCLOPEDIA OF THE ENLIGHTENMENT, *supra* note 167, at 895 ("This process [the secularization of natural law into liberal natural law] reached a temporary conclusion in North America and France with

specifically refer to Enlightenment authors by name, the concepts that the Europeans had developed for generations served as the basis for much of their thought.¹⁸⁴

A. *Fundamental Rights and the Enlightenment*

Among the central concepts developed in the course of the European Enlightenment is the singular notion that any human being has certain basic rights simply by virtue of being human.¹⁸⁵ This was famously expressed in the Declaration of Independence.¹⁸⁶ It also found political expression, however, in other foundational documents of the period, such as the French Declaration of the Rights of Man and the Citizen.¹⁸⁷ The French Declaration echoed the American Declaration's emphasis on the "Pursuit of Happiness,"¹⁸⁸ presaged the religious liberty guaranteed in the U.S. Federal Bill of Rights,¹⁸⁹ and helped to usher in the concept of

the bills of rights of various American States, the U.S. Constitution, and the 1789 Déclaration des Droits de l'Homme et du Citoyen.").

184. Again, there existed a synergy between liberalizing developments in legal and political theory between Europe and America. *E.g.*, Otto Dann, *Nation, in* ENCYCLOPEDIA OF THE ENLIGHTENMENT, *supra* note 167, at 883, 885 ("The Enlightenment Project of nation building was a project of social emancipation. Removing the religious and social barriers of the ancien régime would provide the various strata of a single people with the means to integrate into a civil society based on a common written culture and organized politically in a modern state. Finally, after the United States had gained independence and adopted a republican constitution, the new North American nation was held up as a precursor in Europe.").

185. *See, e.g.*, I GAY, *supra* note 166, at 3.

186. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness . . .").

187. FRANCE: DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN 1789, *reprinted in* COMPARING CONSTITUTIONS, at 208-10 (S.E. Finer et al. eds., 1995).

188. *E.g.*, Michel Delon, *Happiness, in* ENCYCLOPEDIA OF THE ENLIGHTENMENT, *supra* note 167, at 635 ("The happiness that [Louis-Antoine-Léon] Saint-Just was invoking [before the French National Assembly] is collective, social, and political—the common good rather than individual well-being. It corresponds to the first article of the [Declaration of the Rights of Man and of the Citizen]. . . . The idea of the pursuit of happiness marked a break with the tradition that had placed the highest value on the salvation of the soul or the glory of the prince.").

189. *E.g.*, Hanna Roose, *Protestantism, in* ENCYCLOPEDIA OF THE ENLIGHTENMENT, *supra* note 167, at 1116 ("The [French] Revolution brought religious freedom to the Huguenots. The *Déclaration des droits de l'homme et du citoyen* (27 August 1789; Declaration of the Rights of Man and of the Citizen) guaranteed freedom of conscience and of worship. After 24 December 1789, Protestants were allowed to hold public office.").

popular sovereignty.¹⁹⁰

The French Declaration was promulgated by the revolutionary French government in 1789, the same year the first U.S. Congress was seated pursuant to our current Constitution.¹⁹¹ The text of the original U.S. Constitution explicitly guarantees similar fundamental rights, such as the right to a trial by jury,¹⁹² the right against arbitrary imprisonment through petitions for habeas corpus,¹⁹³ and the right to be free from the retroactive impairment of contracts.¹⁹⁴ Upon the adoption of the Bill of Rights two years later, the list of explicitly guaranteed rights was expanded.

B. *Fundamental Rights and the U.S. Constitution*

The modern Supreme Court has developed the concept of fundamental rights in a non-textual sense through its interpretation of the Due Process Clause and the Equal Protection Clause. These non-textual fundamental rights can be traced to the 1942 case of *Skinner v. Oklahoma*,¹⁹⁵ in which the Court referred to “marriage and procreation” as being among the “basic civil rights of man,” and as being “fundamental to the very existence” of humanity.¹⁹⁶ Accordingly, the Court in *Skinner* suggested for the first time that “strict scrutiny” was necessary for any governmental act that impaired rights that could be considered so basic as to be “fundamental” in this sense.¹⁹⁷

Since *Skinner*, this doctrine of fundamental rights has grown

190. E.g., Jean Bart, *Law, Public, in* ENCYCLOPEDIA OF THE ENLIGHTENMENT, *supra* note 167, at 764, 767 (“[P]ublic law [can be defined] as the law ‘that has been established for the common use of people considered as a political body.’ It differs from ‘private law, which is enacted for the use of each person considered individually and independently of other persons.’ . . . Thus the notion of public law . . . was at the heart of the political debate waged in the years before the French Revolution. At that period, the concept was easily absorbed into that of the [French] constitution . . . before it would be fully implemented in the Declaration of the Rights of Man and of the Citizen . . .”).

191. For a detailed comparison between the French and English revolutions and their comparative philosophical impacts on U.S. constitutional law, see Harold J. Berman, *The Impact of the Enlightenment on American Constitutional Law*, 4 YALE J.L. & HUMAN. 311 (1992).

192. U.S. CONST. art. III, § 2, cl. 3.

193. *Id.* art. I, § 9, cl. 2.

194. *Id.* art. I, § 10, cl. 1.

195. 316 U.S. 535 (1942) (holding unconstitutional an Oklahoma statute under which habitual criminals could be sterilized).

196. *Id.* at 541.

197. *Id.*

considerably, having been applied through both the Due Process and Equal Protection guaranties to protect interests in privacy including contraception,¹⁹⁸ abortion,¹⁹⁹ and marriage,²⁰⁰ and the rights of interstate travel²⁰¹ and voting.²⁰² Activists and litigators have attempted at various points in time to expand the list of fundamental rights that would be subject to the strict scrutiny requirement. Members of the Supreme Court have been skeptical of such efforts. For example, the Court has declared that education is not a fundamental right in this sense.²⁰³ Also, in some circumstances, an unmarried man's right to the consortium of his minor child does not constitute a fundamental right.²⁰⁴ Initially, the Court held in 1986 that the interest perceived by same-sex couples to engage in private sexual relations was not a fundamental right.²⁰⁵ In 2003, the Court offered protection to this interest but

198. *E.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding unconstitutional a Connecticut statute criminalizing the use of contraceptives and the provision of assistance in obtaining contraceptives).

199. *E.g.*, *Roe v. Wade*, 410 U.S. 113 (1973) (holding unconstitutional Texas statutes criminalizing abortion).

200. *E.g.*, *Zablocki v. Redhail*, 434 U.S. 374 (1978) (holding unconstitutional a Wisconsin statute requiring non-custodial parents obliged to provide financial support for minor children to receive court permission before marrying).

201. *E.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969) (holding unconstitutional statutory provisions requiring welfare recipients to have been residents of the state for one year prior to applying for benefits).

202. *E.g.*, *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) (concluding that requiring payment of Virginia poll tax as precondition to voting violates the Equal Protection Clause of the Fourteenth Amendment).

203. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (concluding that there is no fundamental right to education and that the Texas method of funding public education is constitutional).

204. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (holding that a California statute presuming the cohabiting husband of a woman to be her child's father did not violate due process rights of the child or of the putative natural father). This case is not as much of a negative indicator as it might initially appear. There was no opinion of the Court, and the plurality opinion by Justice Scalia attached importance to the fact that the child's mother was living with a man other than the child's probable father but to whom she was married at the time the child was born. *Id.* at 129-30. The case did not present a situation in which the mother was unmarried. Also, the concurring opinion by Justice Stevens, which was necessary to help form the judgment, was grounded on statutory interpretation rather than the primary constitutional question. *Id.* at 133-34 (Stevens, J., concurring). However, on the basis of the Court's subsequent reluctance to find new constitutional rights, I assume that the Court may not be receptive to finding a fundamental right for a natural father's consortium with his child born out of wedlock even in more general circumstances.

205. *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding constitutional a Georgia law criminalizing sodomy and explicitly refusing to announce a

not necessarily on the basis that it encompassed a fundamental right.²⁰⁶

The primary motivation for the resistance exhibited by Court members toward the expansion of fundamental rights is rooted in concern for majoritarian democracy.²⁰⁷ After all, whenever strict scrutiny is used to invalidate a governmental act that is held to impair a fundamental right, the will of the popularly-elected legislature is frustrated. However, the mere observation that the enforcement of a fundamental right through strict scrutiny can be counter-majoritarian does not answer the question of whether an asserted new right should become a fundamental right. The observation may be a basis for urging restraint in finding new fundamental rights, but it does not provide a basis for determining which asserted rights, from one juncture to the next, should be considered fundamental.

The failure of majoritarianism to provide a key in identifying fundamental rights is emphasized by the Enlightenment idea that human rights cannot be removed.²⁰⁸ The Declaration of

“fundamental right to engage in homosexual sodomy”). Justice White stated that “we are quite unwilling” to hold that there is “a fundamental right to engage in homosexual sodomy.” *Id.* at 191. Perhaps somewhat famously, at least for followers of this area of the law, he added that any claim that “a right to engage in such conduct is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious.” *Id.* at 194.

206. *Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling *Bowers* and holding unconstitutional a Texas statute criminalizing intimate sexual contact between persons of the same sex even in the privacy of a home). The Court in *Lawrence* never indicated whether its holding was based on a determination of the existence of a fundamental right. Indeed, the character of the right on which the Court’s holding was based is the subject of some discussion. See generally Dale Carpenter, *Is Lawrence Libertarian?*, 88 MINN. L. REV. 1140 (2004) (examining how broadly the *Lawrence* decision should be read).

207. A passage from Justice White’s opinion of the Court in *Bowers v. Hardwick* illustrates this type of concern:

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of [the Due Process and Equal Protection] Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.

Bowers, 478 U.S. at 194-95.

208. See Berding & Klippel, *supra* note 183, at 893, 895 (“The rights of man established by the United States’ Bill of Rights . . . marked a fundamental

Independence refers to basic rights of all persons as being “inalienable,” asserting that the rights to life, liberty, and the pursuit of happiness are simply “among” those so denominated and not a complete catalog of them.²⁰⁹ The “inalienability” of these rights, as well as the notion that people possess the rights because they have been “endowed” by the people’s “creator,” have roots in natural-law theory.²¹⁰ Although natural-law theory was problematic for some during the Enlightenment, there is no doubt of its power or influence during the period.²¹¹

Members of the Supreme Court rarely offer explicit methodologies for identifying fundamental rights. The only prominent example of such an attempt is the plurality opinion in the 1989 case of *Michael H. v. Gerald D.*²¹² In that opinion, Justice Scalia’s explication of a (very limiting) methodology for identifying fundamental rights was joined by only one other Justice.²¹³

It is not difficult to see why some people, including Justice Scalia, might be reluctant to find new fundamental rights, even apart from the “counter-majoritarian difficulty.”²¹⁴ Trying to determine a balance between individual rights and social stability is an endeavor of profound implications for a society. Each political society in the world can be defined in terms of the balance it strikes between individual rights and the collective interest, whether envisioned in terms of stability, tradition, collective will, or some other countervailing value. At first glance, this seems to support an ethnocentric view of fundamental rights—if the balance between

transition from the feudal notion of freedom . . . to the concept of the inalienable rights of individuals, of man as man, as defined in the Bill of Rights . . .”).

209. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

210. See Berding & Klippel, *supra* note 183, at 893, 895.

211. See, e.g., 2 PETER GAY, THE ENLIGHTENMENT: AN INTERPRETATION: THE SCIENCE OF FREEDOM 457 (1969) (“In the hands of the philosophes, natural law was, in effect, secular, a modern version of classical pagan speculation: there are eternal immutable principles of morality that stand as critics of positive law, for they often contradict it.”); accord Berding & Klippel, *supra* note 183, at 893, 894 (charting the development of natural-law theory from a sectarian base in the Middle Ages through to its later secularization and ultimate status as an aspect of liberalism).

212. 491 U.S. 110 (1989); see *supra* note 204 and accompanying text.

213. The famous “footnote 6” approach set forth in the lead opinion, the source of that opinion’s most detailed description of methodology, expressed the views only of Justice Scalia and Chief Justice Rehnquist. *Michael H.*, 491 U.S. at 127 n.6.

214. Basic background discussions of the “counter-majoritarian” or “anti-majoritarian difficulty” were provided, for example, by authorities such as Laurence Tribe. TRIBE, *supra* note 161, at 61-66.

individual rights and the collective interest defines a society, then only the authorities of that society should be involved in setting the limits of individual rights within it.

In the larger scheme of things, however, there is no reason to suppose that any one society has hit on the optimal balance, in some objective sense, between individual rights and the collective interest. Judges in any one society attempting to discern whether newly asserted rights should qualify as fundamental might benefit, in a subjective sense, from exploring which rights other societies have considered to be fundamental. This is not to suggest that judges in one society should feel bound by the rules of another, but simply to note that the experience of other societies can be informative in their consideration of the issue.²¹⁵

C. A Basis for Comparison

The very idea that fundamental rights cannot be taken away even by a majority vote traces its roots to the European Enlightenment. As noted earlier, the French Declaration of the Rights of Man and of the Citizen was issued the same year the first government under the U.S. Constitution was established. John Locke's conception of property as a fundamental right finds its way at numerous junctures into the U.S. constitutional tradition, and the idea of fundamental notions of liberty is implicit in much of Enlightenment theory.²¹⁶

The countries in which the European Enlightenment flourished²¹⁷ have had well over two centuries to address and

215. In his debate with Justice Scalia, for example, Justice Breyer indicated that references to foreign sources do not suggest that the foreign sources have mandatory effect, allowing that "it's important that these things not be binding." Scalia & Breyer, *supra* note 112; see also Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL'Y REV. 329, 337 (2004) (suggesting that considering the law of foreign nations in domestic constitutional opinions is, in the language of the Declaration of Independence, according "a decent Respect to the Opinions of [Human]kind," and predicting that the Court "will continue to accord" this respect "as a matter of comity and in a spirit of humility"). The emphasis Justice Ginsburg places in "comity" distinguishes the usage of foreign sources for persuasive purposes from a usage based on binding precedent.

216. E.g., Jürgen Heideking, *North America, in* ENCYCLOPEDIA OF THE ENLIGHTENMENT, *supra* note 167, at 921, 923 ("In addition to the Declaration of Independence, the federal Constitution and the Bill of Rights (added to the Constitution in 1791) were the principal American contributions to the Enlightenment—contributions that still have not lost their vigor.").

217. Professor Gay discusses the Enlightenment in England, Scotland, France,

experiment with the ideas it espoused. In particular, each of those countries has arrived at its own dynamic of balance between individual rights and the necessary interests of the State. There is thus a wealth of experience in each of the countries of the European Enlightenment regarding the protection and accommodation of fundamental rights.

Other states are unlikely to have experienced the same degree of involvement with the idea of fundamental rights over the same period of time.²¹⁸ Even if some states in other parts of the world confronted a similar issue during this time period, those states, lying outside the geographic area which experienced the intellectual and political stimulation of the Enlightenment period, would have had fundamentally different experiences than Western Europe and the United States.

VI. CONCLUSION

The Western European experience informed and undergirded much of the U.S. Constitution, especially the concept of fundamental rights.²¹⁹ This could well prove a basis for resolving the jurisdictional selection objection in the context of identifying fundamental rights. Those countries that formed a part of the European Enlightenment, by virtue of their centuries of experience with its concepts, are significantly better suited than others as examples of how to resolve the conflict between individual liberty and collective security or stability. Judges, commentators, and other observers can safely reference authorities from these countries when attempting to identify fundamental rights.

Italy, and Germany. 1 GAY, *supra* note 166, at 3-19.

218. I hasten to note that my emphasis on the countries of the European Enlightenment is not meant to suggest that other countries of the world are not currently “enlightened,” in the modern sense. Indeed, many other areas of the world have rich and illustrious cultural and intellectual histories. However, the U.S. Constitution has an intimate relationship with this particular period of Western intellectual history.

219. See *supra* Parts V-V.A.