2005

Justifying the Use of International Human Rights Principles in American Constitutional Law

Vincent J Samar, Chicago-Kent College of Law

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JUSTIFYING THE USE OF INTERNATIONAL HUMAN RIGHTS PRINCIPLES IN AMERICAN CONSTITUTIONAL LAW

Vincent J. Samar*

I. INTRODUCTION

In this Article, I shall take up the thesis that international and comparative law sources are relevant to interpreting the U.S. Constitution because the Constitution itself warrants respect only insofar as it is a means for achieving minimal protections for human dignity. I argue a narrow version of this thesis:¹ Our domestic constitutional interpretations should be checked by looking to the minimal set of rights recognized in other systems that share certain contents. Here the problem is that what appear as shared values at one level may reflect different understandings at a deeper, more reflective level. For example, the framers of our own Constitution clearly sought to advance liberty. But the liberty they sought to advance may not have been the same liberty that became of concern

* Vincent J. Samar is Adjunct Professor of Law at Illinois Institute of Technology, Chicago-Kent College of Law, and an Adjunct Professor of Philosophy at both Loyola University Chicago and Oakton Community College. He wrote this article as his LLM. paper while on sabbatical as an LLM. student at Harvard Law School. The author wishes to thank Professor Martha Minow of the Harvard Law School, who served as advisor, reader, and supportive critic of earlier drafts of this essay, and Professor Mark Strasser of Capital Law School and Howard Kaplan, who made helpful suggestions in support of various aspects of this project.

¹ The strong version of this thesis would be that the justification for using international and comparative sources is that the values inside a legitimate constitution must themselves be universal and therefore comparative ones should check parochial assessments. This thesis is too strong, however, because it presumes that what makes a justification universal is its range of support among many nations. While certainly such a thesis is not to be scoffed at, it is by no means self-evident that just because many places adopt a certain pattern of rights and obligations, the pattern adopted is correct.
during the Fourteenth Amendment's period of ratification, and in the subsequent history of Supreme Court constitutional cases following its adoption.

This is because many of the framers, including Alexander Hamilton, were initially enlightened by a protestant dissenting tradition that saw liberty as a right to serve God but, in their role as framers, came to see it as the right to serve the common good.\textsuperscript{2} Although no one in America today would seriously depreciate this positive sense of freedom to civic responsibility, many would want to juxtapose it against a negative sense of freedom from constraint over our own actions. This then suggests that what lies behind these two senses is a notion of liberty that runs deeper than either one. And, in fact, there may be other moral values that are also in play here, such as well-being in the sense of human purpose fulfillment, which helps to bring these two senses of freedom into context. Therefore, in this Article I propose to consider the set of rationally based aspirations that our system of constitutional rights and many other related systems seem to presuppose as a ground for developing a growing conception of liberty and dignity that the U.S. Supreme Court should adopt.\textsuperscript{3}

Specifically, starting from three recent Supreme Court decisions concerning the death penalty, adult consensual same-sex sexual relations in private, and tort claims for violation of the law of nations, I will argue that European human rights decisions and international human rights conventions can provide helpful insights to the U.S. Supreme Court in interpreting American constitutional norms, provided that two conditions related to a broad normative conception of constitutional interpretation are met. The first is analytic; the second, normative. The analytic condition requires that there exist a common normative language capable of equating established meanings of settled American constitutional law with newly developing understandings of various conventions of

\begin{footnotesize}
\footnote{2.\ See Gordon S. Wood, The Creation of the American Republic 1776-1787 23--24 (1970). I am not suggesting that the negative sense of liberty as freedom from was not a part of the background here; rather, I am suggesting only that for many framers the positive sense of freedom to was more in the forefront. For a discussion of some of the other liberties that were also of concern, see Forrest McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution 36-41 (1985).

3. My thesis suggests that other constitutional courts should perhaps encourage this as well, although a full discussion of this course of argument is beyond the scope of this article.}
\end{footnotesize}
international human rights by both the domestic courts of other nations and the International Court of Human Rights. The normative condition requires that the values comprising this common language provide a minimal set of basic standards to prevent excessively restrictive interpretations of American constitutional doctrine. The first concern is thus to set out a discourse in which common meanings are recognized. The second is to prevent constriction or devaluation of those settled rights American constitutional law already recognizes.

The theoretical framework that I adopt to achieve these two results finds, in the work of the American philosopher Alan Gewirth, the necessary terminology and construction of values that achieve these ends. I look to philosophy rather than some other academic area because only philosophical arguments have sufficient generality, yet rigor, to connect the history and tradition of the American constitutional understanding with those developing elsewhere in the world and especially in Western Europe without succumbing to any of these forms of understanding as the final word on the subject.

Current debates in the literature raise questions concerning, among other issues, whether allowing judges to consider extraterritorial and international law sources will open the door to their reading into American constitutional law their own idiosyncratic moral points of view. I hope to show that this concern is unwarranted. The methodology I plan to rely upon will take seriously both the constraints that are imposed on courts by way of language,

reason, and past case precedent, and the duty of judges to decide cases. It will show that in order for these two constraints to be satisfied judges may sometimes have to balance a move to a higher level of abstraction with staying with the values already put in place by the constitutional order. That higher level of abstraction will then provide the philosophical common ground for deciding what international and comparative foreign norms judges can take into account and what the minimum permissible standard should be for affirming human rights. This dual approach of increasing the range of sources while ensuring constraint is warranted by the kinds of issues judges are beginning to face living in a global society.

Having said that I rely on philosophy to achieve the basis of essential comparisons between American and extraterritorial norms and interpretations, I recognize that there will be a number of theories within philosophy that might be offered to fit the bill, including John Stuart Mill’s harm principle, John Rawls’s notion of “public reason,” and Alan Gewirth’s rational justification of human rights. Among the possible alternative approaches, Gewirth’s rational justification approach best meets the two requirements set out above. Mill’s principle is inadequate because, notwithstanding the very strong justification he offers for certain normative presumptions in favor of freedoms of thought, speech, tastes and pursuits, and association, he ultimately grounds his theory in a utilitarian analysis, which leaves any right open to the charge that it can be readily overridden by an appeal to utility alone, regardless of any other values that may be at stake. Rawls’s approach of public

5. The now classic formulation of the principle as Mill originally presented it says: “The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.” John Stuart Mill, On Liberty and Utilitarianism 12 (1993).

6. See generally John Rawls, Political Liberalism (1993) (arguing that in a pluralistic society, there will likely exist an overlapping consensus in which citizens share a sense of justice and a capacity for a conception of the good).

7. See generally Alan Gewirth, Reason and Morality (1978) (arguing that all humans have a set of generic rights as prospective purposive agents).

8. As Mill states: “It is proper to state that I forgo any advantage which could be derived to my argument for personal liberty from the idea of abstract
reason avoids this problem by tracing out a more deontological
grounding in the idea of “justice as fairness.” But Rawls’s system
also fails insofar as his more recent expressions of how to achieve a
just system presuppose that one already accepts the democratic
commitment to put aside in public debate incommensurable
metaphysical and religious claims in favor of consensus building.

Because Gewirth’s system begins from a principle that all moral
theories logically presuppose, namely that the persons they address
are voluntary prospective human agents. Thus, it alone is capable
of evaluating all claims of values on sufficiently general principles to
meet both of the above requirements.

Section Two will pose the question: Does the U.S.
Constitution direct judges to consider international and comparative
law sources? It will then preview three recent Supreme Court
opinions where the Court looked to non-U.S. sources of law to provide
some elaboration of constitutional doctrine: Atkins v. Virginia, Lawrence v. Texas, and Sosa v. Alvarez. This section will also
distinguish between international sources that have been generally
imported into constitutional decision-making and those that have
not, including international common law, treaties adopted, treaties
not adopted, and treaties in which the United States has expressed
some reservations. It will then address the question of whether these
prior incorporations suggest that courts should also be considering
trends in the development of general principles of international law
and jus cogens.

right, as a thing independent of utility. I regard utility as the ultimate appeal on
all ethical questions; but it must be utility in the largest sense, grounded on the
permanent interests of man as a progressive being.” Mill, supra note 5, at 14.

Liberalism, Business Ethics Quarterly 22.1, 620 (1995) (contrasting John Rawls,
A Theory of Justice (1971) with his newer work Political Liberalism (1993)); see
also Daniel Brudney, Hypothetical Consent and Moral Force, 10 Law & Phil. 235,
253 (1991) (arguing the moral relevance of Rawls’s notion of capacity for an
unspecified sense of the good and blind sense of justice).


11. See Gewirth, Reason and Morality, supra note 7, at 27.

12. Here, I am not concerned with the positive sense of prescriptiveness
that would address what some agent actually accepts or is likely to accept in
respect to their behavior. Rather, the point is normative, focusing on what an
agent is logically required to accept on pain of contradiction. Id. at 195.


Section Three will consider the challenge that allowing judges to look at general principles will lead to their imposing their own idiosyncratic views into American law without any kind of democratic constraint. In response to this question, I will consider the ways that language, reason, and past case precedent restrain the freedom of judges to act by looking at certain recognized forms of constitutional argument and then analyzing the consequences of considering only "legitimacy" when assessing what law means. In this later regard, I will highlight various problems legitimacy encounters regarding constraint, determinacy, and openness. I hope to show that a careful unlocking of the terms of this debate will lead us away from a strictly positive law view of constitutional practice and towards a more normative view in which law serves to establish social order and enhance human dignity.

To this end, Section Four will introduce the work of the late 20th century American philosopher Alan Gewirth, who believed that morality must ultimately be derived from voluntary, purposive human action.\textsuperscript{16} The goal of this section will be to show, by a set of carefully worked out steps, how a judge might begin to use Gewirth's framework to develop a fully normative conception of constitutional law that goes from theory justification to engaging institutional norms to legitimating the use of extraterritorial standards.\textsuperscript{17} Attention here will also be drawn to how the Gewirthian distinction between "particularist" and "universalist" morality affords conceptual space for the articulation of specifically American values and institutional norms without treading upon those more serious universal values\textsuperscript{18} that should be held in common.\textsuperscript{19}

Section Five will then come back to the three cases described in Section One to explore how the conception developed for constitutional interpretation offers insights into and critiques of the selection of sources (both domestic and foreign) and methods of analysis that the Court used to decide these cases. As testimony of the theory's power in the area of prediction, the section will also

\begin{itemize}
\item \textsuperscript{16} See Gewirth, Reason and Morality, \textit{supra} note 7, at 27.
\item \textsuperscript{17} See Vincent J. Samar, \textit{Gay Rights as a Particular Instantiation of Human Rights}, 64 Alb. L. Rev. 983 (2001).
\item \textsuperscript{18} An interesting question that can be put off for another day is what should happen if the Constitution were to violate universal morality since then it would be questionable whether it had any authority at all in regulating the terms of the debate. Happily, that question does not arise in the cases I plan to consider, and it is beyond the scope of this article.
\item \textsuperscript{19} See Alan Gewirth, \textit{Self-Fulfillment} 152--54 (1998).
\end{itemize}
consider a potential future case involving same-sex marriage.

In Section Six, various criticisms to the interpretative conception I have proposed will be reviewed and answered. I will start with those criticisms that might be thought, in the first instance, to be internal to the legal system, but quickly branch out to a criticism that seeks to undermine the whole rational justification of decision-making. My goal will be to suggest that the framework offered does not succumb to the usual critiques often heard in this area and is more robust than might at first be imagined.

Finally, this article will conclude with a few remarks on what additional specialized training future judges might need to handle the philosophical material and the foreign legal matters that are likely to impact their decision-making. I will also note an analogous way that might be undertaken to arrive at a similar conception for those less comfortable with the strength of Gewirth’s justificatory apparatus.20

II. DOES THE U.S. CONSTITUTION DIRECT JUDGES TO COMPARATIVE AND INTERNATIONAL LAW SOURCES?

In this Section, I take up the question of whether the U.S. Constitution itself directs judges to look at comparative and international law sources without the intervention of any broader normative conception. Because the question is broad and has many potential turns, I will narrow my focus for purposes of this article to three recent Supreme Court cases involving the death penalty, same-sex intimacy, and a claimed statutory right to sue the United States and a foreign operative for abduction and false imprisonment of a Mexican national in Mexico to bring him to stand trial in the United States.

A. Three Recent Supreme Court Cases

In the first case, Atkins v. Virginia, a Virginia court sentenced Daryl Atkins to death following his conviction for

20. Two general points of clarification apply to the whole work. One is that from time to time I will speak of norms as encompassing both rules and principles in American law. Here it should be understood that my use of “norm” is broader than principle and is meant to also include rules. The second point is that, when I refer to international courts, I mean to include regional courts that operate among several nations like the European Court of Human Rights.
abduction, armed robbery, and capital murder. Atkinson, with another accomplice, abducted Eric Nesbitt, robbed him of his money, drove him to an automated teller machine where they forced him to withdraw additional cash, and then transported him to an isolated location where they shot him eight times, causing his death. At his trial, the defense introduced evidence that Atkins was "mildly mentally retarded." At the sentencing phase of his trial, the defense introduced evidence that Atkins's IQ was 59, placing him in the one percent of the population that is considered mentally retarded. The jury returned a sentence of death that the Supreme Court of Virginia affirmed, with two justices dissenting. The dissent argued that the imposition of death on a criminal defendant with a mental age between nine and twelve years is excessive under the Eighth Amendment. Based on the gravity of the concerns and the fact that several state legislatures had over the past thirteen years shifted in their opinions on this matter, the U.S. Supreme Court granted certiorari to consider whether execution of mentally retarded persons was a form of "cruel and unusual" punishment prohibited under the Eighth Amendment. In finding that the imposition of death on a mentally retarded person was cruel and unusual punishment, the Court concluded in a six to three decision that the American public consensus had changed enough to warrant a change in the constitutional demand.

On the surface, the Court appeared to be limiting its understanding of the word "unusual" in the Eighth Amendment to only American public consensus, stating its agreement with the several state legislatures that had essentially moved in that same direction. Since Penry v. Lynaugh, the Court has taken the position of looking to whether or not a national consensus existed against the execution of the mentally retarded. However, in addition to what the Court found in the record regarding the way state legislatures had changed on the issue, it also considered—in the text of its decision, and not just in a passing footnote—that "[a]dditional
evidence [including evidence from extraterritorial sources] makes clear that this legislative judgment reflects a much broader social and professional consensus."

Specifically, the Court relied upon, among other documents, an amicus curiae brief for the European Union, from which the Court noted that, "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." Although the majority justices never explicitly stated why the reference to the "world community" was necessary, the Court, with this and several other references, affirmed that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man.... The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." This appeal to the "dignity of man" points to the Jeffersonian understanding that the Constitution must prioritize minimal protections for basic human rights as distinct from the particular rights of any group within society (whether majority or minority) which might allow it to tyrannize others. This understanding, implicit in the Constitution, is actually made explicit with the adoption of the Bill of Rights.

On the dissenting side, the reference to the views of the so-called "world community" led Chief Justice Rehnquist to comment that we have "rejected the idea that the sentencing practices of other countries could 'serve to establish the first Eighth Amendment prerequisite, that [a] practice is accepted among our people.'" More strident was Justice Scalia's angry comment: "Equally irrelevant are the practices of the 'world community,' whose notions of justice are

30. Atkins, 536 U.S. at 316. Interestingly, following Atkins, a 5-4 majority led by Justice Kennedy declared unconstitutional the use of the death penalty in cases where the assailant was between the ages of fifteen and eighteen years. Roper v. Simmons, 125 S. Ct. 1183 (2005). In support of its decision, the majority opinion stated that "the overwhelming weight of international opinion [is] against the juvenile death penalty." Id. at 1200.


32. Atkins 536 U.S. at 311--12.


34. See McDonald, supra note 2, at 162.

(thankfully) not always those of our people." The Supreme Court's even considering such extraterritorial sources in interpreting an American constitutional amendment was what most inflamed the dissenters. But this was not to be the only time that the Court would follow this practice.

In *Lawrence v. Texas*, the Court took up the question of whether the state of Texas could make it a crime for two persons of the same sex to engage at one of their homes in same-sex sexual activity. Police officers from the Harris County Police department were dispatched to the home of John Lawrence following what turned out to be a false report of a weapons disturbance. Upon entering the home, the officers found Mr. Lawrence and Mr. Tyron Garner engaged in anal intercourse. Under the Texas penal code, such conduct by two persons of the same sex constituted a crime described as "deviate sexual intercourse." Both Lawrence and Taylor were arrested and held in custody overnight, and each was fined $200 plus court costs of $141.25. As a result of their arrests, both defendants challenged the Texas statute as violating both the state and federal constitutions' equal protection clauses. The Court of Appeals of Texas, Fourteenth District, rejected the petitioners' challenge under the Due Process and Equal Protection Clauses of the federal Constitution. On petition to the Supreme Court for a writ of certiorari, the Court agreed to hear the case and resolve three questions: Did the petitioner's convictions under the Texas Penal Code violate the Fourteenth Amendment guarantee under the Federal Constitution to afford equal protection of the laws? (2) Did their convictions violate the Due Process Clause of that same amendment? (3) Should *Bowers v. Hardwick*, a prior case with similar facts that had held such statutes constitutional, be reversed?

In a six to three decision, the Court reversed the Court of Appeals, with five justices finding that the conduct was part of an

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38. *Id.* at 562.
39. *Id.* at 563.
41. *Lawrence*, 539 U.S. at 563.
42. *Id.*
43. 478 U.S. 186 (1986).
44. *Lawrence*, 539 U.S. at 564.
intimate relationship protected by the Due Process Clause and one justice finding that the statute violated the constitutional guarantee of equal protection but not due process. The opinion for the five justices, written by Justice Kennedy, also explicitly overruled Bowers. In reaching its decision, the five-member Lawrence majority reviewed not only the practice of enforcement of such statutes by the several states but also took a more in-depth look at the history of sodomy in the country than had been previously considered by the Bowers Court. The Court did this because of its due process (as opposed to equal protection) jurisprudence of looking backwards into the nation’s long-standing traditions to see whether a fundamental right had been implicated.

Central to our concern was the Court’s willingness to engage, for the first time, as part of its due process analysis, in a textual discussion of a decision by the European Court of Human Rights. Here it is worth noting the emphasis that the Court itself placed on that decision when it stated:

> Of even more importance, almost five years before Bowers, was a case with parallels to Bowers and to today’s case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights... Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 now), the decision is at odds with the premise in Bowers that the claim put forth was insubstantial in our Western civilization.

But the very fact that the majority’s opinion would even discuss the European Court of Human Rights decision incited a
vociferous reply by Justice Scalia, in his dissent, saying:

The *Bowers* majority opinion *never* relied on 'values we share with a wider civilization . . .' The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since 'this Court . . . should not impose foreign moods, fads, or fashions on Americans.'

Third, in *Sosa v. Alvarez-Machain*, a Mexican alien named Alvarez-Machain ('Alvarez') was abducted in Mexico by other Mexicans and brought to the United States to stand trial for the torture and death of a U.S. Drug Enforcement Administration (DEA) agent in Mexico. Following his acquittal for complicity to murder, Alvarez sued for false arrest both the United States government, under the Federal Tort Claims Act (FTCA), and one of his Mexican abductors, Sosa, under the Alien Tort Statute of 1789 (ATS). Alvarez alleged first, against the United States, that under the FTCA it was liable in the same way that a private citizen would be liable for false arrest, and second, against Sosa, that under the ATS the district court had jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations . . ." The Ninth Circuit found that, because "the DEA had no authority to effect Alvarez's arrest and detention in Mexico," the United States was liable to him under California law for the tort of false arrest. Furthermore, the Ninth Circuit agreed with the District Court's summary judgment decision holding Sosa liable for

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50. Id. at 598 (Scalia, J., dissenting) (quoting Foster v. Florida, 537 U.S. 990, 990 (2002) (Thomas, J., concurring in denial of certiorari). While the *Bowers* majority did not claim to rely on values shared with a wider civilization, Chief Justice Burger, in his concurring opinion, stated that "[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization." *Bowers v. Hardwick*, 478 U.S. 186, 196 (Burger, C.J., concurring).


52. *Id.* at 2747. The FTCA authorizes suits for personal injuries in tort caused by the negligent or wrongful acts or omissions of the government or its employees operating within the scope of their duties. See 28 U.S.C. § 1346(b) (1946).


54. *Id.* at 2747 (citing 28 U.S.C. §1350 (1948) as based on the Judiciary Act of 1789, 1 Cong. Ch. 20, 1 Stat. 73 (1789)).

55. *Id.* (quoting Alvarez--Machain v. United States, 331 F.3d 604, 640--41 (2003))
wrongful arrest under the ATS. On grant of certiorari, the Supreme Court, in a unanimous judgment but divided set of opinions, reversed the Ninth Circuit on both grounds. The Court held first that the FTCA's "limitation on the waiver of immunity" exception for "any claim arising in a foreign country" barred any such suit against the United States and second that Alvarez's brief "single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy."

With respect to Alvarez's FTCA claim, the Ninth Circuit had found the United States liable because the proximate cause of the injury, the authorization for the arrest, occurred in California. Notwithstanding where the arrest was authorized, the Supreme Court noted that it actually occurred in Mexico, and any cause of action could be repackaged to put part of the proximate cause within the sovereignty of the United States. According to the Court, this result was exactly what the Congress was trying to avoid in including the "arising in a foreign country" exception in the FTCA. The problem, as the Court saw it, was that under state choice of law rules, California would apply the law where the injury occurred, namely, Mexico. In the Court's view, Congress's motivation for creating the foreign country exception to the FTCA was to avoid subjecting the United States to the laws of a foreign country.

The questions the Court considered were: (1) Is there a federal common law here? (2) If so, what is the law? And (3) how would that law be linked to or informed by the law of nations? Should the law of nations be adopted wholesale, or only settled parts of it? With regard to this latter question, of significance to the Court's decision was not the question of whether courts in enforcing the ATS could take cognizance of the law of nations, but rather what exactly they should recognize as the law of nations. Since the case involved no treaty violation, the Court determined that the violation must be assessed in terms of the customs and practices of international law

56. Id.
57. Id. at 2748.
58. Id. at 2769.
60. Sosa, 124 S. Ct. at 2750.
61. Id.
62. Id.
63. Id. at 2751-52.
that were recognized at the time the statute was adopted, with perhaps some attention to further norms that Congress had subsequently identified by positive law. Nonetheless, the Court rejected the United States's absolutist position that there is no judicial power over such claims, instead stating that "nothing Congress has done is a reason for us to shut the door to the law of nations entirely." As a cautionary note, the Court added that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when §1350 was enacted." Those paradigms included "violation of safe conducts, infringement of the rights of ambassadors, and piracy." Accordingly, the Court felt that the claim being raised by Alvarez would require the courts to carve out a new tort of detention that had not been previously recognized.

Here it is interesting to note the Court's reluctance to find a violation of the ATS given Alvarez's attempt to trace the notion of a violation of arbitrary detention both to the Universal Declaration of Human Rights of 1948 and the International Covenant on Civil and Political Rights of 1996, despite the Court's recognition that "the United States is a party" to the Covenant. However, as the Court noted, the Declaration could not of its own force impose obligations under international law; and the Covenant, although it does bind the United States, does not "create obligations enforceable in the federal courts." For these reasons, the Court held that the claim being asserted by Alvarez could not be recognized under the ambit of the statute.

B. The Law of Nations in American Law

So exactly what is the positive state of international law with respect to constitutional interpretation? For purposes only of situating the three cases examined in this article, the issue can be

64. Id. at 2765.
65. Id.
66. Id. at 2756.
69. Sosa, 124 S. Ct. at 2767.
70. Id.
divided into three components: first with respect to treaties that the United States has adopted; second with respect to treaties the United States has not adopted; and third with respect to treaties that the United States has adopted but with some reservations. After explaining these distinctions, I will go on to say what the prevailing view is regarding both customary and general principles of international law while acknowledging points of contention and dispute among scholars on this matter. Again, my purpose is simply to give a flavor of the kinds of issues these matters are likely to raise, rather than provide some definite final conclusion as to how they can be settled.

Three provisions of the U.S. Constitution relate to international treaties. Article II provides that the President "shall have Power, by and with the advice and consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."71 Article III goes on to provide, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . "72 Finally, Article VI states that:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treatises made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary, notwithstanding.73

As discussed below, the U.S. Supreme Court has interpreted these provisions and others to indicate that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."74 By the same token, the Court has not provided the legislature or the president with a blank check to use treaties or other aspects of international law to override constitutional protections.

In *Reid v. Covert,*75 the Court made clear that the treaty

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72. *Id.*, art III, § 2.
73. *Id.*, art. VI.
74. The Paquete Habana, 175 U.S. 677, 700 (1900).
75. 354 U.S. 1, 16 (1957) (plurality opinion of Black, J.); see also Boos v. Barry, 485 U.S. 312, 324 (1988) (reiterating the Reid v. Covert standard).
power could not be used to override constitutional norms:

It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions.76

That being said, the Court has shown a willingness to use the data of a treaty to bolster its interpretations of various provisions of the Constitution.

Gerald Neuman has noted, for example, that the Lawrence Court's use of the Dudgeon decision of the European Court of Human Rights "was primarily normative" and intended to reinforce the Supreme Court's "own reasons for affording constitutional protection."77 The idea here is that if another impartial body had reached the same conclusion, that offers support to the conclusion the Court was reaching; it adds to the Court's sense of security for its own decision. Interestingly, as Professor Neuman points out, the Court avoided any particular "functional" approach (in the sense of recognizing a slippery slope analysis) as to how its interpretation might play out down the road if the issue of same-sex marriage were to reach it.78 Justice Scalia did draw this aspect out, however, noting in his dissent that the majority's position would likely lead in the future to constitutional protection for same-sex marriage.79 It is also interesting to note that previously, in a case80 related to the Atkins decision because it involved an Eighth Amendment challenge to the punishment of denationalization as a criminal penalty, the Court took cognizance of the "dignity of man" as an underlying concept of the amendment, which Neuman argues was probably a "response to the postwar international emphasis on the principle of human dignity."81

Still, the point needs to be clarified: What exactly is the American constitutional interpretation of the role of international law in constitutional adjudication? I use "constitutional interpretation" here as an independent variable because the

76. Reid, 354 U.S. at 17.
77. Neuman, supra note 4, at 90.
78. Id.
81. Neuman, supra note 4, at 84.
Constitution itself, as signaled by the *Reid* case, seems to make clear that it is the Constitution and not international law that is the supreme law of the land. That being said, we might find a helpful analogy in considering the international law status of treaties adopted, treaties not adopted, and treaties about which the United States has expressed some reservations. I say this because if the Court in *Reid* held that it would not follow international law provisions that contravene constitutional guarantees, that in effect is placing a reservation on international principles in general. Put another way, the Court's opinion described the American governance as dualist, where the internal obligations of the country will be decided in terms of domestic law and will take account of international law only to the extent such law is incorporated into domestic law. The latter follows from the fact that the courts decide whether or not a treaty comports with constitutional requirements.

Now there is debate over the status of treaties with reservations. Obviously, from the point of view of consent, a treaty adopted is binding if it neither contravenes the Constitution nor is overridden by a subsequent federal statute. Where a treaty is not adopted, its force, to the extent it has any force, is purely moral in showing what other countries may be doing. Notably, however, regardless of whether a treaty applies, general principles of international law and even stronger peremptory norms, *jus cogens*, cover some of the same field. If either of the latter applies, then from an international law perspective, although not necessarily from an American constitutional point of view, their norms are binding. But this is just another way of getting at the same issue. If a treaty were entered into by the United States and there was no issue of prior reservation or consent, but the treaty had provisions that the Court determined violated the Constitution, then, at least to the extent of those provisions, the treaty would be null and void, prior adoption notwithstanding.

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84. *Reid v. Covert*, 354 U.S. 1, 18 (1957)
86. *See Reid*, 354 U.S. 1 (1957) (demonstrating that a treaty is not null and void with respect to its other provisions, provided the offending provision is not
different ways of characterizing what is going on here. Certainly, one possible characterization is to say that if the reserved position is incompatible with the purpose of the agreement, the agreement as a whole is nullified. However, especially in situations where the reservation is not essential to the core agreement, it may be more to the interests of international cooperation to simply sever out the offending provision and otherwise consider the treaty enforceable.

This is important because it suggests that international law at least allows for some room to maneuver in the way treaties are recognized. The question for us, however, is how this room to maneuver should play out in terms of American constitutional jurisprudence. Put another way, why should courts look at the provisions in a treaty, or general principles of international law, or *jus cogens*, even when they do not violate constitutional norms, as possible guides to determining when a punishment is cruel or unusual or what qualifies as liberty protected by the Fourteenth Amendment? Surely, as Neuman suggests, for courts to look to such provisions would show sincerity in oft-expressed commitment by the United States to promoting human rights internationally as being substantially in its own interests. Perhaps a prior question here is why need courts interpret constitutional provisions at all: Why can they not just rely on the written words or the written words plus a few narrowly drawn canons of interpretation? This has been a central problem of constitutional and legal interpretation generally from almost the beginning of the republic.

At its core, the issue raises several very specific analytical and normative concerns in the American constitutional context. For instance, one critic argues that the possibility of misuse of international sources will arise "when the 'global opinions of humankind' are ascribed constitutional values to thwart the domestic opinion of Americans." That same critic also asks whether we misuse international sources when we ascribe to them a status for constitutional interpretation that "they do not enjoy under our federal system." Put another way, would we intentionally provide

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88. *Id.* at 546, 556.
89. *See Id.* 544--45.
91. *Id.* at 66.
sources to the Executive and the Senate (as the ratifying body) with a backdoor route to subvert constitutional provisions? A third criticism asks if courts are prepared to do the necessary investigation (especially when it comes to general principles, customs, and practices of international law) to ensure that their selection of materials is not haphazard. A fourth criticism, related to the third, is that the Court deliberately focuses on certain international norms to achieve a specific set of results pre-ordained by the Justices. Clearly, the last criticism suggests that courts might be engaging in a countermajoritarian effort to thwart the democratic concern for self-rule under the Constitution.

A different set of questions concerns "[t]he dogma of constitutional hegemony." Here one way to formulate the question is to ask what the legal status of treaties, custom, general principles, and jus cogens should be in the hierarchical federal order culminating in the Constitution as the supreme law of the land. This latter issue raises an important concern for Professor Mark Tushnet: "that we must be aware of the way in which institutional and doctrinal contexts limit the relevance of comparative information." Additional difficulties result when we ask:

Are there in fact existing and binding customary rules . . . ? Is there discoverable state practice, and is it consistent? Is the conforming practice accompanied by opinio juris? What are the precise contours and terms of the norm? Did the relevant treaty provisions simply codify preexisting customary rules, and, if not, has state practice subsequent to the drafting of the treaties transformed the provisions into a customary rule binding on nonratifying states? Is the United States exempt from the norm as a persistent objector or dissenting nation?

One might also ask: Are customary rules evidence of the norms, or are they considered binding norms in themselves?

92. See id. at 64.
93. See id. at 67.
97. See Tushnet, supra note 4, at 662.
98. Hartman, supra note 4, at 665.
As the literature demonstrates, such debates are far from settled, and there exists a wide range for future discussion. Several scholars have attempted to resolve these questions. One author suggests that if international norms are included in constitutional interpretation, there should be a three part effort to (1) define "which international materials, and how should they be used,"\textsuperscript{99} (2) to adopt, without bias, rights-reducing as well as rights-enhancing norms, to "take the bitter with the sweet,"\textsuperscript{100} and (3) to "[g]et [t]he [f]acts [r]ight" about exactly how well-accepted certain customs and practices are.\textsuperscript{101} In contrast to the forebodings of this critic, Professor Neuman has suggested that "the interpretative value of international human rights norms and decisions derives from the normative insight that they provide."\textsuperscript{102} But what those insights are will be open to various sorts of questions.

In an address at the University of Idaho, Justice Ginsburg recently stated: "We live in an age in which our most cherished values—liberty, equality, and justice for all—are encountering extraordinary challenges. But it is also an age in which we can join hands with others who share those values and face similar challenges."\textsuperscript{103} A similar sentiment seems to lie behind Professor Jenny Martinez’s recent suggestions that international courts are showing signs of beginning to "make use of system-protective reasoning and dialogue to promote an institutional framework for cooperation among states, compliance with international law, and the maintenance and development of democratic, rights-respecting national governments."\textsuperscript{104} This suggests that both domestic and international courts may be entering a new era of respect for each other’s democratically-oriented, well-considered, and human rights-related decisions when interpreting their own national laws. Nor is the idea that the law should develop in this way all that new. Professor Louis Henkin described this idea in 1985 as follows:

\begin{quote}
[I]n a world of states, the United States is not in a position
\end{quote}

\textsuperscript{99.} Ramsey, \textit{Agora: The United States Constitution and International Law}, supra note 4, at 72.
\textsuperscript{100.} \textit{Id.} at 76--77.
\textsuperscript{101.} \textit{Id.} at 77.
\textsuperscript{102.} Neuman, \textit{supra} note 77, at 87.
to secure the rights of all individuals everywhere, but it is always in a position to respect them. Our federal government must not invade the individual rights of any human being. The choice in the Bill of Rights of the word 'person' rather than 'citizen' was not fortuitous; nor was the absence of a geographical limitation. Both reflect a commitment to respect the individual rights of all human beings.\(^{105}\)

If this is the direction for the future, then both domestic and international judges will have a wide range of sources available to fill various legal gaps when they occur. Such gaps, as will be discussed in the next section, occur where rules are unclear or when their application seems to run against important principles of justice or fairness.

The tenor of these criticisms also suggests that the analytic and normative aspects of the debate over constitutional interpretation are not so readily isolated. For any given text, we need to figure out both what it means and what value it has for our understanding of the law. More generally, these criticisms represent two different approaches to international law in the context of constitutional interpretation. As Professor Koh describes them, the first approach is one of “nationalist jurisprudence,” exemplified by the opinions of Justices Scalia and Clarence Thomas.\(^{106}\) Under this approach, “jurisprudence is characterized by commitments to territoriality, extreme deference to national executive power and political institutions, and resistance to comity or international law as meaningful constraints on national prerogatives.”\(^{107}\) The second, “transnational jurisprudence,” which Koh notes is exemplified by Justices Breyer and Ginsburg, began with Chief Justices John Jay and John Marshall, “who were familiar with the law of nations and comfortable navigating by it.”\(^{108}\) Both views are locked in an intense

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107. Id.
struggle over the future of constitutional interpretation.

Nor should we think that only academics and courts participate in this debate. In 1998, the United Nations established an International Criminal Court but the United States held off becoming a signatory to the statute creating the court until President Clinton's last day in office.\(^{109}\) In 2002, President George W. Bush repudiated the U.S. signature.\(^{110}\) In March 2003, sixteen co-sponsors in the House of Representatives introduced a bill making clear that actions by the International Criminal Court would not be considered valid with respect to the United States or its citizens.\(^{111}\) Furthermore, as recently as November of 2003, twenty-two co-sponsors introduced a resolution in the Congress "[e]xpressing the sense of the House of Representatives that the Supreme Court should base its decisions on the Constitution and Laws of the United States, and not on the law of any foreign country or any international law or agreement not made under the authority of the United States."\(^{112}\) The resolution specifically mentioned with disapproval the Supreme Court's citation of world opinions in both *Atkins v. Virginia* and *Lawrence v. Texas*.\(^{113}\)

According to Rep. Ron Paul of Texas, the bill was necessary to protect members of the United States Armed Forces who would be at risk "for politically motivated arrests, prosecutions, fines, and imprisonment for acts engaged in for the protection of the United States."\(^{114}\) Neither this bill nor the resolution against foreign international law has as yet passed the Congress, and both are pending only in the House of Representatives. Nevertheless, from these materials alone one can see the widespread controversy over the application of international law to constitutional interpretation.

These concerns, however, essentially relate to the dynamics of the contemporary domestic political environment, which seems also to sometimes produce elements of xenophobia in U.S. foreign


\(^{111}\) Id.


\(^{113}\) Id.

policy. In attempting to integrate into American constitutional law international legal materials, it will be necessary to draw upon a set of higher-order, relatively abstract principles of constitutional jurisprudence. In particular, I will extrapolate from the viewpoint, recently articulated by Daniel Bodansky, that "the constitutional text itself is often open-ended and invites the use of broad community standards as a means of interpretation." This viewpoint relates to the ongoing debate between those who interpret the Constitution on a strict constructionist basis versus those who view it as a living, organic document. More fundamentally, it speaks to the Jeffersonian position that the Constitution must afford human rights protections for all persons.

III. WHAT ISSUES WOULD HAVE TO BE OVERCOME BEFORE USE OF COMPARATIVE AND INTERNATIONAL LAW SOURCES COULD BE JUSTIFIED?

In this section, I begin with a recent statement made by Justice Scalia that typifies his strict constructionist approach to the Constitution and that suggests a possible basis for his adamant criticism of the use of comparative and international law by the majorities in Atkins v. Virginia and Lawrence v. Texas. In a Catholic magazine entitled First Things, Justice Scalia addresses the question of the morality of capital punishment to a religious audience. He began his remarks by stating:

Before proceeding to discuss the morality of capital punishment, I want to make clear that my views on the subject have nothing to do with how I vote in capital cases that come before the Supreme Court. That statement would not be true if I subscribed to the conventional fallacy that the Constitution is a "living document"—that is, a text that means from age to age whatever the society (or perhaps the Court) thinks it ought to mean . . . . As it is, however, the Constitution that I interpret and apply is not living but dead—or, as I prefer to put it, enduring.

115. This climate, unfortunately, has been characterized by extremes of xenophobia clearly manifested in recent U.S. foreign relations as well. See Oliver Burkeman, My Fellow non-Americans. . . , The Guardian (London), October 13, 2004, 2.


117. See McDonald, supra note 2, at 158–59.

118. Antonin Scalia, God's Justice and Ours, 123 First Things 17, 17
The comment is really quite telling of an important jurisprudential divide over exactly how to understand and interpret the Constitution itself, a divide which is, in a sense, prior to the question of whether extraterritorial norms may be part of the interpretative process. On one side of that divide are those who would want to hold close to the text when deciding what the specific words of the Constitution or a particular piece of federal legislation might mean. For these scholars, even investigating legislative histories or referring to the writing of those who were at the constitutional convention risks the chance that clever judges, on either side of the political spectrum, will use the information to hijack the democratic process and usurp the basic guarantees of the Constitution and Bill of Rights to satisfy their own unelected agendas.

Contrasting this view are those who see the Constitution as a living document meant to embody an idealized set of meanings that grows and changes over time as the moral understanding of the citizenry evolves over time.

The problem, of course, is that each of these two views necessitates the difficult task of anchoring its understanding to

(2002).

119. The nature of this debate over how to best understand the Constitution and federal statutes has stirred much discussion. See Charles Fried, Sonnet LXV and the "Black Ink" of the Framers' Intention, 100 Harv. L. Rev. 751, 759 (1987) (arguing that the meaning of a text is fixed by the constraint of reason); see also Richard A. Posner, Law and Literature: A Relation Reargued, 72 Va. L. Rev. 1351, 1374 (1986) (showing that the functions and readership of law and literature are so different that the methods developed to interpret the one have little use in interpreting the other). Contra Martha Minow et al., Interpreting Rights: An Essay for Robert Cover, 96 Yale L. J. 1860, 1892 (1987) (arguing that under Ronald Dworkin's account "rights can be something—without being fixed, and can change—without losing their legitimacy"). See generally Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law (1997) (with critical commentaries by Gordon S. Wood, Laurence H. Tribe, Mary Ann Glendon, and Ronald Dworkin, and a response by Scalia); Richard H. Fallon, Jr., Implementing the Constitution (2001).

120. See Scalia, God's Justice, supra note 118, at 34, 38--39, 46--47. This concern been clearly articulated in recent U.S. Senate Judiciary Committee hearings relating to the nomination of Judge John Roberts to succeed Chief Justice William Rehnquist. Senator Tom Coburn suggested that Justices who cite foreign authority should be impeached, and Judge Roberts himself expressed reservations that the use of such authority might be antidemocratic and self-serving. See Ann Althouse, Innocence Abroad, N.Y. Times, September 19, 2005, at A2. For what may be at stake in this debate, see Mary Ann Glendon, Judicial Tourism, Wall Street Journal, September 16, 2005, at A14.

121. See generally Scalia, A Matter of Interpretation, supra note 119.
something more concrete than either frozen opinions from the past or present-day fads and fashions dictating how the society should be run. Contrasting both of the above views, Professor Richard Fallon has suggested a way for changing meanings by noting that "our tradition of relatively robust judicial review reflects a rationally grounded hope that the Court, having taken reasonable disagreement into account, can often resolve questions of constitutional principle better than other actors in the constitutional scheme,"122 Exactly where the moorings for this rationally grounded hope should be is a question we must now begin to explore.

A. Legitimacy and the Problem of Openness

Professor Phillip Bobbitt has identified six different modalities or forms of argument that the Court has relied upon to establish the truth of various constitutional propositions.123 The modalities are: historical argument (which tries to discover the meaning of the constitutional text from looking to the original intentions of its framers), textual argument (which seeks to establish the current meaning of the words used), structural argument (which tries to ascertain the meaning based on the relations among the governmental structures the Constitution establishes), doctrinal argument (which focuses on precedent and the use of reason in constitutional decision making), ethical argument (which interprets constitutional provisions based on moral commitments as they are reflected in the Constitution), and prudential argument (which assesses various possible decision-results utilizing a cost/benefit analysis).124 Both Professor Bobbitt and Professor Mark Tushnet125 have found the first five of these modalities to reflect the way the Supreme Court has decided various cases over its history, although Bobbitt questions how accurately Tushnet describes them because Tushnet evaluates them from a prudential approach.126 For Bobbitt, these modalities are legitimate in the sense that they are recognized modes of argument the Supreme Court follows.127

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122. Richard Fallon, Jr., Supra note 119, at 81--82.
124. Id.
126. Bobbitt, supra note 123, at 130.
127. Id. at 22.
Here it is important to distinguish the *justification* of a legal opinion, which consists of arguments that show it to be morally correct, from *legitimation*, which requires that the rationale behind the opinion fit previously settled forms of argument that the Court has consistently relied upon in deciding cases. The distinguishing feature between these two argument-types is in where the support for the opinion’s conclusions derives. If it derives from some set of policies, principles, or purposes that enhances the law’s existing ideals in the particular area of legal concern, then the conclusions the opinion comes to are said to be legitimate. In contrast, if the opinion is grounded in some outside moral theory that would also show support for the particular legal system as a whole, or at least for most of its settled results, we say the opinion is justified. Bearing this difference in mind, one might imagine a legal system incapable of recognizing a morally justified opinion because the system had no modal resources capable of incorporating by reference any such outside evaluations. Bobbitt believes that this is not the case with the American system of constitutional interpretation. On my own account of the matter, democratic societies usually presume that the laws they follow, insofar as they are liberal, are morally justified; consequently, unless a particular law is shown to be otherwise (which puts the burden on the challenger), the courts of the society will treat its legitimacy as a virtual indicator of its justification. The obvious counter-example to any such view is a legal system that upholds a continuous set of inconsistent principles or blankly disregards any outside concerns for justice. A good example of this was Nazi Germany’s legal system, where judges flagrantly ignored legal precedents and interpreted statutes more to maintain social control and to please those in power than to achieve justice.

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129. See Bobbitt, *supra* note 123, at 114.

130. *Id.*

131. *Id.* at 163.

132. *Id.*


134. See *id.* at 92.

135. See Lon Fuller, *The Morality of the Law* 40–41 (1964) (describing the Nazis’ wanton use of retrospective and ex post facto legislation to suit the
I raise this point because it shows an important difference separating legal judgments from moral ones. Legal judgments contain aspects of tradition, policy aims, and institutional detail (as found within the modes of constitutional argumentation Bobbitt identifies) that find no corresponding place in moral judgments. Indeed, it is probably more for this reason than any other that pure moral judgments cannot be substituted for legal judgments without producing a legal system in chronic practical disorder. By the same token, a legal system without a moral underpinning would not be one under which most people would want to live. This means that in deciding what combination of argument modes will be most persuasive to a court, one needs to take into account the whole range of concerns the various modalities represent including, but certainly not limited to, concerns related to prior history (tradition), institutional prerogatives (policy aims), manner of operation, respect for the political process (institutional design), and moral justification.

That being said, the six modalities Bobbitt identifies provide options for classifying, as opposed to justifying or revising, important aspects of politics and culture. This is made apparent every time the choice of modality either excludes certain sorts of information (such as the opinions of courts outside the United States) as being illegitimate (perhaps from a historical point of view), or includes other kinds of information (such as learned treatises on federalism) as worthy of receiving constitutional attention. More important for our purposes, then, is to understand how these different modalities are likely to constrain efforts to broaden the range of legitimate sources for the Court to consider when interpreting the Constitution.

For instance, in the Sosa case, the Court made use of the historical modality not only to reflect but also to constrain its determination to look only at what the framers of 28 U.S.C. §1350 thought the law of nations was at the time they passed the statute. Similarly, in Omstead v. United States, the Supreme Court reached for some textual support in the Fourth Amendment's prohibition on searches and seizures before considering whether a certain means of listening in on conversations brought about by improved technology fell within the ambit of what is commonly understood as a seizure of persons, papers or effects. In Planned Parenthood of Southeastern

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Pennsylvania v. Casey, the Court explained that it would not overrule its prior abortion decision in Roe v. Wade not because the earlier decision was correct, but because the Court recognized prudentially “after two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion.” McCulloch v. Maryland illustrates Chief Justice Marshall’s willingness to ground the Court’s refusal to allow the state of Maryland to impose a tax on the Bank of the United States on a structural understanding that such an action would upset the delicate balance of federalism, which the Constitution mandates. In my judgment, Lawrence v. Texas follows the ethical approach, especially when Justice Kennedy says: “The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. [Lawrence and Tyron] are entitled to respect for their private lives.” Finally, Bowles v. Willingham shows the prudential argument at work when the Court defers to the Roosevelt administration's authority to place price controls on rental units to support its continuing war effort.

Putting aside for the moment ultimate questions about justification, it is worth asking whether these six argument forms on their own help to reduce the concern that constitutional interpretation may be subject to too much openness and too little constraint. Constraint and openness are the focus here because at least part of what Justice Scalia and those who support him seem to be concerned about is protecting the field of constitutional interpretation from becoming hostage to idiosyncratic agendas of the Justices. Additionally, these legitimating forms of argument might provide some context for the debate over if and how extraterritorial sources are incorporated into the interpretative process. Obviously, use of the ethical and prudential modalities may provide two ways the outside sources are drawn upon. All this, of course, assumes that what appear as early indications of some willingness by the Court to

123, at 14.
139. 410 U.S. 113 (1973).
engage with these sources will continue and not be shut down by the intensity of the criticisms.

Before setting down that road and finding an argument for how such norms might be incorporated, let us first consider whether there may be other issues concerning how modalities operate that implicate the concern for constraint. According to Bobbitt, these six modalities have constraining value insofar as they allow for development of critical descriptions of the "ideological and political manipulations of the various grammars," exhibit the ways ideologies can impact law without law becoming politics, and aid the non-specialist in seeing how problems of constitutional law come to be decided.

With respect to exposing the political and ideological aspects of a decision, the modalities have a value in exposing the political and ideological aspects of a decision by making explicit these manipulations on the surface of the grammar rather than burying them beneath such language. Similarly, with respect to the separation of law and politics, the argument-forms exhibit the terms of ideology that would otherwise be conflated in the interpretation of a text. The circularity aspect is shown once one realizes that the value of the historical approach arises out of an unjustified presumption that it was the intention of the framers that gave rise to the authority of the government. As for making constitutional decisions easier to understand, the modalities expose the thinking that the justices engage in when rendering their decisions.

Some have argued that the decline of legal formalism, in which one is guided by a clear set of rules, points to a need for more traditional understandings of doctrine. Charles Fried, for example, would consider this approach because he sees it as consistent with law's internal ideals: "We require continuity in legal doctrine. Yet we also require each new decision to be more or less right on its merits. The only way we can have both is for the new decision to be right, in part at least because it accords with established doctrine." This

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144. Bobbitt, supra note 123, at 23.
145. Id. at 24.
146. Id. at 28.
147. Id. at 23.
148. Id. at 24--25.
149. See id. at 25.
150. See id. at 28.
approach, however, is incomplete because contemporary issues emerging in the areas concerned with human rights often raise questions for which either traditional doctrine fails to provide definite answers, or, where it does, the doctrine is itself being called into question. For instance, the issue of same-sex marriage is one for which there is no clear traditional doctrine (perhaps because it had not been seriously challenged as a legal matter), at least outside certain religious or fundamentalist readings of the Bible, which by definition are inconsistent with or inimical to the Constitution’s guarantee of separation of church and state.152

Still, because these issues are likely to inspire shifting minorities to become deeply ideological and divisive, and will probably not impact more than a minority in the society, some have argued that judges might do best to simply stay out of these matters. For example, Alexander Bickel has noted that “[t]he [U.S. Supreme] Court commands no significant police power of its own.”153 Consequently, it must rely on the support of the Executive Branch to effectuate its commands. But this means that on particularly controversial cases, like same-sex marriage, the Court will have a need “to engage in a continual colloquy with the political institutions, leaving it to them to tell the Court what expedients of accommodation and compromise” they can agree to.154 However, this type of response is inappropriate where fundamental rights are concerned precisely because the legislative process that it evokes will be unable to give adequate appreciation to the differential interests of the affected groups.155 Indeed, it is precisely this concern that the

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152. The “canonical test” of First Amendment’s constitutional guarantee for the separation of church and state was stated in Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) as “[first, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’” (citation omitted) (quoting Wane v. Tex. Commission, 397 U.S. 664, 674 (1970)). Although it continues to be invoked, the Lemon test has been criticized and there are differing views among the current Supreme Court justices as to exactly how the Establishment Clause is to be understood. See Fried, supra note 151, at 156–61.

153. See Alexander Bickel, Least Dangerous Branch: The Supreme Court at the Bar of Politics 252 (2d ed. Yale Univ. Press 1986 (1962)).

154. See Bickel, supra note 153, at 252–54.

155. Professors Ely and Choper have noted that because majorities tend to devalue or disregard the interests of minorities, judicial review is necessary as a correction against this sort of malfunction in the legislative process. See John Ely, Democracy and Distrust: A Theory of Judicial Review 135–79 (1980); Jesse Choper, Judicial Review and the National Political Process: A Functional
framers sought to address by separating out from political determination a Bill of Rights to be adjudicated by the courts.  

B. Determinacy and the Problem of Constraint

There are other limitations that occur because the modalities do not provide answers. No one of these modalities can "be both comprehensive and determinate." For one thing, the modality will not be able to show why it should be decisive in all cases, unless it is already presumed to be decisive, but, of course, this would be circular reasoning. The problem of determinacy, Bobbitt notes, has been addressed both by Professors Owen Fiss and Stanley Fish. According to Bobbitt, Fiss argues, "the meaning of a constitutional text is not 'out there' to be discovered" but is constrained by the imposition of specific "disciplining rules' that determine the correctness of a particular interpretation." But Bobbitt correctly objects that Fiss's approach leaves too much open to an interpretative community reliance on outside constraints which themselves may need to be interpreted. Fiss's attempt to avoid reductionism is itself reductionistic.

A more sophisticated approach along the same lines is adopted by Stanley Fish, who also rejects rules as constraints on interpretation. The difference is that, for Fish, an internalized ordering for principles is reflected in the very practice of constitutional law:

The person who looks about and sees, without reflection a field already organized by problems, impending decisions,

Reconsideration 229--30 (1980). However, both theorists favor a more strictly process oriented approach, which has been criticized for being too narrow in the protections to minority rights that it would recognize. See Richard D. Parker, The Past of Constitutional Theory—and Its Future, 42 Ohio St. L.J. 223, 235--57 (1981). These types of theories are meant to blind "a particular type of malfunctioning [in the political process]: the routine political ineffectiveness and quiescence—rooted in social and economic inequality—of masses of ordinary citizens," who may not have the ability and power to access the political process even if they have the right. See id. at 249.

156. See Kathleen M. Sullivan & Gerald Gunther, Constitutional Law 446 (15th ed. 2004).
158. Id. at 35--42.
159. Id. at 35 (quoting Owen Fiss, Objectivity and Interpretation, 34 Stan. L. Rev. 739, 742, 744--745 (1982)).
160. See id. at 37--38.
161. See id. at 42.
possible courses of action, goals, consequences, desiderata, etc. is not free to choose or originate his own meanings, because a set of meanings has, in a sense, already chosen him and is working itself out in the actions of perception, interpretation, judgment, etc. he is even now performing.\(^{162}\)

As Bobbitt notes, however, while Fish's approach here is clearly an improvement over Fiss's, the problem of indeterminacy still remains.\(^{163}\) Fish's approach is anti-foundationalist.\(^{164}\) The deeper problem here is that ordering principles are not self-evident. The modalities thus can only partly satisfy what we want from a constitutional interpretation. That is to say, to the extent that the Court adopts these forms of argument in going about constitutional interpretation is simply to acknowledge that they are viewed as legitimate.\(^{165}\) It says nothing about whether they ought to be viewed in that way when determining the legal consequences of state action.\(^{166}\) To the contrary, by themselves, the modalities leave the field of constitutional interpretation without foundations.

In this same vein, I would note that Tunick follows more closely the line from Fish's reasoning in describing the way legal judging in general operates:

I have argued throughout the book that social practice plays an important role in ethical and legal judging. I have argued against the Kantian position that we should not consult social practice to determine what morality requires by pointing to examples of how a determination of right is contingent on social practice. I have argued not that something is right because it is recognized as right in practice (although sometimes the fact that a norm exists itself establishes a good reason for adhering to it or makes adhering to it reasonable); but that there are ways in which social practice—both discrete, rule-governed practice and practice more broadly understood, bears on or constrains principled determinations of what is right.\(^{167}\)

Notably, both these authors leave open the question of which modality to use in any particular interpretation.

\(^{163}\) See Bobbitt, *supra* note 123, at 38.
\(^{164}\) See id. at 42.
\(^{165}\) See id. at 39.
\(^{166}\) See id.
In an important article in the *Harvard Law Review*, Richard Fallon questions: "How are these different kinds of arguments related to each other? Are all entitled to influence in every case? Which takes precedence in cases of conflict?"\(^{168}\) He claims that "privileged factor theories give determinative significance to arguments within one or two of the categories and virtually ignore other kinds of argument."\(^{169}\) As Bobbitt notes, Fallon rejects Professor Laurence Tribe's notion that would seek to "ratify a particular decision by subsuming one's instincts for justice within the forms of constitutional argument."\(^{170}\) Still, the methods that Bobbitt relies upon to interpret the Constitution, although they may be well accepted as legitimate processes from which courts may operate, will not on their own be able to guarantee a single, morally just answer to a particular challenge to human dignity.\(^{171}\) This is because they do not engage the problem at a sufficient level of generality to be morally foundational. So, the question remains: Which modality would a court be justified in following? And with it comes the question of which international law principles the Court should look to (if and when it should look to any at all) when interpreting the Constitution. Assuming that a general set of settled norms exists and is determinative of at least some constitutional guarantees affirming human dignity, perhaps by defining salient terms or setting parameters on what government can do, it remains to be shown how these general norms are to be understood and applied to specific case contexts that may be less certain. This uncertainty arises not because the facts of a case are novel or unclear, but because they reach questions beyond the scope of what the norm was designed to answer. It is resolving this sort of question that requires us to take a more normative approach to the U.S. Constitution itself and, where


\(^{169}\) Id. at 1209.


\(^{171}\) Jürgen Habermas draws a different but related distinction: "the *de facto* validity of legal norms is determined by the degree to which such norms are acted on or implemented, and thus by the extent to which one can actually expect the addressees to accept them," while "the *legitimacy of statutes* is "justified from pragmatic, ethical, and moral points of view." Jürgen Habermas, *Between Facts and Norms* 29–30 (1996). But see Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 Wis. L. Rev. 379, 385 (arguing "the Weberian model — law to belief to behavior— at best is problematic and unproven and at worst is probably wrong.").
potentially helpful, make use of international and comparative law sources as guides to its interpretation.

At this point, it should be noted that international and comparative norms are not exempt from the same concerns about openness and determinacy that have so far animated this discussion of constitutional norms. Bringing in these norms, however, is valuable because the international and foreign courts that have previously considered them in particular case contexts may have already resolved some of the ambiguities and vagueness associated with the norms' hidden insights in a way that would serve American courts making decisions in analogous contexts.

Still, this would not resolve all of our concerns about constraint. For that, we need to look more closely at how constraint is related to determinacy. This is clearly seen in the formalist approach to constitutional interpretation, which has dominated the field until recently, as exemplified by Bobbitt's discussion. Clearly, rules run out, and so do low and even intermediate-level principles (understood as a set of reasons that courts rely upon as guides for their decisions). At the intermediate level, the principles are guided not by behaviors but by other lower level principles. For example, the principle of free speech guides courts when making judgments concerning the lower-level principle of deference to legislatures who exercise their authority by enacting hate crimes statutes. At the highest level, I would envision a single norm that guides all of the norms beneath it but that still would not be a rule because its authority would always be subject to analysis of the strength of the arguments that could be made on its behalf.

So, principles guide courts in deciding particular cases where

172. I distinguish low-level from intermediate-level principles to indicate that at the lowest level, the principles primarily guide behaviors (For example, I make it a principle to work out three times a week in the gym, which means I try to but do not always work out three times per week). Thus, the Court might make it a principle to give deference to the military in matters concerning the readiness of the armed forces, as has happened in respect to exclusion of gays from the military. See, e.g., Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996) (en banc) (holding that the military's discharge of a naval lieutenant pursuant to the “Don't Ask, Don't Tell” policy was a constitutional and appropriate exercise of military authority).

173. C. E. Harris, Jr., Applying Moral Theories 61 (3rd ed. 1997) (noting that a moral standard provides the criterion that all morally correct actions meet without focusing on any particular action, as are emphasized by moral judgments and moral rules).
rules are conclusive of any given result on their own terms. And indeed, the following of a rule will itself be the manifestation of the principles supporting it, both with respect to its legitimacy and to whether the legislature, in creating it, was acting within the scope of its specific authority as assigned by the Constitution. In cases with novel facts, the rules that are commonly thought to govern an area of law will often not fit, as the abortion rights cases exhibit. When that happens there will need to be resort to principles that might themselves conflict, as in the case of a journalist’s protecting private sources against a grand jury investigation of criminal activity. Or a new case might be formulated in such a way as to raise a substantial question of justice that previously had not been considered under the rules or principles. Market share liability is a good example here.

All these jurisprudential concerns line up to show that courts will confront situations where strictly formalist approaches of applying settled rules or principles will simply be inadequate to meet the challenge being presented by the advocates. In that instance, judges, if they are to fulfill their duty to follow the law, will have to go beyond the limiting aspects of settled meanings to find how the case ought to be decided. At this point, the difference between what the law is and what it ought to be is a difference without a distinction. This does not mean that judges will not in appropriate cases defer to legislative authority, as in respect to regulation of intra-state instrumentalities affecting interstate commerce, because the situations are so complex that courts are not the best places for these policy decisions to be resolved. What it does mean is that, on

175. In the abortion cases, previous understandings of privacy as relating to the selective disclosure of information gave way to an understanding of privacy as personal liberty, since the question was no longer about information that could be discovered but acts that could be performed. Vincent J. Samar, The Right to Privacy: Gays, Lesbians and the Constitution 34–35 (1991).
176. See generally Branzburg v. Hayes, 408 U.S. 665 (1972) (declining to grant a newsman special testimonial privilege under the First Amendment).
177. See generally Note, Market Share Liability: An Answer to the DES Causation Problem, 94 Harv. L. Rev. 668 (1981) (suggesting market share liability as a solution where traditional liability rules would deny seriously injured plaintiffs the opportunity to recover damages from negligent defendants because of problems proving causation).
178. Here I have in mind cases that either confront conflicting principles or seem out of keeping with general requirements of justice.
179. The evolution of the Court's Commerce Clause jurisprudence shows
matters less technical, where the court's expertise is more readily
discernable, and especially where important interests involving life,
liberty, and some property are at stake, the courts will have to
ensure that fundamental rights are not being ignored.180

Nor will it always be the case that an adequate (in the sense
of persuasive) solution will be made available by rote application of
Bobbit's six modalities. For part of what might be at issue is how
these modalities should be arranged to ensure that government
meets all its obligations in a morally satisfactory way. I will
illustrate this more with examples in Section Four. For now, we
should just note that as cases fall outside the strict formalism of the
law, as unconscionability cases fall outside the theory of contract
understood as promise,181 and my example of disclosing a reporter's
sources brings into conflict two separate constitution principles, it
will become even more encumbent on courts to find new sources of
support for their legal judgments. Indeed, so often has it become
necessary for the Supreme Court to veer from just treating the
Constitution as containing a set of rules—by fixing the meanings of
phrases like "due process" and "equal protection" or taking guidance
from state legislatures as to when a punishment is "cruel and
unusual"182—that most classes in American constitutional law begin
by studying Supreme Court cases rather than studying the
different approaches to the question of legislative authority. In NLRB v. Jones &
Laughlin Steel Corp., 301 U.S. 1 (1937), the Court conducted its own examination
of the relationship between the law and interstate commerce and, finding the
necessary relationship, acknowledged that Congress had the power to regulate
activities having a "substantial relation" to interstate commerce. More recently,
in United States v. Lopez, 514 U.S. 549 (1995), the Court declined to defer to the
legislative body, concluding that Congress does not have the power to criminalize
possession of a firearm in a school zone. One explanation for the change from the
Court's holding in Jones & Laughlin was that gun possession near a school was
too far distant from the kinds of economic-related activities traditionally
understood to affect interstate commerce.

180. In the now famous footnote 4 to United States v. Carolene Products
Co., 304 U.S. 144 (1938), the Court identified certain types of laws to which it
should not be deferential under the Commerce Clause because they implicate
liberties protected by the first ten amendments. In the Court's view, the impact of
these laws on some groups is less related to differences in bargaining position and
more related to realizing the desire for superiority for other groups.

181. See Duncan Kennedy, Form and Substance in Private Law
Adjudication, 89 Harv. L. Rev. 1685 (1976). Contra Charles Fried, Contract as
Promise: A Theory of Contractual Obligation 92, 103--108 (Harvard University
Press 1981) (arguing that the doctrine of unconscionability is compatible with the
understanding of a contract as a promise).

Constitution itself. All this has opened the door to new ways of understanding many of the most salient constitutional issues of our time.

C. Hierarchy as a Way to Discover What the Law Is

When judges must look beyond the Constitution to decide cases, they move up a ladder of abstraction from the specific judgments of cases, to rules, and then to principles, and ultimately to moral standards. These higher levels begin at what are thought to be the applicable rules governing the case. But as the rules are found to be inadequate, either because the case does not clearly fall within the ambit of the rule or the rule itself is brought into question, the judge's resort will be to move to a level of intermediate principles where the rules themselves gain meaning. Here rules gain meaning either by protecting some important right society is generally concerned with protecting or by setting forth some important governmental structure that supports democratic procedures and the rule of law. Beyond this level of what might be called the society's prevailing political morality is the kind of case a judge confronts when the principles themselves seem inconsistent or uncertain in their application. In that case, judges must move to the still higher level of political morality ("political" in the sense that it is morality used to justify the operations and arrangements of political institutions) if they are going to make sense of their duty to follow law and the society's duty to obey law. But at this level of abstraction there will oftentimes be more conflict. What might exist at this level is itself a question.

Still, the conflict will be of a different nature as the issue will then be centered on whose theory of political morality should be applied. That said, judges should not shy away from such controversy when it is necessary to the resolution of a dispute for it gets to the very heart of what gives life to their duty to follow the law. Thus, we see that as cases become increasingly uncertain because the rules and even the principles appear out of step with the prevailing

183. See Samar, Justifying Judgment, supra note 133, at 76-77.
184. See id.
185. See id.
186. See id.
187. See id.
188. I have in mind that the conflict will engage difficult epistemic and normative issues of moral and political philosophy.
political morality, judges will be forced to consider more general principles of political morality than they might otherwise.

What problems does this tendency to move toward higher levels of abstraction confront? Does it signal the death of the liberal ideal of a society governed by laws rather than by persons, as scholars like Charles Fried fear? Or should it be seen as opening the door to what animates law in the sense of making it a social good? Arguably, considering what gives rise to the duty to obey laws when considering what the laws are is what makes law such an important form of social governance and a guarantee of baseline protections in democratic societies. I emphasize democratic here to avoid concerns that might relate to following law strictly out of fear.

In particular, the tendency to move up the ladder of abstraction will coincide with how the six different constitutional modalities function once we assign them an ordering principle marking out their priority. This can be seen in the following way. At the lowest level of abstraction is textualism since this modality involves no greater level of abstraction than how a set of words is understood in the current vocabulary. One step above textualism is prudentialism. I place this second on the ladder because prudentialism ascertains whether the purposes behind a law or statute are feasible from a cost/benefit point of view. After prudentialism I place the historical modality. This requires abstracting from the meaning of a text the drafters’ psychology in the sense of what they understood to be the text’s meaning. This means juxtaposing the words actually used against what the drafters most likely understood them to refer given their particular historical circumstances. The fourth rung on the ladder is doctrinalism. Doctrinalism involves both an understanding of what a term originally meant and how that meaning may have evolved over time to resolve various indeterminacies in its actual application. The next rung up is structuralism, which is in a sense not too distant from the ideas of Claude Levi-Straus, who thought “that society is itself organized according to one form or another of significant communication and exchange—whether this be of information,

189. See Fried, Saying What the Law Is, supra note 151, at 2.
190. Here I am following a distinction, raised by Professor H. L. A. Hart, between being obliged as in the case of a gunman saying “your money or your life” and having an obligation. See H. L. A. Hart, The Concept of Law 80 (1961).
knowledge, or myths, or even of its members themselves." I regard this approach as higher than doctrinalism because the structures not only divide authority, but signal how different authorities operate for the good of the whole. The sixth and final rung is the ethical argument. I place this last in line because it seems that this form of argument requires that one first engage the question of what basis exists from which we are to discover moral truths. Are we to discover them in some generally accepted social practice or in some highly-ordered deontological or teleological theory? Once that question is decided, we move on to fit our answer to the case at hand.

Two questions need to be kept separate in thinking about this picture. The first question concerns justification: Why accept this view of decision-making versus some other one? The second question follows from the first: Why should the modalities be ordered this way rather than some other way? More specifically, with respect to the first question, the concern is to find some foundational ground that judges can rely upon to ensure that human rights are protected. That foundational ground must provide clear contents and a basis for its being accepted. With respect to the second question, the point is to distinguish between practices being seen as legitimate merely because they are accepted, as opposed to practices being justified because they are right. An interesting side benefit of giving judges a wider range of sources to consider is that this may also constrain

191. See generally The Cambridge Dictionary of Philosophy 883 (Robert Audi ed., 1995) (describing, under the definition of "structuralism," Levi-Straus's views). Note that under the constitutional structure information is transmitted when one house of Congress sends a bill it passed to the other house, or when both send it to the President for signature. Knowledge is exhibited by the checks and balances that constrain each branch of government from acting too much on its own, along with a somewhat limited check of the states and federal government on each other. Myth is established in the Preamble's words "We the People." So, in this sense, we can abstract from the document not only words with meanings but institutional structures that exhibit how government should operate. Those structures may set up different meanings for the Court to consider, caused both by their form in relation to each other (e.g., three equal branches of government, federalism) and what they imply when operating together.

192. Here I am following a distinction Jeremy Waldron makes, specifically with respect to rights, between seeing them as justified in the philosopher's sense (as trumps on utilitarianism) and seeing them as legitimate in the political theorist sense (as trumps on majoritarian democracy). See Jeremy Waldron, Rights and Majorities: Rousseau Revisited, 32 NOMOS: Majority and Minorities 44 (John Chapman & Alan Wertheimer eds., 1990), reprinted in Liberal Rights: Collected Papers, 1981-1991 (1993) 393--94.
them from ever straying beyond those sources. The approach I plan to follow will delve deeply into each of these issues.

IV. TOWARDS DEVELOPMENT OF A NORMATIVE CONCEPTION OF CONSTITUTIONAL INTERPRETATION

In this section, I set out a normative conception of constitutional interpretation that both provides a hierarchical structure for the modes of constitutional argument Professor Bobbitt sees as legitimating U.S. Supreme Court constitutional decisions and also explains the circumstances under which the Court is justified, when interpreting the U.S. Constitution, in considering the opinions of other national courts and those of the International Court of Human Rights. The approach I follow draws from the writings of the American philosopher Alan Gewirth, who believed he succeeded in justifying a principle of universal human rights from an assumption about the nature of human action that all moral theories implicitly share quot;quaquot; moral theories. Gewirth's methodology tries to show that every rational agent, from her own standpoint, logically must admit, on pain of contradiction, that she has certain basic human rights to freedom and well-being merely because she is an agent. In this way the argument is meant to derive only true moral judgments from the logically entailed requirements that every agent implicitly agrees to when performing any action.

Of particular interest to us is the theory's ability to provide a rationally justified, systematic understanding of certain basic human rights to which all persons have legitimate claim simply by the fact of being human. Many of these rights are already recognized in the laws of nations and several international treaties, declarations, and conventions, as well as in our own Constitution. It is also of interest to see how the theory's focus on the purposive nature of human action can serve as a pointer for extending the scope of these rights. Through engaging the theory as a common ground for understanding the contents and scopes of the various rights claims found in the

193. Gewirth's central work in this area is Reason and Morality, supra note 7, although I will also be making reference to other writings, which in some cases are briefer and in other cases offer something new to what is stated there.

194. Id. at 63. See also Alan Gewirth, The Basis and Content of Human Rights, in 23 NOMOS: Human Rights 119,129--32 (J. Roland Pennock & John W. Chapman eds., 1981) (arguing that one cannot be an agent without admitting that other persons must at least refrain from removing or interfering with freedom and well-being).
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various international and comparative law documents and our own Constitution, the U.S. Supreme Court is provided with a wider range of sources and understandings to aid its own interpretation of the Constitution. More generally, because the theory provides a means for developing common ground with others in the international human rights legal community, it advances the hope that the peoples of the world are being brought more closely together in a kind of cooperative, rational partnership to secure their mutual liberty and well-being.

In practical effect, supplementing the more traditional U.S. constitutional interpretive sources with insights offered by the courts of other countries and the International Court of Human Rights—while at the same time maintaining a baseline set of protections for the rights presently recognized—engages a dialogue among nations sharing similar cultures and traditions to ensure common basic human rights protections. This move towards a common universal conception of human rights, anchored on top by a modern, rationally constructed philosophical theory, is analogous to the revolution brought about through the systematic introduction of economic analysis and market principles into tort law, whereby courts came to recognize that overall wealth maximization of society is better advanced by paying attention to the implications of state court decisions affecting the economic interests of all.195 Like the economics reading of tort law, the comparative state decisions would have been far less informative if the contents of the principles had not been previously well understood. To achieve the same result for constitutional interpretation, I need to explain more precisely how the Gewirthian philosophical approach achieves its objective of finding a common ground for a foundational set of human rights in voluntary purposive human action. Once that is done, we will be able to advance the analysis to see how a systematic expansion of minimal rights protections becomes more credible as we compare those already afforded by the U.S. Constitution with those of other nations and the international community on the scale of increasing purpose fulfillment.

A. Step One: Justification and Content

A connection between the three forms of discourse—normative morality, constitutional interpretation, and international

norms—is that all are concerned with human action as being constituted by voluntariness and purposiveness. Working with this understanding, Gewirth's methodology is seen to set out a background scheme of logically interconnected claims that achieve a set of universal human rights very similar to those already affirmed by constitutional law and some international norms. Obviously, it will be always open to American courts to adopt a different strategy for determination, but the value of this strategy is that not only will it provide for minimal protections, but also for a common language with which to discuss the extraterritorial norms.

In The Basis and Content of Human Rights, Alan Gewirth begins by asking: Are there any human rights? How are we to know them? “What is their scope or contents and how are they related to one another?” He answers these and several other related questions by directing us to first find what all moral theories share in common, which is that they all presume themselves to be addressing voluntary, purposive human agents. By voluntary, Gewirth means that the agent can act with knowledge of relevant circumstances by his own unforced choice. By purposiveness, he means that the agent acts for some end or purpose. “Human” is just a stand-in for the fact that normal, adult human agents exhibit such voluntary and purposive abilities. Thus, voluntariness and purposiveness can be seen as the generic features of human action. As such, they are basic starting points for any moral discussion. As Professors Deryck Beyleveld and Roger Brownsword remind us, because the legal enterprise is also centrally concerned with human actions, voluntariness and purposiveness must be starting points for our

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196. Deryck Beyleveld and Roger Brownsword have noted that “The Legal Enterprise and knowledge of it involves action. The concept of action commits an agent, logically, to the acceptance of a supreme moral principle, the 'PGC.' Phenomena of the Legal Enterprise can only be properly characterised by judging their moral statuses in relation to the PGC.” Deryck Beyleveld & Roger Brownsword, Law as a Moral Judgment 33 (1986) (numbering in quote omitted).
199. Gewirth, Reason and Morality, supra note 7, at 31.
200. Id. at 37.
201. See id. at 64.
202. Id.
considerations as well.\textsuperscript{203} Thus, in the area of law as in morality, it is enough that we start from what all normative theories accept in order to see if that might lead us to a background interpretative framework of specific understandings of human rights that any legal system should be willing to accept.

Now in order to discover what human rights humans have, Gewirth realizes that the usual methodological approaches of the past will not be very helpful. Thus, intuitionism, as recognized by Thomas Jefferson when he wrote in the \textit{Declaration of Independence} that "[w]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights," fails to acknowledge that many people hold different intuitions on moral questions as, for example, southern slaveholders and northern abolitionists.\textsuperscript{204} Nor does Gewirth believe that an arbitrary acceptance of conventions can be a proper grounding for human rights: there are morally wrongful conventions, like slavery and the South African scheme of apartheid, which certainly would fail to meet even a modest conception for human rights.\textsuperscript{205} Interests also fail as a possible foundation both because there are simply too many interests and also because, like intuitions, people have conflicting interests.\textsuperscript{206} The ideal that humans possess intrinsic worth and dignity is likewise unsatisfying, because it begs the question of why humans should be thought to have worth and dignity.\textsuperscript{207}

Gewirth also rejects Rawls's veil of ignorance and original position machinery as incapable of establishing rights. In the case of the veil of ignorance, it seems counterintuitive to believe individuals could ever forgo the whole of their knowledge about themselves.\textsuperscript{208} In the case of the original position, Gewirth notes that it is circular because it sets up as the conditions for choosing principles of justice that all parties are roughly equal in mental ability, alike in their

\begin{itemize}
  \item \textsuperscript{203} Beyleveld & Brownsword, supra note 196, at 33.
  \item \textsuperscript{204} Gewirth, \textit{Human Rights}, supra note 198, at 43--44.
  \item \textsuperscript{205} See \textit{id.} at 44.
  \item \textsuperscript{206} Gewirth, \textit{The Basis and Content of Human Rights}, supra note 194, at 122.
  \item \textsuperscript{207} See Gewirth, Human Rights, \textit{supra} note 198, at 44.
  \item \textsuperscript{208} \textit{Id. Cf.} John Rawls, \textit{A Theory of Justice} 11 (1971) (arguing that free and rational persons would accept, in an initial position of ignorance as to their relative position in society, certain fundamental ordering principles for their association which assign rights and divide benefits).
\end{itemize}
desire to reason rationally, and self-interested. Those conditions are then relied upon to produce egalitarian principles of justice. Gewirth also notes that to the extent the original position operates from within a rational constraint, no person who operates on the basis of means/ends rationality and who would be better off under the status quo would ever rationally commit to place herself behind the veil of ignorance, which suggests that rationality must consider more than just means and ends reasoning. It must also consider whether the ends are reasonable without being biased.

Given the inadequacy of the above methods of justification, Gewirth adopts a different method, which he labels dialectically necessary. The idea of this method is to ask what claims every rational agent logically must affirm from her own point of view, that is, from the position of only being an agent. The point is that if, under such circumstances, there is one thing an agent must affirm, it could provide a powerful ground for establishing human rights. We now turn to the specific steps Gewirth follows to show that such rights obtain.

He begins by noting: “A does X for end or purpose E.” This statement illustrates several aspects of what was said above. First, since it is taken from the agent’s own point of view, it is placed in quotation marks. Second, the content of the statement exhibits the fact that the action is both voluntary and purposive, the two independent requirements we said all normative theories must presuppose. From this it follows that “E is good,” whereby good Gewirth is not necessarily referencing a moral good, but any sufficient positive reason that motivates the agent to act. From this, it further follows “[m]ly freedom and well-being are necessary goods.” Freedom comes in here from voluntariness, well-being from purposiveness. The idea here is that one cannot rationally will the

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210. Id.
211. See id. at 123.
212. Gewirth, Reason and Morality, supra note 7, at 44.
213. Id. at 42.
215. Id. at 20–21.
216. Id. at 24–25.
218. The idea is that to act voluntarily a person must presume some degree of freedom, and a similar claim is made about acting purposively. To act purposively, one must have the mental and physical well-being to pursue
ends without willing the means to the ends. Together, then, these two ideas constitute for Gewirth a normative structure of human action from which certain moral claims can be derived.\textsuperscript{219} If I affirm any action for any purpose I take to be good, I must affirm my freedom and well-being as necessary goods. This is a version of Immanuel Kant's principle, "ought implies can."\textsuperscript{220} For Gewirth, it is also just another way of saying, "I must have freedom and well-being" if I am to do any action for any purpose.\textsuperscript{221} As such, Gewirth believes it follows that the agent would necessarily claim, "I have rights to freedom and well-being."\textsuperscript{222}

Now, it is important at this stage to understand that all Gewirth has shown so far is what the agent prudentially must claim if she is not to contradict herself. There is no claim, as of yet, that anyone else needs to recognize her claim, and hence that her claim is a moral claim.\textsuperscript{223} To become a moral claim, our agent also would

\begin{itemize}
\item \textsuperscript{219} Gewirth, Reason and Morality, \textit{supra} note 7, at 52--53.
\item \textsuperscript{220} Immanuel Kant, Critique of Judgment 345 n. 48 (Werner S. Pluhar trans., Hackett Publishing Co. 1987).
\item \textsuperscript{221} Samar, \textit{Gay Rights as a Particular Instantiation of Human Rights}, \textit{supra} note 17, at 998.
\item \textsuperscript{222} Now at this point Gewirth acknowledges that some might disagree with his introduction of the term "rights" as if he were sneaking into the analysis something normative that had not been present from the start. So Gewirth considers the above scenario again, except that now the agent denies, "I have rights to freedom and well-being." Gewirth, \textit{The Basis and Content of Human Rights, supra} note 194, at 129. Here, I note that the particular rights being discussed are claim rights, implying in Hohfeld's sense, that there is some correlative duty on others. \textit{See} Gewirth, Reason and Morality, \textit{supra} note 7, at 67 (citing Wesley N. Hohfeld, \textit{Fundamental Legal Conceptions as Applied in Judicial Reasoning} 41 (1964)). This means then that when the agent denies she has these rights, she also denies "[a]ll other persons ought to at least refrain from removing or interfering with my freedom and well-being." Gewirth, \textit{The Basis and Content of Human Rights, supra} note 194, at 129. But this in turn means she must accept "I may not have (i.e., it is permissible that I not have) freedom and well-being." \textit{Id.} Now clearly this last step in the argument produces a contradiction with the earlier one "I must have freedom and well-being." When a contradiction such as this occurs, one of the two statements is false. From the agent's own point of view, it would not be the first statement that is the false one, since if she seeks to do any action for any purpose, she must simultaneously claim the means (freedom and well-being) to perform the action. So the mistake lies with the agent's denial of rights to freedom and well-being. Thus the agent was originally correct when she claimed, from her own point of view as consistent with doing \(X\) for purpose \(E\), that she had rights to freedom and well-being.
\item \textsuperscript{223} Gewirth, \textit{The Basis and Content of Human Rights, supra} note 194, at 129.
\end{itemize}
have to show that all other persons similarly situated would affirm the same rights. She does this by recognizing as her sufficient reason for claiming rights to freedom and well-being that she is a prospective purposive agent.\textsuperscript{224} Put another way, no other more peculiar reason, other than her being an agent, such as regarding her age, race, wealth, education, or religion, justifies the claim. But this means that anyone else who would seek to do $X$ for purpose $E$ could make this same claim. In other words, the claim is universalizable.\textsuperscript{225} Hence, were she to deny to other agents rights to freedom and well-being that she affirms on the basis of agency for herself, she would be contradicting herself.\textsuperscript{226} This leads Gewirth to affirm that every rational agent is logically compelled to accept on pain of contradiction, as the supreme principle of morality, the Principle of Generic Consistency ("PGC").\textsuperscript{227} That principle provides: "Act in accord with the generic rights [rights to freedom and well-being] of your recipients as well as yourself."\textsuperscript{228}

This principle, Gewirth claims, has both positive and negative aspects.\textsuperscript{229} It also possesses the positive affirmation that one ought to aid another in securing these rights when there are "no comparable costs" to oneself.\textsuperscript{230} Another feature of the PGC concerns the way the rights to freedom and well-being are understood. The freedom side encompasses notions of autonomy, privacy and basic civil liberties.\textsuperscript{231} The well-being side breaks down into three distinct categories of goods distinguished by their degree of needfulness for purpose fulfillment: basic, nonsubtractive, and additive.\textsuperscript{232} Basic goods are life, physical integrity, and mental equilibrium, the

\begin{itemize}
  \item \textsuperscript{224} Id. at 130.
  \item \textsuperscript{225} Id.
  \item \textsuperscript{226} Id. But note that now the contradiction would be moral in that our agent would be denying to relevantly similar others the same rights that she claims on the same basis for herself.
  \item \textsuperscript{227} Id. at 131.
  \item \textsuperscript{228} Id.
  \item \textsuperscript{229} It has the obvious negative ones that no person ought to interfere with another's freedom and well-being as was just shown. Id.
  \item \textsuperscript{230} Gewirth, Reason and Morality, supra note 7, at 217. So, if a person were on a beach and discovered another drowning nearby, she may not have a duty to directly aid the swimmer if that might imperil her own life, but she would have the duty to throw a life preserver if one were available or to seek help from others.
  \item \textsuperscript{231} Id. at 308-310.
  \item \textsuperscript{232} Gewirth, The Basis and Content of Human Rights, supra note 194, at 134.
\end{itemize}
essential ingredients that make it possible to be an agent. Nonsubtractive goods are those necessary for maintaining one's current level of purposive fulfillment. Additive goods are those necessary to enhance one's current level of purpose fulfillment.

Because agents will sometimes use their rights against each other, it also becomes necessary to describe how the theory would handle situations involving a conflict of rights. Here, two approaches to resolution apply: direct actions between the parties involved and indirect actions involving third parties. Direct actions, such as self-defense, are justified when an agent reasonably perceives a direct attack on her basic right to freedom or on her basic right to well-being. The ground of this response is that, as a victim, the agent suffers a transactional inconsistency because the perpetrator impliedly affirms rights for himself that he is equally unwilling to allow the agent. In the case where the rights in conflict are at different levels, such as between basic and nonsubtractive well-being, nonsubtractive and additive well-being, or basic and additive well-being, the agent is obligated to take account of their different degrees of needfulness for action. So, for example, it would be morally acceptable to lie to a Gestapo officer to save an innocent family from the gas chamber even though normally lying would violate a nonsubtractive right. Because this article is concerned with the operations of law, our focus must be on the indirect actions that the PGC permits. These are actions allowed to legislators, police, prosecutors, and judges, because it is felt that purposefulness in the long run is better served when impartial institutions act to protect rights according to certain prescribed methods of investigation and judgment rather than following the direct self-help measures undertaken by the parties affected.

233. Id. A person's basic goods are threatened when her life is threatened or her body is harmed. Id.
234. Id. at 134--35. Nonsubtractive goods are threatened when a person is lied to, cheated, or made the object of broken promises. Id.
235. Id. at 135. Thus, a person's additive well-being is threatened when she is not provided with reasonable opportunities for maintaining wellfulness, intellectual and emotional stability, and economic security.
236. See Gewirth, Reason and Morality, supra note 7, at 199, 272.
237. Id. at 213--14.
238. Samar, Gay Rights as a Particular Instantiation of Human Rights, supra note 17, at 1004--1005.
239. See Gewirth, Reason and Morality, supra note 7, at 277--82. Thus governments can be established to maintain order and provide services so long as they afford each citizen the right to vote for who will be in charge. See id. at 283,
However, this also means that there are constraints imposed on how these third parties function. From the freedom component of the PGC applied procedurally to the institutions of government, the constraint is that consent must be protected, which means that democratic procedures must be made available to set forth the laws and determine who are the holders of public office. From the well-being component applied instrumentally to governmental institutions, the constraints include establishing a legal system capable of affording remedies for violations of basic and some nonsubtractive rights while, at the same time, providing appropriate safeguards of due process to ensure that only wrongdoers be punished. Additionally, government must also aid in the well-being of the citizens by affording certain entitlements to education, welfare, and health care to ensure the protection of basic rights in the long run. These constraining conditions are required for governmental institutions to be thought to be morally justified and thus true protectors of human rights.

B. Step Two: Guaranteeing the Protections

Although Gewirth's theory can be seen to apply to a wide variety of human rights situations, my focus here is on meeting the first requirement I set out at the beginning of this article, namely, to show that it can produce a common normative language capable of equating established meanings of American constitutional norms with newly developed understandings arising under international human rights norms and the human rights laws of other nations. As previously noted, all legal systems are centrally concerned with human action. Therefore, it is fair to say they must presuppose the possibility of moral interests, specifically those recognized by the PGC. The Gewirthian theory thus provides a common baseline upon which to compare and evaluate the interpretations of the norms that the different national courts have rendered. This common baseline opens the door for our own Supreme Court to develop further understandings of such words and phrases as "due process,"

306.
240. See id. at 292.
241. See id. at 318--19. Such entitlements would include ensuring that adequate levels of education are made available, along with reasonable health care, decent jobs, various cultural forms of expression, and opportunities for developing feelings of individual dignity and self-fulfillment. Id.
242. See Beyleveld & Brownsword, supra note 196, at 128--29.
“liberty,” and “equal protection.” The finding that these terms, found in our own Fourteenth Amendment, might share certain contents with other similar words or expressions interpreted by other national and international courts, even though there may be differences in history and tradition, gives rise to the possibility of developing a deeper account of the transnational nature of the rights at issue.

For example, in Lawrence v. Texas, the Court noted that its earlier decision in Bowers v. Hardwick failed to take into account that a prior decision by the European Court of Human Rights had gone in a completely opposite direction. Could not this failure be explained by the Bowers Court’s inability to look beyond its own precedents because it thought itself bound by a certain construction of its own history and tradition and not by a broader understanding of the rights it was unraveling? Here, the two legal systems might really be aiming at the same end, namely, protection of human dignity, yet one system’s court completely ignores the other. Perhaps this also explains why the Bowers Court seemed so out-of-touch with how the law was evolving elsewhere, at least in the Western world. However, to adequately utilize Gewirth’s theory as a ground upon which to compare and evaluate our understandings of constitutional norms with the extraterritorial interpretations of foreign and international norms requires more than similarity of language or description. For there remains the real fear, as indicated by the second requirement set out at the beginning of this article, that the minimal protections allowed by the theory might fall beneath those already afforded under existing constitutional interpretations in American law.

Using Gewirth’s theory avoids this problem by making the attainment of self-fulfillment through voluntary purposive action the common end to which the rights to freedom and well-being must always be directed. That being said, the theory, by way of its guarantees of freedom and well-being, actually provides limits on the range of interpretations that a court could justifiably offer of these concepts, which otherwise might allow curtailment or constriction of legitimate rights. It does this by ensuring that no interpretation will be morally justified if it could not result from what any rational agent logically must accept on pain of contradiction from his or her own point of view as an agent. That is to say, it is not any specific action that a person might want to engage in that cannot be contradicted (as, e.g., killing another human being); rather, the

conditions for the possibility of performing any action at all require every agent to recognize similar rights of others.\textsuperscript{244}

A state by its laws acts contrary to what morality requires when it restricts the freedom to act or the objects over which that freedom might be exercised without showing that such a law either will be more protective of freedom and well-being or will generate a greater degree of purpose fulfillment for all concerned. Thus, we find that the protection of freedom and well-being, understood in context to supporting the possibility of purposeful action, also provides for expanding rights protections in instances where to do so promotes greater dignity through greater self-fulfillment and no other rights of anyone else are violated in the process. From this brief description, one can see the value of my appeal to Gewirth's theory as providing a common way to evaluate different understandings of very basic human rights principles, which to some extent have already been acknowledged by our own constitutional tradition. Thus the theory provides for a common rational understanding of the norms our Constitution already recognizes, while at the same time protecting against interpretations from the consideration of extraterritorial norms that might fall below that baseline as currently recognized in American constitutional law.

Beyond that, however, I see the theory as opening the door in American constitutional interpretation to expanding our understandings of American norms through comparisons with international and national norms from other countries whose courts have also sought to advance human dignity and purpose fulfillment. The other benefit of the theory is that it holds out as a real possibility that in the long run human rights distinctions between legal systems will become attenuated by common understandings that make these rights more internationally secure.

There are two additional reasons for also looking to Gewirth's theory as providing the baseline for understanding and evaluating different schemes of rights. First, because Gewirth's theory follows a rather rigorous system of logical entailments even though it speaks at a fairly high level of generalization, it avoids much vagueness that might otherwise provide room for rational dispute.\textsuperscript{245} Second,

\textsuperscript{244} See Gewirth, Reason and Morality, supra note 7, at 75.

\textsuperscript{245} I have in mind here vague notions like the "nature" in Thomistic Natural Law Theory. See generally Concerning the Nature of Law in 2 Thomas Aquinas, The Basic Writings of Saint Thomas Aquinas 750 (1945) (illustrating Thomastic Natural Law Theory and objections to Aquinas's view that natural law
because in the end Gewirth's system supports the idea that human rights should enhance as much as possible individual purpose-fulfillment, the latter can be seen to provide a test for resolving conflicts of rights that have two or more ways of being understood. That test is to choose always in favor of the interpretation that promises to produce the greatest degree of individual self-fulfillment without corresponding violation of anyone else's human rights.

One caveat should be mentioned. Once the normative system, like the U.S. constitutional law, satisfies the minimalist protections afforded by the Gewirthian understanding, it is free to provide any additional benefits or impose any added responsibilities on its people so long as these do not undermine the baseline of serving human freedom and purpose-fulfillment. Thus concerns for every individual's basic, nonsubtractive, and additive well-being, as well as their individual autonomy, privacy, and basic civil liberties, must always be the floor beneath which no government or quasi-governmental body can be said to be protecting human rights. That being said, individuals and groups can forgo important baseline human rights protections (such as occurs when added requirements are imposed for membership in voluntary organizations including religious institutions), provided it is done with full consent by persons of mature age and with the fullest possible knowledge of the choice being made.246 Such a system of further limitations Gewirth calls "particularist morality" when applied to groups and "personalist morality" when strictly of an individual nature.247 Both are distinguished from "universalist morality," which is the baseline principle of human dignity that the PGC sets forth.248

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246. See Brian Barry, Culture and Equality: An Egalitarian Critique of Multiculturalism 239–45 (2001) (arguing that illiberal groups are sometimes given legal privileges that prevent their members a real exit from the responsibilities of membership). One example I have in mind is allowing Amish children to be taken out of public secondary schools and educated in the home as a way to keep them permanently tied to the community because they will otherwise have no skills to sell on the open market. See Wisconsin v. Yoder, 406 U.S. 205 (1972).

247. See Gewirth, Self-Fulfillment, supra note 19, at 140–41.

248. I should make more explicit the relationship between prospective purposive fulfillment (what the PGC demands) and individual human dignity. When an agent seeks to do some action for some purpose, he obviously regards his ability to perform the action as a thing of value from his own conative standpoint. What may be missed when the analysis is run too briefly is that our agent is also proclaiming his action as a thing of value just because it is his
C. Step Three: Institutional Rights as a Way to Guard Moral Rights

Bearing these features in mind, let us see how the Gewirthian framework might aid a systematic development of American constitutional laws affecting human rights. Perhaps not surprisingly, it will turn out that American constitutional norms and many of the international norms contained in various charters of human rights, as well as the six modalities of constitutional decision-making discussed above, all get assessed in the process. This is because many of the norms referenced both in the American Constitution and in various international documents, such as the *UN Declaration of Human Rights of 1948* and the *European Convention on Human Rights*, as well as *jus cogens* principles, overlap with each other and also comport with the guarantees of the PGC. When overlap occurs, if a dispute also results, however, a more general principle will be needed to adjudicate between the conflicting intermediate principles or norms.

To see this, it is important to take as our common denominator the idea that human rights should serve the end of supporting voluntary purposive human behavior. That being said, various provisions of both the American Constitution and the Bill of Rights illustrate either the notion that we should promote human purpose-fulfillment whenever possible and to the greatest extent or, at least, protect against its diminishment. I have in mind the right to contract,\(^{249}\) the right to vote,\(^{250}\) the right to run for political office,\(^{251}\) the right to have a system of courts that provides due process,\(^{252}\) and all the various civil liberties rights, including an expansive reading, at least in the political area, of rights to freedom of speech and the press, the right to worship the God(s) of one's choice, the right of assembly, and the right to petition the government for the redress of action. But this is to say that the agent is necessarily committed by the argument for the PGC to recognition of his own human dignity and, with that (since everyone else would make the same claim), the equal human dignity of others. The connection is sometimes lost because dignity is not deduced formally from the purposive-based argument we started with, but rather the argument for dignity supervenes on that earlier argument. *See* Gewirth, *Self-Fulfillment*, *supra* note 19, at 159–74.

\(^{249}\) U.S. Const. art. I, § 10.
\(^{250}\) U.S. Const. amend. XXVI.
\(^{251}\) U.S. Const. art. I, § 2; U.S. Const. art. II, § 1.
\(^{252}\) U.S. Const. art. III, § 2; U.S. Const. amend. V.
These rights that are often extolled as cardinal virtues of the American constitutional democracy are also fully consistent with the PGC and its support of voluntary purposive action. An obvious exception here is the three-fifths rule that permitted slavery to be recognized in the early days of the Republic.

That being said, however, it is important for us to recognize that the Constitution is a structural document in the sense of providing an architectural blueprint of the United States government with much more detail than would be expected if it were only a philosophical theory of government. This means that as we go about interpretation, we need to consider more than just what rights are protected, but also what institutional arrangements are made available to support those rights and actually resolve various legal and political conflicts.

This point is interesting to note for another reason as well, for it shows how philosophical argument can inform but not replace legal argument. In other words, whatever may be the proper philosophical justification of various human rights, unless there are a set of institutions established with baseline commitments to, at least, the minimal protection of those rights, harms will likely result with no remedy available. In short, the legal system will fail to achieve the various institutional purposes for which it was designed. More generally, Beylved and Brownsword have described this movement between the philosophical moral concerns and institutional practices as follows:

(1) The Legal Enterprise can only be explained in terms of a particular model which defines it. [In our case, the model is set by the Constitution and methods that the Supreme Court has adopted for its interpretation.] The model is a constellation of conditions and interests which we may refer to ‘as the human social condition under a problem of social order.’ This model may be thought of as being bounded, on the one side, by a perfectly consensual model in which personal interests and facts of human finitude are absent

253. U.S. Const. amend. I.
254. U.S. Const. art. I, § 2. Originally put in the Constitution as a compromise between the states to gain adoption of the Constitution by allowing the southern states to count their slaves for purposes of determining the number of representatives they were entitled to in the House of Representatives by counting the slaves as three-fifths of free citizens, even though there would be no provision for their emancipation, let alone any rights of citizenship such as the right to vote. See McDonald, supra note 2, at 236--37.
and, on the other side, by a perfectly coercive model in which moral interests are missing. The perfectly consensual model is incompatible with the nature of the Legal Enterprise because this presupposes a problem of social order which is inconceivable without facts of human finitude and personal interests. The purely coercive model is incompatible with the Legal Enterprise because the possibility of knowledge of social phenomena, and thus of knowledge of phenomena constituting the Legal Enterprise, presuppose the possibility of moral interests—specifically specified by the PGC. (2) The model of the human social condition under a problem of social order manifests an ideal-typical case in which all interests are idealistically transformed by relations of consistency with the PGC. Only in this case can coherent reasons be given. Such reasons are based upon real interests which provide self-sufficient explanations of actions guided by them. In non-ideal-typical cases all real interests are present, but awareness of some real interests or the ability to act on the basis of real interests is missing. In general, departures from the ideal-typical case are to be explained by citing causal mechanisms which explain why essential human nature is not manifest in action. The ideal-typical case, and the ethical ideal which it grounds, is thus a necessary yardstick for ethical evaluation, description, and explanation of activities which constitute the Legal Enterprise.255

Here is where the six modalities of constitutional interpretation can be re-understood to promote the PGC's general aim of protecting individual freedom and well-being and human self-fulfillment. This will only happen if the modalities follow a hierarchy to guarantee basic universal rights and are made open to legislative avenues for enhancing, when possible, human purpose fulfillment. For example, the textual modality, because it opens the door to recognized understandings, may itself provide a vehicle for norms to receive practical recognition. The historical modality insures that longstanding commitments don't disappear from memory because of prevailing new fads and fashions. It might be noted that a truly purposive understanding of the historical modality would not lead to the conclusion that the text could not develop greater or more expansive understandings of the rights considered in service to their needfulness for purposive action. In this respect, the PGC requires and the Constitution makes available (Justice Scalia's idea of a

"dead" Constitution notwithstanding) a degree of flexibility to meet changing social conditions, provided only that change never be adapted to lessen the protections afforded by the rights the framers originally intended or that the Court has since acknowledged.

Here, too, a full appreciation of the best wisdom and understanding of the human social condition that science and social science can provide is derived from the PGC's commitment to reflecting truth in moral judgments and not just opinion. The doctrinal modality further supports this point by adding different concrete applications to the basic spirit of the law. This can have the effect of allowing a better side of the law to be expressed even after the objects for which it was originally adopted have ceased to exist because of changes in technology or other forms of human interaction (as occurred, for instance, with the weakening of the privity doctrine since the days of horses and buggies).

With respect to finding a moral function for the structural modality, I would take a lesson from St. Thomas Aquinas, who noted that principles of human law will sometimes be deduced from natural law (e.g., the principle that one should not kill is deduced from the natural law principle that one should harm no person), while at other times human law will take its authority from the mere fact that it is a reasonable specification of what the natural law permits. For example, our framework requires a democratic form of government. But as long as the basic concern for providing democratic forms of consent is satisfied, natural law is agnostic between whether the government created is of a representative form or a participatory form. Here, as in the Gewirthian application, the moral theory would leave to other disciplinary concerns the evaluation of whether, for example, a republican form of government, as is present in the United States, versus a participatory democracy, as was present in the Athenian city-state, is optimal toward resolving the complex social realities confronting a highly diverse and widely

256. See supra note 118 and accompanying text.
257. In McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819), Chief Justice Marshall emphasized this flexibility with the famous line: "It is a constitution we are expounding."
258. See Gewirth, Reason and Morality, supra note 7, at 26.
260. See Aquinas, supra note 245, at Q. 91, art. 3, 750--52.
geographically separated modern nation-state. The same can be said for other structural arrangements to assure control over the use of power through the separation of powers doctrine and at least minimal acknowledgement of local interests through federalism.\(^{261}\)

In thinking about the ethical modality, we are required to be more circumspect. For here, the problem is not to develop a moral vision but to determine which vision is best suited to resolving a particular case. The sense of best here is understood to be following reason as the highest human capacity because of its ability to find truth.\(^{262}\) But if that is the case, then when engaged in the search for truth in practical affairs, Gewirth asserts that one must always be willing to engage a "Purposive Ranking Thesis."\(^{263}\) To engage such a thesis, one must first define “a kind or context of the activity,” then determine “the purpose for the activity,” then, finally, establish “the comparison or value-rankings of capacities according to their contribution to that purpose.”\(^{264}\) Depending on what the issue is, and what skills or understandings the judges bring to the task, any one of a number of moral perspectives might be implicated in a given problem, including: utilitarianism, libertarianism, egalitarianism, or some form of communitarianism.\(^{265}\)

That being said, one can imagine instances where the best ethical solution may be a utilitarian one because the matter at stake is more related to the aggregation of value, as with common good analysis, than to any distributive concern about right or justice.\(^{266}\) In other instances, a more libertarian solution might be the best choice


\(262\) Gewirth, Self-Fulfillment, \textit{supra} note 19, at 72.

\(263\) \textit{Id.} at 72–73.

\(264\) The utility of this “Purposive Ranking Thesis” is to assist in the determination of any activity, what will best serve the purpose assigned the activity. Purposes that are immoral are ruled out, not because they violate the thesis, but because they violate some provision of universal morality. \(\text{Id.}\) at 69–71.

\(265\) What should not be followed if the framework I have suggested is to be maintained is anything that might throw the Court off track from protecting the voluntary purposive nature of human action.

\(266\) See, \textit{e.g.}, Ronald Dworkin, Taking Rights Seriously, \textit{supra} note 128, at 22 (noting that reducing automobile accidents is a policy that provides a common good to society).
because the issue involves what is almost an exclusive matter of
property rights without invoking any other moral concern.\textsuperscript{267} Still, in
other instances, where an issue of fair play or basic equality is at
stake, a more egalitarian outcome might be best.\textsuperscript{268} Whatever the
choice is, it should always be seen as able to satisfy the concern of
enhancing human purpose-fulfillment. My use of Gewirth then is
really a kind of metatheory ranging over a variety of normative
ethical systems in which legal theory must participate if the rule of
law is to make sense.\textsuperscript{269}

So, for example, the Supreme Court has recently decided the
question of whether or not Congress can prohibit the states from
regulating a limited sale and use of marijuana for medical purposes
to aid terminally ill patients.\textsuperscript{270} A number of legal doctrines were
potentially at stake, including giving deference to Congress’s right to
regulate intrastate business activity that has interstate ramifications. But in assessing the purposes of the commerce cases and the medical concerns raised by California, the Court could have concluded that within a narrowly tight regulatory focus, a state
should have this freedom, even if the details of the regulations need
yet to be worked out to provide a needed health treatment without
endangering other legitimate interests.

This gives rise to an interesting question regarding the
purposive fulfillment direction of our interpretative framework. Could the framework’s emphasis on purposive fulfillment force
judges to leave engaging in actions thought to be harmful, like the
person who wants to privately use narcotics, to individual choice?
Here the answer would have to be looked at in light of the
intermediate, in this case constitutional, principles recognized by the
PGC because no higher ordered principle is threatened. Those
principles, like privacy and Fourteenth Amendment liberty, could
have, in the final analysis, resulted in saying that the state ought not

\textsuperscript{267} See, e.g., Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 810 (1984) (disagreeing with challenger’s claim that a city’s aesthetic prohibition on the posting signs on public property could only be justified under the first amendment if the law were similarly applied to the posting of unattractive signs on private property).

\textsuperscript{268} See Frontiero v. Richardson, 411 U.S. 677 (1973) (sustaining an equal
protection challenge to a federal law requiring servicewomen but not servicemen
to prove their spouses were dependent before a dependency allowance would be
granted).

\textsuperscript{269} See Samar, Justifying Judgment, supra note 133, 61--89.

\textsuperscript{270} See Gonzales v. Raich, 124 S. Ct. 2909 (2005).
to be able to stop the private use of drugs in the home by fully consenting adults, provided no one else is harmed and information about harmful effects is readily available at little or no cost. At the same time, however, even if this view had been adopted, nothing would have prevented the state from limiting their import or preventing their sale by the use of criminal sanctions\(^2\) or requiring sellers of drugs to pay a tax to offset the costs of making information available on the harmful effects of some drugs. The latter is justified, under the PGC's voluntariness requirement, so that the choice to use drugs is always made in light of relevant information being available.

These limitations would have all been consistent with the purposive nature of the PGC, which is first to protect freedom and basic well-being in the forms of life, physical integrity, and mental equilibrium. The PGC would demand only that such restrictions be based on accurate scientific investigation of real harms due to their use. In effect, the notion of purposive fulfillment here takes on the constructive role of providing a ranking to direct courts and, with respect to the providing education, the legislature as well, on how to decide which human choices deserve greater attention and protection, because they are likely to have a more direct effect on human agency. Through the use of a ranking, the courts and the legislature are given a criterion for sorting out situations where two or more interpretations of the same law are both permissible under the PGC, but one has a greater likelihood to enhance individual well-being for more people in the long run.\(^2\)

Moreover, with respect to the rights just mentioned, since their application will not always coincide with the most current fads and fashions of democratic politics, the Constitution, from the point of view of the PGC, properly assigns them to the protection of the Supreme Court and other lesser federal courts.\(^2\) Since the Supreme Court is made up of nine justices, who enjoy life tenure and who are usually appointed by presidents coming from different political persuasions, they are in a unique position to view the democratic

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271. See Stanley v. Georgia, 394 U.S. 557, 568 (1969) (reversing a conviction for possession of obscene materials, stating that, while the state had an interest in the sale and distribution of obscene matter, it did not have any interest in the mere possession of obscene materials in the home and, therefore, could not criminalize it).

272. See Gewirth, Self-Fulfillment, supra note 19, at 71.

273. U.S. Const. art. III, § 1; see also Marbury v. Madison, 5 U.S. 137 (1803).
process from outside the immediate effects of the political arena. But since the Supreme Court cannot just make up rights as it goes along if it is to maintain its legitimacy in the public's mind, it will of necessity have to find recognized sources for the rights it proclaims. This is where the modalities of constitutional interpretation are most helpful, including the requirement of giving deference to legislative enactments which are thought to engage in more fact finding than courts are capable of performing.

This does not mean that our interpretative framework should be left behind when evaluating the way institutions operate. For the PGC, under its indirect applications, has been well enough developed to provide at least a general outline of what processes must be in place for laws and administrative regulations to be justified. The Constitution satisfies those process requirements by requiring election for most public offices where laws are likely to be made or enforced and by requiring courts to ensure that the Constitution is followed and that before any person should be convicted of a crime they are afforded appropriate due process in an open court of law. The Constitution also meets the additive goods requirement by allowing Congress to experiment with entitlements to serve the common good.

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275. This is the idea that courts should just interpret laws but not legislate, which has been increasingly attacked in recent years, according to one opponent of judicial legislation. See Scalia, A Matter of Interpretation, supra note 119, at 46–47.
276. U.S. Const. art. II, § 1. The Electoral College is a strange historical counterexample that may not fully comport with protecting consent as recently witnessed in the first “election” of George W. Bush to the presidency.
277. U.S. Const. amend. V. This is true notwithstanding recent actions by the American executive branch regarding non-public trials, and in some cases no trial at all, for persons suspected of terrorism that may prove to be human rights anomalies; although the courts have already undertaken some effort to repair that damage. Rasul v. Bush, 540 U.S. 1175 (2004) (holding that the administration cannot prevent federal judges from hearing habeas corpus petitions brought by detainees held at Guantanamo Bay), Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (holding that a U.S. citizen held as an enemy combatant was entitled to a meaningful hearing before a neutral magistrate in order to contest his detention).
278. U.S. Const. art. I, § 8. This clause has been interpreted by a line of commerce cases allowing government intervention into business decisions for the public good. See, e.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (allowing the NLRB to order companies to end discrimination against and coercion of labor leaders). Its principle came to eventually allow imposition of civil rights protections on commerce. Heart of Atlanta Motel v. United States, 379 U.S.
D. Step Four: Selecting Among Extraterritorial Norms that are Morally Justified and Constitutionally Compatible

Turning now to the issue of extraterritorial norms, a similar analysis can be offered to what was said regarding American constitutional norms. We begin with the UN Declaration of Human Rights of 1948, which sets out two distinct categories of rights: political rights and social and economic rights. The latter differ from the former in that the UN recognizes that for less developed countries, for reasons of economic privation, many of these rights will be mostly aspirational. Still, there is some duty that developed states have to try to provide less developed countries in these circumstances with the means to achieve economic improvements. Political rights, on the other hand, always apply. They include such rights as the right to life, liberty, and security; to not be held in slavery or subjected to torture or inhumane treatment; to be treated as an equal before the law; to not be subjected to arbitrary arrest, detention, or exile; to a presumption of innocence; to a fair and public trial; to travel and asylum; to have privacy respected; to own property; to change nationality; to freedom of religion, thought, and conscience; to express opinions; and to peacefully assemble; and to be able to take part in government.


280. Louis Henkin, International Human Rights as "Rights," in 23 NOMOS 257, 261 (J. Roland Pennock & John W. Chapman eds., 1981); see also Kant, supra note 220, at 345 n.48 (describing Kant's famous recognition that "ought implies can," which is exemplified by Henkin's discussion on economic, social, and cultural rights).

281. See The President's Commission, supra note 279, at 100--103.
The rights listed under this category include negative rights that are thought to substantially protect individual freedom of action against governmental interference. They also include a few positive rights like a right to a fair and public trial, a presumption of innocence, and a right to ownership of property. These positive rights are listed here because they too are seen as protecting freedom in its most basic sense by ensuring that there exists a baseline protection for those matters that are essential to human dignity and that no signatory to the Declaration and, hopefully, no nation will ever disregard.

The social and economic category presents almost all positive rights, including rights to work, to rest and leisure, to social security, to an adequate standard of living, to education, including compulsory primary education, to participate in the cultural life of the community, and to a social and international order in which these rights are realized. This category also incorporates a few negative rights, including the right not to be prevented from joining a labor union. As previously implied, the objects of these positive rights will not be achieved in every case because the social and economic resources will not be present.

Moreover, the Declaration says that these rights hold for all people regardless of their color, race, sex, religion, language, or political or other opinion. They also apply regardless of property or birth status, national or social origin, or other status. Sexual orientation is not specifically referenced in the Declaration, but might arguably be brought under the coverage of “other status” because of its significance to individual self-fulfillment. Furthermore, the rights contained in the Declaration are proclaimed by it to be universal. Notably, the document is entitled the “Universal Declaration.” The rights contained in it are also thought to be rights that one cannot alienate, although one can forfeit them, as in the

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282. See id.
283. Id. at 103–105; see also Ann I. Park, Comment, Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation, 34 UCLA L. Rev. 1195, 1263 (1987) (arguing that “[i]f American law is to conform to international human rights standards, basic needs must be given some degree of constitutional protection.”).
284. See The President’s Commission, supra note 279, at 104.
285. This is but another example of Kant’s dictum “ought implies can,” applied now to international law norms.
287. Id.
case of self-defense. Lastly, because the rights here are general, it follows that each person has these rights and that the rights are the same for all.\textsuperscript{288} This is consistent with the PGC's requirement that no fundamental distinction be established by law between people with respect to what rights they have.

All of this suggests that the rights proclaimed in the Declaration, like those found within the American constitutional framework, can be expressed and understood in the common language of purpose fulfillment (including its rights to freedom and well-being), as set out by the PGC. This consequence is of significance because if either set of rights falls below the meanings and protections of the other set, the court adopting the more restrictive interpretation will have to explain its decision in the common language of protecting purpose fulfillment. This suggests that the court might look to the more expansive treatment of the other set of rights unless good reasons specifically related to the protection of human rights exist for not doing so.

The commonality of the language under which the rights are compared weighs on the logic of any decision by a court to always operate from within the principle of protecting human purposive fulfillment. Moreover, this analysis, when combined with the observations about the modalities of constitutional argument made in the last section, suggests that we now have the comparative apparatus in place to help us reach a morally justified result without worrying over the loss of constraint. The latter is, in part, because we also have an objective way to prioritize the modalities of constitutional argumentation (and whatever equivalents might exist within another system) within our meta-framework. Indeed, the willingness of several justices of the current Supreme Court to interpret American constitutional and some statutory law by considering the norms and prior related judgments of various European courts, including the European International Court of Human Rights, by fitting them into traditional modalities of constitutional argument highlights this process of analysis in resolving concrete legal disputes.\textsuperscript{289}

Notably, the Gewirthian framework's assistance in the


\textsuperscript{289} Although in two of the cases that will be discussed in the next section the Court focused on the ethical modality, in the third case the Court gave more weight to the historical modality.
interpretation of American law could also aid in interpretations by
the International Court of Justice and the European Court of Human
Rights by providing an additional opening for their consideration of
extraterritorial norms. The framework could do this by opening such
courts to the possibility of drawing on other domestic and American
law norms where the PGC recognizes them as furthering prospective
purposive agency.290 Interestingly, this approach seems to fit
Professor Jenny Martinez’s views on the way the international
judicial system seems to be developing, namely, through the use of
“antiparochial, prodialogic rules” that represent domestic insights
that international courts might adopt.291

V. SHOWING HOW GEWIRTH’S HUMAN RIGHTS FRAMEWORK MAKES
EXTRATERRITORIAL NORMS RELEVANT TO AMERICAN
CONSTITUTIONAL INTERPRETATION

The best way to show any interpretative framework at work
is to apply it in practice. Therefore, in this section I will apply the
interpretative framework set out in Section III to show how it makes
comparative or international law documents relevant to American
constitutional interpretations. I will do this specifically in the context
of the Supreme Court’s fairly recent use of international norms in
three cases: Atkins v. Virginia,292 Lawrence v. Texas,293 and Sosa v.
Alvarez-Machain.294 Following that discussion, I will speculate on
how the framework might predict the outcome in a same-sex
marriage case, which seems likely to come before the Court within
the next decade.

One possible objection to my analysis merits consideration
before I begin discussing these cases. Under my system, federalism is
trapped by minimal protection concerns. Yet it could be argued that
federalism was embedded in the Constitution as a means to limit
government and, by so doing, to ensure individual freedom. But if
that is the case, what impact should this structural feature of the

290. Interestingly, over twenty years ago one writer suggested using
human rights norms via the methodologies of the common law as positive sources
for appraising the levels of scrutiny afforded under the due process and equal
protection clauses. See Gordon A. Christenson, Using Human Rights Law to
291. Martinez, supra note 104, at 514, 528 (quoted passage).
Constitution have on the minimal protection concerns I seek to advance? The answer is that where maximal freedom, in the sense of the freedom of all, is ensured by the separation of the federal and state governments, it will be maintained. This simply follows as a requirement of universal morality. It is also consistent with the justification offered in the last section for the structural modality of constitutional interpretation, which here proceeds from the procedural side of the PGC. Were the use of such a modality, however, to operate contrary to individual well-being, a further argument would have to be drawn within the context of the theory that would justify overriding freedom in favor of basic well-being. Although I do not believe that this is likely to occur too often, it does occur in regard to death penalty cases, and, thus, we will need to take up this issue there.

A. Applying the Framework

1. Atkins v. Virginia

Recall that Atkins v. Virginia addressed the question of whether it constituted “cruel and unusual punishment” under the Eighth Amendment for the state of Virginia to execute a convicted murderer with a seriously diminished IQ.295 That case addresses not whether the death penalty may be constitutionally permitted for normally sane adults, but whether it is constitutionally permitted for persons who suffer serious mental challenges. Here the Court is asking whether mental capacity in itself should bar a challenged person from suffering this most final penalty.296 The Court reasoned that while a mental deficiency would not by itself suffice to warrant an exception to a criminal sanction, it did nevertheless bear on the culpability of the offender. In coming to this understanding, the Court’s language followed two traditional theories of punishment generally, the retributive theory and the deterrence theory.297 The retributive theory is exhibited by the Court’s statement that, “it is a precept of justice that punishment for a crime should be graduated and proportioned to the offense.”298 The deterrence theory is exhibited when the Court notes that, “[t]he theory of deterrence in

295. Atkins, 536 U.S. at 306
296. Id. at 306.
297. Id. at 319-20.
298. Id. at 311 (citing Weems v. United States, 217 U.S. 349 (1910)).
capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct.”\textsuperscript{299} This deterrence theory is a form of a utilitarian model of punishment.

The retributive and deterrence theories operate on different planes. As Joel Feinberg describes the retributive theory, it provides:

1. Moral guilt is a necessary condition for justified punishment.
2. Moral guilt is a sufficient condition (“irrespective of consequences”) for justified punishment.
3. The proper amount of punishment to be inflicted upon the morally guilty offender is that amount which fits, matches, or is proportionate to the moral gravity of the offense.\textsuperscript{300}

Contrast this view with his description of the utilitarian model:

1. Social utility (correction, prevention, deterrence, et cetera) is a necessary condition for justified punishment.
2. Social utility is a sufficient condition for justified punishment.
3. The proper amount of punishment to be inflicted upon the offender is that amount which will do the most good or the least harm to all those who will be affected by it.\textsuperscript{301}

The key issue in \textit{Atkins} directly concerned the third point of each of these two theories. To satisfy justice under the retributivist model, the Court noted, the punishment of death had to be proportionate to the offense, which in this case was capital murder. But, as already quoted, the Court did not leave the matter there, noting that the purpose behind the death statute was to protect society.\textsuperscript{302} This was the Court paying deference to the third prong of the utilitarian theory. In effect, the Court was looking to the purposes that underlie the use of death as a form of punishment to determine, first, whether those purposes are satisfied in the present case-type situation and, second, if not, has the baseline principle of human dignity (that we know the PGC requires to be respected) been

\textsuperscript{299} \textit{Atkins}, 536 U.S. at 320.
\textsuperscript{300} Philosophy of Law 589 (Joel Feinberg & Hyman Gross eds., 3rd ed. 1986).
\textsuperscript{301} \textit{Id.} at 591.
\textsuperscript{302} \textit{See Atkins}, 536 U.S. at 319.
violated by Virginia's attempt to use the death penalty in the present case.

The significance of the last point should not be lost. When the person sentenced to die has "diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses[,] that also makes it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information."303

In other words, adequate mental capacity is essential to the governance of personal behavior.

Here the Court states its belief that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."304 This leads it to say that "[t]he amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."305 For the Court, this meant that its proportionality review would have to "be informed by objective factors to the maximum possible extent."306 Hence, the Court pressed its view that "the 'clearest and most reliable objective evidence of contemporary values is legislation enacted by the country's legislatures.'"307 Guided by this recognition of earlier cases, the Court would engage the ethical modality to determine what various legislatures around the country, which had taken the time to study the issue, thought. But the Court would not end its consideration of the matter at that level.

Despite the fact that there was no question in this case over whether death might be a constitutionally acceptable and morally legitimate penalty for a competent adult, the Court's concern was with the ethics of executing a person with serious mental challenges. This adoption of the ethical modality appears in the Court's reference

303. Id. at 320.
304. Atkins, 536 U.S. at 311.
305. Id. at 312. See also Paolo G. Carozza, "My Friend is a Stranger": The Death Penalty and the Global Ius Commune of Human Rights, 81 Tex. L. Rev. 1031, 1036 (2003) (arguing "that the interaction of different national and supernational legal institutions across Asia, Africa, Europe, and the Americas both creates and draws upon a common body of norms that is transnational in practice and grounded in universal principles of human dignity and that exists in an intimate and mutually beneficial relationship with local law.").
307. Id. (citing Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).
to Enmund v. Florida, where a prior Supreme Court determination held that, "[f]or purposes of imposing the death penalty, Enmund’s criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt." So the Atkins Court was really saying two things. To impose the highest penalty of capital punishment on a person, first that person must have been voluntarily connected to the crime and, second, the degree to which that person was voluntary connected had to be tied to the severity of the punishment. Where, as in the instant case, these matters are often deeply psychological and may not lend themselves to quick assessment, the Court felt itself obliged to at least consult the judgments of the various state legislatures, who have studied the issue, to provide greater perspective on the problem.

Still, after seeking legislative guidance to expose the social consciousness with respect to the morality of punishment in this case, the Court took its biggest step yet by then bringing within its purview the views of the European Union as another conscience to be considered in determining what the law is regarding the punishment of mentally challenged persons. The value of that move was no doubt to dilute some views that might occasionally emerge within American legislative contexts but may be more tied to constituent voting patterns than to serious reflection on the issue. This is not to say extraterritorial sources do not also reflect various constituent voting patterns, only that now one is considering a wider range of opinion.

The Court reasoned that, in the present case, the moral goal of encouraging respect for life is not likely to be affected by providing an exception for not executing the mentally ill. As the Court noted, "exempting the mentally retarded from execution [will not] lessen the deterrent effect of the death penalty with respect to offenders who are not mentally retarded." Thus, the question is on what moral basis can Atkins be executed?

Under the Gewirthian view, a court can punish a criminal to offset a transactional inconsistency or to avoid a loss of a more needful good for purpose fulfillment. On the face of it, since Atkins committed murder, it would appear morally justified to execute him in return. However, one must also consider that the morally justified reason for why courts can operate in this way—through an indirect
application of the PGC to resolve a conflict of rights—is that having impartial institutions operating is more likely than not to add to purpose fulfillment in the long run. But what purpose fulfillment in the long run is likely to be added to here by executing Atkins? It has already been noted that execution in this case is irrelevant to whatever general deterrent effect the death penalty is likely to have on sane people. It stretches credulity to believe it would serve even an idea of affording some recompense to the family of the victim if the executee does not understand or appreciate what is happening. Under these circumstances, execution is clearly immoral, which is not to say keeping Mr. Atkins off the streets is immoral. The state has a moral duty to protect the well-being of its entire people. If Mr. Atkins is a threat, the state can restrict his movements, but it cannot simply execute him. That would be the grossest form of denying him dignity by ignoring the relevance to what he is capable of understanding because of his disease. It would also not likely serve any valid purpose fulfillment for anyone affected by the execution.

Here we begin to see what lies behind Justice Scalia's conservative concern that such engagement with foreign and international legal norms may dilute the structure of federalism, understood here as states' rights, by bringing in an outside influence to add greater credence to one point of view over others. This is true because structural arguments cannot themselves resolve moral disputes, especially ones concerning fundamental rights. But that means that the real issue Justice Scalia is concerned with is not the moral truth of a given position, but who purveys it. It would be like ignoring the message because one is infatuated with the messenger. As such, this challenge to the use of foreign and international norms in death penalty and related jurisprudence does not warrant much weight.

So we can see here the Court’s method of tying American state legislative understandings on the issue to a still wider purposive context of opinion shared within the European Union. Doing this allowed the Court to consider the relationship of mental disease to punishment from a broader set of perspectives. That being

311. The American Constitution does create a system of federal rights and duties, leaving the remainder as said in the Tenth Amendment to the states. See U.S. Const. amend. X. But at any moment those rights will be in flux. Moreover, if I have been correct in the normative part of my analysis, this is exactly how it should be to reflect the greater authority of the moral over the strictly legal in fundamental rights conceptions.
said, what is really going on here is the Court placing a principled moral check onto itself to ensure that its decisions really do represent what most people understand by voluntary and purposive behavior, and in this sense, at least, it is striving to meet the PGC's minimal moral requirements for proper constitutional-decision making in this area. Let's now turn to our second case.

2. Lawrence v. Texas

In Lawrence v. Texas, the Court for the second time within two decades took up the question of whether a state can prohibit adult same-sex partners from engaging in intimate sexual conduct. Only 17 years earlier the Court had decided in a similar case that the state of Georgia could prohibit such conduct because it was outside the scope of protections the due process clause afforded. Since in Lawrence the Court would reach a very different conclusion, it was bound to explain its departure from Bowers to preserve the legitimacy of the doctrinal modality for future use. The Court's approach to confronting this issue was to make use of the ethical modality, suggesting its superiority in this case to the doctrinal one.

Following this mode of argument, Justice Kennedy, in his majority opinion, draws a connection between human dignity and same-sex intimate relationships. Furthermore, he shows what previously had been mistaken with the Bowers Court's understanding of the law in this area. Unlike in Lawrence, in Bowers the Court never talked about the value of same-sex relationships as viewed by the parties themselves, preferring to instead focus on whether the Constitution protected homosexual sodomy. In this sense, the Bowers Court never really confronted the issue of self-fulfillment operating as part of purpose fulfillment. The Bowers Court also exhibited a surprising lack of awareness, let alone understanding, of the historical and anthropological materials that might have shed some light on these relationships and the ways they had been treated both in the United States and elsewhere. So, Justice Kennedy's opinion really represents a departure for the Court from the kind of particularist moral focus that seems to characterize

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314. Bowers, 478 U.S. at 190. This passage is specifically referenced by the Lawrence Court. Lawrence, 539 U.S. at 566–67.
315. See Lawrence, 539 U.S. at 567–71.
the way the issue was understood in Bowers to favor a more universal human rights focus now to be applied in Lawrence.

How does my use of a Gewirthian purposive interpretation help us understand Justice Kennedy's opinion in this case? Justice Kennedy did not reference Gewirth's ideas, but the ideas nevertheless can provide the logic behind the set of reasons and intuitions that inform the Kennedy opinion. The answer lies in the fact that the Court was recognizing, as against the particularist morality of the state of Texas, an intermediate principle of liberty that was sufficiently robust to both meet the freedom criterion of universalist morality as well as the well-being requirement for self-respect and self-esteem that is essential to produce a self-fulfilled life. As will become clear, underscoring Justice Kennedy's discussion of the right to liberty was a deep commitment to human dignity. That commitment is what the PGC requires that all legal systems adopt in order to be able to legitimately claim to support human rights.

The sincerity of the Court's commitment here was illustrated by its willingness to consider a history lesson provided by petitioners' counsel and many of the amicus curiae briefs describing the litany of abuses, particularly in areas of employment and in opportunities for parenting, that had befallen gays and lesbians since the Bowers decision was handed down. That pattern of abuse, as the Court recognized, had already given rise to other constitutional challenges, specifically based in the Equal Protection Clause of the Fourteenth Amendment. One such example was Romer v. Evans, where the Court held that mere animus by the state of Colorado could not justify denying its gay and lesbian residents access to the protections of anti-discrimination statutes by using “Amendment 2” to the state constitution to prohibit the state legislature and all municipalities from passing such legislation. One argument originally used in advocating the passage of Amendment 2 claimed that since a defining activity central to the group's identity could be made criminal, how could a responsible governmental body afford members of the group the same right to equal treatment under the law as everyone else?

316. Id. at 575; see also id. at 584 (O'Connor, J., concurring) (describing how Texas law brands homosexuals and thereby sanctions discrimination against them).
318. The Romer Court noted that "equal protection of the laws is not achieved through indiscriminate imposition of inequalities." Id. at 633 (quoting
My own view of the intermediate principle in *Lawrence* is that it was an offshoot of the claim to privacy that had been dismissed by the Court in *Bowers*. Now, however, under a reformulated construction of the idea of liberty as involving not homosexual sodomy but intimate decisions, the Court was able to show how the activities in both cases clearly fall within the line of cases beginning with *Griswold v. Connecticut*319 and continuing through *Planned Parenthood of Southeastern Pennsylvania. v. Casey*.320

Still, the Court understood that its recognition of this intermediate principle would not fully resolve the liberty issue in *Lawrence*, although it should have resolved *Bowers*, since there the only question the Court would consider was whether any privacy was at stake.321 In *Lawrence*, the Court had to further consider whether the state may seek to limit certain arguably self-regarding behaviors because of their potential effect on third persons when the behaviors are tied to an intimate relationship that appears to be self-fulfilling.322 To handle such situations, it helps to bolster the concept

*Sweatt v. Painter, 339 U.S. 629, 635 (1950)).
319. 381 U.S. 479 (1965).
321. See *Bowers v. Hardwick, 478 U.S. 186, 190--91 (1986)*. This direction in privacy law is made all the more apparent if one sees the prior privacy cases involving the Fourth Amendment, tort law, and the *Griswold* line as connected to the dual notions of negative freedom and self-regardingness. *See Samar, The Right to Privacy, supra note 175, at 62--66 (1991)* (quoting a similar concern by John Stuart Mill to define a private act. *Id. at 66*); Mill, *supra* note 5, at 15. These two ideas lead to the notion of what I have elsewhere called a “private act” and described as “[a]n action is self-regarding (private) with respect to a group of other actors if and only if the consequences of the act impinge in the first instance on the basic interests of the actor and not on the interests of the specified class of actors.” Samar, The Right to Privacy, *supra* note 175, at 68. Still, since any action can in some way be said to affect another, to produce a real set of private decisions, the above definition requires two further considerations. First, “in the first instance” must mean that “a description [of the action] without the inclusion of any additional facts or causal theories” suggests a conflict. *Id. at 67*. Second, to ensure the possibility of prima facie cases, the interests affected in the first instance must be *basic* interests (that is, an interest independent of conceptions about facts and social conventions). *Id. The point is that if these two components of the definition are met, and if liberty is a value, then the action given rise to should be the ideal case example of a protected liberty interest where no harm to another is involved.

322. *Lawrence*, 539 U.S. at 571, 577 (citing as controlling J. Stevens’s dissent in *Bowers, 478 U.S. at 216*, which concluded that “the fact that the governing majority in a State has traditionally viewed a particular practice as
of privacy (or, in Lawrence's description, liberty) as it is traditionally articulated in American law with some further norms supporting intimate relationships of same-sex couples, which, as I will shortly explain, go beyond the Bowers Court's understanding of the issue, exactly as Justice Kennedy's majority opinion in Lawrence did.\textsuperscript{323} Such an outside understanding provides an ability to transform the fundamental principles of our constitutional jurisprudence to fit the real interests of the people (as recognized by the PGC) and the Constitution.\textsuperscript{324} In Lawrence, the Court's battleground was squarely at the center of the ethical modality, with due process as its legal hook. But the difficult problem of doctrine coming out of Bowers still remained. How could the Court resolve this seeming clash of modalities of constitutional interpretation without looking like it had lost all legitimacy?

Recognizing two separate themes important in the Court's decision helps to resolve this apparent conflict. First, the Court was concerned for its own precedent, which is understandable given the prior Bowers decision. Second, the Court was concerned about protection of intimate interpersonal relations, a fundamental aspect of human freedom and well-being. The former is an intermediate principle; the latter is a fundamental human rights standard. These two norms cannot be reconciled if the two principles are not distinguished in terms of their degrees of importance to the overall project of protecting human rights, although Justice O'Connor's concurring opinion does attempt a reconciliation by treating the central question in Lawrence as falling under the Equal Protection Clause (instead of the Due Process Clause) because same-sex couples are treated differently from opposite-sex couples.\textsuperscript{325}

According to Justice O'Connor, "[w]e have been most likely to apply rational basis review to hold a law unconstitutional under the immoral is not a sufficient reason for upholding a law prohibiting the practice.").

\textsuperscript{323} Lawrence, 539 U.S. at 567.  
\textsuperscript{324} The fact that the Court in the prior case of Romer v. Evans arguably had to fashion a new \textit{per se} test for this equality illustrates the difficulties that Bowers had placed in the way of protecting gays and lesbians even under such basic dignity criteria as the Equal Protection Clause. In writing for the majority in Romer, Justice Kennedy stated that Amendment 2 created "a classification of persons for its own sake, something the Equal Protection Clause does not permit." Romer, 517 U.S. at 635.  
\textsuperscript{325} "The Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction." Lawrence, 539 U.S. at 581 (O'Connor, J., concurring).
Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships." 326 Justice O’Connor thus acknowledged that her approach did not affirm a fundamental right, as did Justice Kennedy’s due process approach, and did not entail any need to describe same-sex couples as comprising a suspect class warranting heightened scrutiny, as in the case of race, color, or ethnicity, or even, as with respect to sex, intermediate scrutiny to resolve so blatant a denial of equal protection. 327 Justice O’Connor’s approach also signaled a new stage in the development of heightened rational basis review. Prior to Lawrence, a state could almost always successfully defend legislation by offering some reason related to its legitimate interests. 328 But Justice O’Connor’s narrow approach only perpetuates the issue of whether protection of a particularist moral view can be a sufficient reason for the state to deny individual liberty.

The majority found this limited equal protection approach problematic. As Justice Kennedy’s opinion succinctly stated: “Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.” 329 In other words, the deeper concern to protect individual liberty and purposive well-being would have been sidelined if the majority had followed Justice O’Connor’s lead, suggesting that Lawrence and Bowers are not really irreconcilable.

For Justice Kennedy and the majority, the better solution was to directly confront the particularist morality problem by recognizing the relationship itself as worthy of protection. This solution would tie the decision back to an understanding of the self-fulfillment character of such relationships to individual dignity and sylvaniaself-worth. It would also provide the Court an opportunity to reaffirm what it recently said in Planned Parenthood of Southeastern Penn v. Casey, a case concerning limitations on a woman’s right to terminate a pregnancy:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to

326. Id. at 580 (O’Connor, J., concurring).
327. In Romer v. Evans, the Court utilized either or both a heightened rationality test or a per se violation of equal protection to strike down the amendment. 517 U.S. 620, 633–35 (1996).
329. Lawrence, 539 U.S. at 575.
personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.\(^3\)

The majority's use of this quote in *Lawrence* illustrates its commitment to a system of human rights in which no one is denied opportunities for self-fulfillment because some parts of society regard their conduct as immoral. The decision also affirms the majority's take on the Constitution's moral vision, which, when treated as an avenue to self-fulfillment, allows a fairly expansive reading of the rights it contains. In this respect, the Court's opinion squarely confronted the *Bowers* decision's implicit encouragement of both personal and professional discrimination against lesbians and gays in the society at large.

At its core, the Court's opinion expresses, in terms related to human dignity, the sentiment that *Bowers*' "continuance as precedent demeans the lives of homosexual persons,"\(^3\) that the petitioners had "engaged in sexual practices common to homosexual lifestyle" and were "entitled to respect for their private lives."\(^3\) And it elevates this sentiment to a legal rule when it holds that "[t]he State cannot demean [a whole group's] existence or control their destiny by making their private sexual conduct a crime."\(^3\) As a previous Court had occasion to express the matter, "[t]he Constitution cannot control such prejudices, but neither can it tolerate them."\(^3\) In respect to purpose-fulfillment, *Lawrence* stands for the proposition that when confronted with choosing between protecting past case precedent versus preserving human dignity, the Court will adopt the latter course of action as the only constitutionally sound result. As the Court so succinctly put the point: "*Bowers* was not correct when it was decided and is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick*

\(^{330}\) *Id.* (citing Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992)).

\(^{331}\) *Id.* at 575.

\(^{332}\) *Id.* at 578.

\(^{333}\) *Id.*

should be and now is overruled."\(^{335}\)

In the language of universal rights, the Court’s analysis clearly understands that human dignity supervenes on recognizing the petitioners, Lawrence and Taylor, as agents who valued their purposive behavior, at least in part, because it is their behavior. Moreover, since they harmed no one else in the process of their engagement and gained some degree of self-fulfillment through the intimacy they obtained, their relationship had value and they had a right to respect.\(^{336}\) The fact that the relationship had not harmed others was a reason to leave it alone, but not a reason for the Court to say that it was worthy of respect. That was a clearly stronger assertion that could only be grounded in the reality that the relationship was a positive good to Lawrence and Taylor’s individual self-identities, which the Court found important to articulate, no doubt, because of the serious harm the \textit{Bowers} decision had forced this group to suffer.

Still, Justice Kennedy’s majority opinion recognized that its understanding of the issue could be questioned by those who may have a very different understanding of human dignity. Perhaps some people think that protecting certain forms of intimacy degrades the person or breaks down the shared moral values that hold society together.\(^{337}\) In the face of such arguments, it is helpful to have available the best thinking both from other disciplines that objectively study the human condition and from the opinions of other similarly situated courts outside the jurisdiction that have dealt with these issues. Of course, the procedures followed by these other courts and the norms they address must comport with the minimal Gewirthian standard and be compatible with fundamental constitutional principles. Still, provided that those conditions are met, taking into account the legal decisions arising from respected courts outside the United States seems quite tenable.

Therefore, to shore up its decision, the majority referenced the opinions of various scholars and the American Law Institute’s

\(335\). \textit{Lawrence}, 539 U.S. at 578.
\(336\). \textit{Id.} at 575.
\(337\). \textit{See} Patrick Devlin, The Enforcement of Morals 17 (1968) (suggesting that homosexuality might be “beyond the limits of tolerance” and should accordingly be criminalized); \textit{cf.} H.L.A. Hart, \textit{Law, Liberty and Morality} (1969) (arguing that the criminal law should be guided by the utilitarian harm principle and not by legislated morality).
Model Penal Code. They also made an important comparison to the European Court of Human Rights decision in *Dudgeon v. United Kingdom*. As the *Lawrence* majority pointed out, the *Dudgeon* Court determined—five years before the *Bowers* decision—that Northern Ireland’s sodomy law, which was similar in its application and effect to Texas’s violated the European Convention on Human Rights on dignity-related grounds.

The importance of the Court’s move to consider a decision from a foreign jurisdiction is found not only in the certainty that it adds to the wisdom of the Court’s own understanding when another highly respected court from outside the United States, confronted by the same basic issue, reached a very similar result. It also provides some evidence for believing in a salient constitutional self-fulfilling norm that passes under the name “liberty”, which is not all that clear from the constitutional text and is only hinted at by various Supreme Court cases, but which is more deeply grounded when that text is subsumed under Gewirthian analysis of the minimum human rights protections all human beings are owed simply by virtue of being human.

The idea that the Court must serve to protect voluntary purposive action and human dignity generally is also legitimated when it shows why the ethical modality achieves superior force (in the sense of centralizing human self-fulfilment), under the Constitution, over the less fundamental intermediate principles of stability and predictability that primarily support the doctrinal modality. Because the doctrinal argument looks only to how a norm or legal idea has developed within its own jurisdictional setting, it is unable to consider alternatives beyond what the past case doctrine would permit, even if those alternatives might provide a better human rights resolution of the case. The ethical modality, by contrast, has no such limitation. It can reference both past and present human rights decisions, treating them more for their value as precedent, and can also include within its consideration cases arising from outside the jurisdiction. As a consequence, it offers, as it did in *Lawrence*, an opportunity where dignity is the

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338. *Lawrence*, 539 U.S. at 571–72. The same version of the Model Penal Code was available at the time that *Bowers* was decided. Model Penal Code § 213.2, cmt. 2 (1980).


primary factor for the Court to protect human rights. The Bobbit approach of merely identifying the different legitimate forms of argument associated with the differing analytical concerns is inadequate. It ignores the normative challenge that arises when the various concerns come into conflict. Taking the Gewirthian rights-centered approach to prioritizing these modalities is better at resolving this conflict.

3. **Sosa v. Alvarez-Machain**

In *Sosa v. Alvarez-Machain*, we have a somewhat different issue from what we have been considering up to now insofar as the Court here is interpreting a statute, not a constitutional provision. The case is also different from our two previous cases because neither the Court nor any dissenting justice denies that international norms apply; rather, the issue between members of the Court arises over which norms apply. Moreover, because the Court said that "the domestic law of the United States recognizes the law of nations," and the approach that we have been looking at provides minimum commitments that a model of American law must meet if it is to be consistent with human rights, the fact that Mr. Alvarez, who no one denies suffered a harm, ends up empty-handed suggests this as an appropriate case for our consideration.

What is key, then, about this case is not that the Court denied the application of a foreign jurisdiction's law specifically with respect to the FTCA or recognition of the law of nations with respect to the ATS. More important was the Court's failure to grant relief after finding that the basis upon which Alvarez brought his action under the ATS was a wrongful detention explicitly prohibited by the *International Covenant on Civil and Political Rights* ("International Covenant") the *Universal Declaration* ("Declaration"), and several other conventions. The United

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342. *Id.* at 2763.
346. I mean to include here any *jus cogens* or general principles of international law that may be in flux but which might provide additional support for Alvarez's claim. The DEA's actions in this case may have also violated California law, as the place where the abduction was ordered, which suggests
States was a signatory to the *International Covenant*, although at the time it had expressed its understanding that the document was not self-executing, and the *Declaration* has not been viewed to impose international obligations directly of its own force. Still, the Court erred when it concluded that since there was no international law norm applicable to an illegal detention at the time the ATS was passed, caution dictated that the Court not find one now.

Helping in the Court’s determination here was that the detention was of a particularly short duration, lasting less than a day before Mr. Alvarez was transferred to U.S. legal authorities. Basically, the Court saw itself as choosing a restrictive interpretation of the statute because first, our “conception of the common law has changed since 1789, when the statute was enacted” (a historical argument), second, the role of the courts in the federal system had moved away from further development of a federal common law post *Erie R. Co. v. Tompkins* (a structural argument), and third, the creation of private rights of action seemed better suited to a legislative judgment (a prudential argument). Still, for our purposes, we must assess whether the Court’s action here met the minimal human rights standard that an application of the PGC to this area requires, and I conclude that *Sosa* fell short of affording the minimal human rights protections required under the PGC. Had the Court followed a Gewirthian framework, a different treatment of the structural issue and private right of action would have resulted.

The special question for Mr. Alvarez is why U.S. courts should have offered him a remedy. To begin to answer that question is to first note that on orders of American DEA agents officially operating from within the United States, Mr. Alvarez suffered the specific harm of being illegally detained and forcefully removed from Mexico to the United States in clear violation of his rights. Both the *Declaration* and the *International Covenant* recognize such actions as violations, and that recognition is consistent with the freedom component that the PGC demands from any system of morality that the arguments made here might be recast to criticize federalism when it operates to deny basic rights secured by state law.

347. *Sosa*, 124 S. Ct. at 2763.
348. *Id.*
349. *See id.* at 2762.
350. *Id.* at 2769.
351. *Id.* at 2762.
352. *Id.* (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)).
353. *Id.*
claiming to afford human rights. Moreover, because the Court did not allow Mr. Alvarez a remedy under either the FTCA or the ATS, we have the situation of an internationally recognized right existing without a remedy from the Supreme Court of the United States.

The significance of this is that a transactional inconsistency between Mr. Alvarez's assertion of a right and its denial by the courts leaves his abductors in the position of having gained an unfair advantage without paying the cost. That transactional inequity combines with a further harm to others that is likely to result now because there will be no deterrent against similar abduction attempts in the future. This latter point outweighs the fact that Mr. Alvarez's detention may have been of a short duration. It also outweighs any argument furthering the point that *Erie* may have pushed the Court away from further development of a federal common law. Other durations may be longer or, even if short, may be multiple. And the fact that Congress had chosen to avoid application of foreign law should not be an excuse for a finding that no remedy exists upon which the real harm presented in this case could be addressed. Where is Mr. Alvarez to go, if the very place from which those who ordered his abduction and which has the most direct connection to the DEA agents involved will not hear his case?

Further, the arguments tendered do not seem strong enough to override the human rights presumption of the PGC because the PGC demands that minimal protections be guaranteed. Let me briefly explain how the arguments fail. Note that in a very substantive way the responses will overlap, reflecting that what is really at stake is more a failure of sensitivity by the Court to the specific human rights at issue here.

Looking at the first argument, which makes use of the historical modality, it was noted in the previous section that history alone cannot be used to bring the effective range of human rights below the baseline set by the PGC. That being said, the argument for considering as a matter of common law only those rights that would have been recognized when the ATS was passed, like the exception to the FTCA that Congress wrote into the law, brings this case below the baseline PGC establishes for protections of rights. What is particularly interesting is that the value and existence of these rights is now well recognized by two rather significant international documents: the *Declaration* and the *International Covenant*. Unless some other accommodation was available for the protection of these rights, the PGC requirement that individual freedom be protected would be undermined.
However, the protection that the PGC requires here need not necessarily be through adoption of one of the specific rights specified in the Declaration as part of federal common law provided some other source were available under the ATS. But herein lies the rub with the structural argument. The structural argument suggests that this matter is not for the courts, but for the legislature to decide, possibly through use of the treaty process. It further guarantees this process with respect to the liability of the United States under the FTCA by proclaiming immunity from suit based on state sovereignty unless specifically waived by Congress. The problem with leaving the issue in Congress's hands, as the Court itself noted, is that neither the Declaration nor the International Covenant, as recognized under American law, creates a private right of action against the United States or against another person. The former does not create a private right of action because it is not self-executing, and the latter fails too, because of the United States's announced understanding when it became a party to the treaty. Consequently, under the Court's analysis, there does not appear to be any legal hook upon which Mr. Alvarez might be able to hang his claim. The FTCA is not of any help because Congress has written in an exception to the law. The ATS cannot be relied upon if the rights that it recognizes predate the rights that were violated in this case. But that suggests that there is a real problem if the way the federal system operates can lead to an unaddressed human rights violation.

In the case of the ATC, it is not a specific legal right for which the Court has failed to find a remedy, but a human right that is simply not being acknowledged in law. But to follow out the earlier line of reasoning, the effect of the Court's decision is to ensure that Mr. Alvarez will have no effective way to bring his claim. It is not a solution to resolving this or any future similar situation to simply leave it to the legislature to act. There is simply no assurance that the legislature will act, or act anytime soon. And even if the legislature were to act, it would be considered ex post facto to apply their action to the case at hand. A better solution, and one that the PGC would certainly support, would be for the Court to engage the ethical modality in its treatment of this case and issue an order that, at least, the liberty granting norms the ATC recognizes include those found in the aforementioned documents.

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354. Id.
356. This situation does not fit the Declaration's allowance for
That being the case, the proscription against abductions by American agents operating in other countries is an obligation that should not be left unaddressed. Perhaps it could be brought within American federal common law over a sovereignty challenge by way of a *jus cogens* argument, which would afford it the status of a high moral principle operating cross-territorially in the law of nations. Whatever the method of incorporation, however, what is clear is that in the same way that domestic law abhors a vacuum in affording relief for a rights violation, the PGC and significant international rights documents abhor having their moral principles ignored by a Court claiming to operate for a constitutionally just order.

In short, notwithstanding the decision in *Erie*, a way must be provided by which the norms required by the PGC and found in the law of nations can be made actionable in American domestic law. Here, foreign and international law sources can help toward resolving unanswered questions in U.S. law, as I believe the Court itself suggested in *Lawrence*. Moreover, American law must be understood to include ideas about liberty that take at least part of their form and direction by reference to international and comparative law development, given that otherwise no remedy will be available. If this means we return to developing a federal common law or find some state basis upon which to achieve the same result, the moral burden is on the Court and the legislature to at least try.

B. What the Future Might Look Like

Up to now we have been considering these three cases in the hope of finding, within the normative framework of Gewirth's theory of human rights, a basis for, among other things, the Court's use of international and comparative norms in its interpretation of the Constitution and a federal statute. Also, we have found in each case that the Court was right to consider the international law norms as affording greater coherence to the determination, with the one limitation that in *Sosa* it did not go far enough because it failed to incorporate more recently recognized norms into its interpretation of a statute. Still, this approach does suggest progress towards constructing an underlying rational unity for human rights norms in American constitutional law that takes account of the best noncompliance with an economic or social right because first, the United States is not an impoverished country, and second, the right at stake here is a basic civil liberty that needs protection, at least by way of an economic sanction, if it is to be secured at all.
extraterritorial sources. It should be interesting to see, then, if we can also predict how the Court might handle a case that will probably come before it sometime within the next decade in light of this new direction and the framework proposed.

I have in mind here the case of same-sex marriage. Imagine that the case will come to the Supreme Court by a process something like the following. A resident of Massachusetts, perhaps a student at Harvard Law School, marries a person of the same sex under Massachusetts law, which recognizes same-sex marriage. Following graduation, the happy couple moves to the state of Illinois, where the now Harvard Law graduate takes a teaching position at a public university, for example, the University of Illinois Law School. Being a committed spouse, he naturally wants to put his partner on his insurance benefits, but the school rejects the attempt on the ground that the state of Illinois does not recognize same-sex marriage. The committed young law professor now sues the University on the ground that the school's action does not afford full faith and credit to his marriage in Massachusetts, under Article IV of the federal Constitution.357

The school defends itself by arguing that the Full Faith and Credit Clause allows Congress to determine how it will be effectuated and that Congress, in passing the Defense of Marriage Act ("DOMA"), determined that neither a state nor the federal government need recognize a same-sex marriage license granted in any other state.358 The young professor, dissatisfied with this answer, decides to challenge DOMA itself under the Fourteenth Amendment's Equal Protection Clause.359 It is a claim that will likely make its way up to the Supreme Court, especially if the circuit courts divide over how to resolve it.

I began with this somewhat lengthy scenario both because the case is hypothetical and because of the importance of illustrating how human rights issues actually arise in daily life. Also, I wanted to suggest that when this case reaches the Supreme Court, it will most likely be on the posture of an equal protection claim rather than a full faith and credit claim under the 14th amendment, although this is by no means certain.360 But either argument merely sidesteps the

357. U.S. Const. art. IV, § 1.
360. DOMA might also be judged unconstitutional under the Fourteenth Amendment "privileges or immunities of citizens of the United States" clause,
issue rather than resolving the real question at stake here: whether Congress and the states individually can reserve legal marriage, with all its legal benefits and social status, only for opposite-sex couples, or whether the institution must be made available to same-sex couples on an equal basis. As presenting a fundamental rights question, the case sounds in due process as well as equal protection. Consequently, the ethical modality, rather than the structural or prudential forms of argument, would seem most appropriate to its resolution. Indeed, it is important to remember that one basis for bringing an equal protection claim is that a fundamental right has been denied to a specific group.\textsuperscript{361}

Although itself primarily an equal protection case, the Court, in \textit{Loving v. Virginia}, held that as a due process norm the right to marry “is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival . . . the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.”\textsuperscript{362} Gewirth also describes the institution of marriage in respect to fundamental rights:

For a marital couple is a kind of voluntary association or grouping that, like other voluntary associations, is justified by the universal right to freedom. But, unlike baseball teams and other voluntary associations, it is formed, as reflecting the partners’ mutual love, for purposes of deeply intimate union and extensive mutual concern and support for the participants, purposes that enhance the partners’ general abilities of agency and thus contribute to their capacity-fulfillment.\textsuperscript{363}

If the hypothetical case is treated as an equal protection denial of a fundamental right, the Court will apply the “most rigid scrutiny” test, as it did when asked if Virginia could make criminal an interracial marriage between a black person and a white person.\textsuperscript{364} Holding that it could not, the Court noted that “[t]he fact Virginia prohibits only interracial marriages involving white persons which is different from the Article IV Privileges and Immunities Clause. Here the point is that the privileges of national citizenship cannot be denied by the states. This includes through incorporation some of the liberties protected by the Bill of Rights against the federal government.

\textsuperscript{363.} Gewirth, Self-Fulfillment \textit{supra} note 19, at 143.
\textsuperscript{364.} Loving, 388 U.S. at 11 (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)).
demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. 365 Similarly, in Zablocki v. Redhail, the Court applied strict scrutiny to strike down, under the Equal Protection Clause, a state statute that required a resident parent to first show he had met his child-support obligations before receiving a marriage license because marriage is a fundamental right. 366 How the Court will ultimately treat a ban on same-sex marriage is an open question. If it sees the ban as meant to produce heterosexual supremacy or as designed to reaffirm stereotypical gender roles, it will likely strike it down under Loving. On the other hand, the Court will have to do more than simply adopt some “time-honored” definition of marriage, for, by accepting the case for review, it would already be acknowledging that there is a question of what the society’s interest is in protecting the institution. 367

If the Court sees marriage strictly as an institution designed to support procreation and child rearing, it might uphold the ban. 368 Of course, in that instance, there could be a further question as to why a declaration of the desire to procreate accompanied by a fertility test is not required for opposite-sex couples seeking to marry. Moreover, given the increasing number of gay couples who are allowed to adopt children or have children by surrogate motherhood, the Court would also need to explain why it privileges procreation over other forms of child rearing. 369 Nor will it be good enough for the Court to order that states grant all the privileges of marriage without also granting the status. 370 Since the reason status is brought into

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365. Id.
367. In Vincent J. Samar, Privacy and the Debate Over Same-sex Marriage Versus Unions, 54 DePaul L. Rev. 783, 790 (2005), I note that defining marriage is not for the purpose of “clarifying some obscure institution” or revealing “some deep seated truth that has otherwise eluded us,” but to “perpetuate between two groups of people a normative distinction that at its core will always say to same-sex couples, ‘you are not quite as good as your opposite-sex counterparts because you cannot marry.’”
368. This was one of the arguments the state of Massachusetts raised, which did not prevail, in Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003).
370. For example, in Vermont, where same-sex marriage is not recognized but civil unions are, the relevant statute providing for all the rights and privilege
question is not for purposes of clarifying a distinction (such as between legal marriage and religious marriage) but for conferring greater legitimacy on opposite-sex couples who are allowed to marry, the argument against the ban would be that it runs in the face of the holding in *Brown v. Board of Education*, that separate but equal (educational facilities) is unconstitutional.\(^\text{\textsuperscript{371}}\)

Moving from miscegenation statutes to same-sex marriage will thus no doubt require a more full-fledged treatment of the inherent dignity notion that the Court in *Loving* alluded to and that the majority in *Lawrence v. Texas* was careful to discuss.\(^\text{\textsuperscript{372}}\) It will also mean taking seriously questions such as those mentioned above. Moreover, because a violation of equal protection occurs when a fundamental right is denied to some groups but not others, a portion of the analysis will also have to engage a due process argument to show that what is at the core of this controversy is really a fundamental right. That being said, it should be helpful to draw to the Court’s attention the findings of the Ontario Court of Appeals decision in *Halpern v. Canada*.\(^\text{\textsuperscript{373}}\) In that Canadian case, the court dealt with the same-sex marriage issue and found attempts to ban same-sex couples from participating in the institution an affront to human dignity. Moreover, because Canada and the United States share overlapping histories and a constitutional system that supports human dignity and basic rights, they are an appropriate fit for comparison within the framework set by the PGC.

More specifically, in *Halpern*, the Court of Appeals noted that “[h]uman dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities or merits.”\(^\text{\textsuperscript{374}}\)

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\(^\text{371}\) 347 U.S. 483 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896), a case involving railroad passengers, and noting that the doctrine of “separate but equal” advanced by *Plessy* has no applicability to public education; that “separate educational facilities are inherently unequal” and thus unconstitutional). For a broader treatment of how this notion might apply to the status of same-sex marriage, see Samar, *Privacy and the Debate Over Same-sex Marriage Versus Unions*, supra note 367.


\(^\text{373}\) 65 O.R.3d 161 (2003).

This view of human dignity, the U.S. Supreme Court would certainly recognize, is consistent with its own past case decisions. Additionally, the view is in accord with the understanding of dignity expressed in *Loving*, where the Court noted that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.” Finally, the understanding is consistent with the emphasis on self-fulfillment that comes about when universal morality is respected and individuals are allowed opportunities through their own voluntary purposive actions to discover what constitutes for them a truly fulfilled life.

In *Halpern*, the Ontario Court of Appeals concluded “the dignity of persons in same-sex relationships is violated by the exclusion of same-sex couples from the institution of marriage.” It then went on to determine whether, under the *Canadian Charter of Rights and Freedoms*, the province had shown any pressing or substantial reason warranting excluding same-sex couples from the right to marry. The province had, in fact, made many of the arguments that might be expected to be raised by opponents in the Supreme Court of the United States, given what has already been argued in various state courts like Massachusetts. In finding that the province had not met this burden, the Canadian court did what the U.S. Supreme Court might do, namely, determine that same-sex couples had been excluded from the fundamental right of marriage.

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375. *See, e.g., Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) (noting that “intimate and personal choices” are “central to personal dignity and autonomy” and that “at the heart of liberty is the right to define one’s own concept of existence, of meaning, and of the mystery of human life.”)


377. What the PGC would not be inclined to recognize are marriages that put one of the parties (usually the woman) at a substantial disadvantage in degree of power and control to the other party (usually the man) because this either directly diminishes purpose fulfillment or structures a culture that inculcates within women the notion that this is all they can expect. Gewirth, *Self-Fulfillment*, *supra* note 19, at 102.

378. 65 O.R.3d at 190.

379. *Id.* at 191–93.

380. In the province's argument, “[t]he Attorney General suggested three purposes of marriage: uniting the opposite sexes; encouraging the birth and raising of children of the marriage; and companionship.” *Id.* at 163. Similar arguments were raised by the state of Massachusetts and rejected by the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health*, 798 N.E. 2d 941 (Mass. 2003).
without the state's having shown a compelling reason for the exclusion.\textsuperscript{381}

Thus, the relevance of the Canadian decision to the Supreme Court's determination is twofold. First, it offers support for the commonly shared notion that part of human dignity defined by our Gewirthian sense of individual self-fulfillment is lost when a person is denied the right to marry the partner of her choice, as the U.S. Supreme Court itself seemed to recognize when it implied in \textit{Loving} that the right to marry is a fundamental human right.\textsuperscript{382} Second, it shows that a court with a related constitutional scheme and history was not persuaded by its own state's arguments for disallowing same-sex marriage, even when the arguments were evaluated, as the Ontario court did, to have to meet no higher standard than to be rationally related to a legitimate state purpose. For these reasons, my hypothetical case should be seen as compatible, and the Canadian one provides a strong reason for how my hypothetical should ultimately be decided. Both cases have the potential to represent an evolving notion of human dignity grounded in purposive action.

\section*{VI. SOME RESPONSES TO POTENTIAL OBJECTIONS}

In this last substantive section, I want to briefly take up four possible objections (the second of which can be cast in two variations) to the theory of interpretation I have proposed, along with my responses. The questions and responses to the questions are arranged in increasing order of seriousness reflecting the degree of challenge they pose to the very possibility of the kind of theory I have offered.

The first objection asks how the method proposed here can avoid concerns about a judiciary out of control, legislating its own morality rather than allowing the political process to operate. Put another way, how can the general argument provide reassurance that the specific lines etched by similar cases are followed rather than something broader and less defined?\textsuperscript{383} One response, but not the one I will focus upon, is that I only need ensure that the courts

\textsuperscript{381} \textit{Id.} at 193. A compelling reason would be one that showed another right or interest of at least equal, if not greater importance, was being sacrificed for the right being protected. \textit{See id.}

\textsuperscript{382} \textit{Loving v. Virginia}, 388 U.S. 1 (1967).

\textsuperscript{383} This objection raises the legitimate but common worry that our examples may be too unique to in any way show the theory's affect beyond these specific fact patterns.
are following principle in respect to the three cases I have focused most of this discussion upon. But I prefer to add a stronger response that brings to bear the level of generality with which we have been dealing.

Here it is to be noted that the theory provides criteria for interpretation of the Constitution or an applicable statute so long as the issues involve human dignity in the sense of the freedom and well-being of all agents to act. This includes a right to live in a society whose institutions of government operate and are structured so as to guarantee the necessary degree of consent to political choices and to provide for a civil and criminal justice system that affords due process and protects against violations of basic and nonsubtractive rights. Provided those limitations are satisfied and further provided that prospective purposive agency is an end of the government, the members of the society should otherwise be free to make whatever policy choices they choose by majority rule.

For example, it is certainly part of the right to freedom that knowledge be disseminated, which is useful to performing one's job, to acting as a citizen, and, more generally, to fulfilling a life that maximizes individual capacity fulfillment. And in that vein it is certainly part of this same right that schools be established and funding be made available that will allow individuals to realize their capacity fulfillment. But whether the best approach to doing that is a national voucher system or continued support of a system of public education may properly be considered on efficiency or other relevant grounds that the majority can deliberate upon, so long as the result is not to deny any class of citizens access to a decent level of public education. Indeed, even the form of democratic government itself (parliamentary versus the American representational system) can be decided on grounds of history and tradition, so long as the government operates democratically in the sense of making the rulers ultimately accountable to the people. Since most cases that come before the Supreme Court do not raise fundamental rights issues, it is responsive to the objection to say that the cases reviewed here represent a relatively small set that the Court will actually

384. In *The Right to Privacy: Gays, Lesbians and the Constitution*, I point out that education is a derivative right from the basic right of well-being combined with the factual conception that well-being is advanced when education is made present. See *Samar, The Right to Privacy*, *supra* note 175, at 67.

This response is important to note for another reason too. Because morality deals with the most basic of human concerns, suggesting that fundamental rights are moral rights, it may be thought that rights trump other approaches whenever it appears that a moral argument can be made. However, these other approaches themselves may reflect aspects of the same basic rights concerns that would enhance what the moral argument is trying to do. With regard to same-sex marriage, for example, society's concern for the rights of children is not irrelevant, even though it may turn out, as a matter of character development, that children are better nurtured in a home environment where “people of integrity do not shrink from bigots.” Consequently, as in the instance just mentioned, those alternative approaches should be honestly investigated, and nothing I have argued here suggests that they be preempted by some moral trump in advance.

Put another way, the theory offered does not succumb to what appears to be Justice Scalia's concern, that use of outside sources (philosophical or international/comparative) is just a giveaway of the democratic process to the agendas of some set of intellectual elites. To the contrary, the theory offered goes hand in hand with the democratic process; indeed, it provides a justification for the process. But then, for the sake of the theory's own integrity, it must offer reasons for its own self-constraint. Those reasons will include leaving to the other branches of government their unique responsibilities within a democracy to evaluate policies that support basic rights as defined by the PGC and our constitutional tradition, provided only that the policies are not a sham for some illicit and anti-democratic invasion of those rights.

This is real constraint. Its nature is in the understanding that the constitutional order creates a scheme of institutions with corresponding responsibilities that are presumptively moral until shown to be otherwise. The presumption is itself founded on the need

386. For example, the Supreme Court receives close to 8,000 petitions for certiorari per year but typically grant under 100 of those petitions. See Lee Epstein, et al., The Supreme Court Compendium: Data, Decisions and Developments 81--83 (2d ed. 1996).


for institutional predictability and legal certainty as intermediate moral principles to govern behavior. An example of an argument that supports certainty and will certainly be made in response to any federal or state constitutional amendments to prohibit same-sex marriage is that, if applied retroactively, a number of persons besides the couple may be harmed including creditors and possibly children.389

Nor does this deference to institutional practices create a category mistake by interposing practical concerns against moral ones. For there is a moral dimension to ensuring predictability and certainty tracing back to at least Aquinas's natural law.390 Consequently, as I have argued elsewhere, it is only when the nature of the case dispute is such that it cannot be resolved at a lower level of abstraction without serious conflict of principles or injustice occurring, that further appeal to outside sources need be taken.391 When that happens, resort to higher levels of abstraction and a wider range of sources is justified if the duty to obey law is not to lose its rational normative character. In those instances, where an appeal is appropriate, the constraint that operates is the one that limits court actions to only resolving the problems the case poses, with the further proviso that no principled inconsistency or injustice will occur. As was shown for the three cases discussed above, instances where this will occur are real and not altogether uncommon, but they are relatively few. Bearing this in mind, the approach suggested by this article should offer nothing to fear even to the most sensitive of legal scholars.

A second somewhat more challenging objection begins by asking: Even if one agrees that a theory of normative analysis is needed to supplement or guide constitutional interpretation, why this one as opposed to others? In other words, why should this theory be adopted over some other approach, such as a utilitarian theory (which is based ultimately on a universal want for happiness),392 a libertarian theory (which is based on protecting liberty through

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389. A number of social arrangements rest upon the idea that the couple has a shared responsibility. If the marriage is voided, which partner holds the responsibilities from the former relationship?

390. See Aquinas, supra note 245, at 802.


392. The traditional form of utilitarianism was put forth by Jeremy Bentham, where he describes it as maximizing utility quantitatively. See 1 The Works of Jeremy Bentham (J. Bowring ed., 1962) at 287, n.3.
protecting property rights), or a communitarian theory (which elevates to the status of an ultimate good some shared ideal of the society)

Let me answer the objection this way. Each of these theories does affirm a seemingly neutral starting point analogous to the way Gewirth’s theory affirms voluntariness and purposiveness as its neutral starting point. However, each of these three alternatives must also hold voluntariness and purposiveness as logically prior to any other claim they make, as do all moral theories by definition. This is a necessary feature of what it means to “prescribe.”

Utilitarianism presupposes voluntariness and purposiveness by affirming utility or happiness as an ultimate purpose-motivating goal. Libertarianism presupposes these aspects by affirming liberty (secured by property rights). And communitarianism presupposes them when it speaks of an ideal held by the public at large. But notice that in each case what is being qualified is voluntariness and purposiveness by the various further restricting criteria—happiness or utility, property, or shared value—that the purported theory also assumes. In John Stuart Mill’s utilitarianism, for example, goods had both qualitative as well as quantitative value, which meant for him that principles of justice could presumably be justified on utilitarian grounds. Indeed, Mill’s approach here is close to what today would be described as a rule utilitarian thesis, where the rule is justified on utilitarian grounds, but once derived, all else being equal, it operates in the absolutist fashion of a right.

Similarly, in the case of libertarianism, property is certainly

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397. In On Liberty, for example, Mill appeals to certain interests as “the permanent interests of man as a progressive being.” Mill, supra note 5, at 14. He goes on to describe these as affording a presumption in favor of freedom of thought and expression, the right to go forward with one’s own tastes and pursuits, and the right to assemble with others. Id. at 15–16.
an expression of liberty, but the mere assertion of property rights
without an adequate measure of how property came to be originally
distributed is not a strong enough guarantee of liberty to justify it as
a sole starting point.398 Consider how even formal determinations of
merit are often affected by the schools one attended, which is not
inconsequentially related to where one’s family lives, the experiences
that certain lifestyles can afford a child, and most obviously, as it
conditions most everything else, what the family can afford by way of
early training, cultural exposure, and education.399

In the case of communitarianism, the qualifying
characteristic is the assumption that everyone in society values a
certain set of goods. This is because rather than the individuals
constituting the society, the society constitutes the individuals.400
Surely, when everyone desires some common good, the theory allows
for consent to limitations on individual freedom in the name of some
shared expectation for deeper self-fulfillment, as is the case in a
community of monks. But communitarianism provides a justification
for limiting individual freedom only when everyone shares the same
ideal good. Gewirth’s theory, by contrast, is general enough to take
account of more pluralistic societies where, notwithstanding Rawls’s
notion of public reason, overlapping consensus will not necessarily be
found, notwithstanding.401 In that sense, it provides a deeper
foundation than would a non-pluralistic communitarian approach, for
it paves the way to equal treatment for the same fundamental rights
under law.402 And thus the appropriate response to this second

398. Robert Nozick argued for a historical, non-patterned understanding of
justice involving three stages: Justice in the Acquisition of Holdings, Justice in
the Transfer of Holdings, and Rectification of Injustice. See Nozick, supra note
393, at 151. This was to counter more egalitarian-like patterned understandings
of justice such as that set forth by John Rawls. Still, there is every reason to
suspect, that over the eons of history, discrimination along with more egregious
forms of disenfranchisement more often held swing.

399. John Rawls makes a closely aligned point to the one in my text. See
Rawls, supra note 208, at 107–08.

400. See Gewirth, Self-Fulfillment, supra note 19, at 197.

401. The approach I offer is consistent with pluralistic communitarianism.
See Vincent J. Samar, A Moral Justification of Gay and Lesbian Civil Rights
Legislation, 27 J. Homosexuality 147, 158 (1994) (suggesting that in a pluralistic
communitarian society discrimination would be disallowed).

402. That deeper principle is a principle of justice where justice here is not
just formal, “treating like cases alike,” but material “rendering to each that which
is her due.” Plato, The Republic 9 (Francis Macdonald Cornford trans., Oxford
Univ. Press 1941). Under my approach, the baseline of what is due to an
individual is set by the PGC.
objection is that none of these theories are sufficiently general to serve as a baseline foundation for a set of human rights. But, by the same token, in contexts where the rights conflict appears only commercially motivated, and no other important interests are involved, the PGC may very well support the adoption of a wealth maximization, utilitarian styled approach for its resolution. And the same deference might be found regarding other rights as well. In such cases, the alternative approaches would not be in conflict with the PGC, but in support of it.

The third objection in order of increasing challenge arises out of the post-realist Critical Legal Studies School ("CLS"). In effect, it asks whether my analysis is flawed because it suggests coherence when law is actually incoherent and ultimately politics. Styled somewhat differently, the question asks if my selection of Gewirth's theory is just to serve my own politics and not really to provide a set of neutral legal constraints. Surely, the CLS criticism describes accurately daily occurrences involving legislative and executive compromises between different interests groups (including political parties) before any bill finally becomes law. But that does not mean that what results cannot be fitted into an overarching rational structure to aid courts in making decisions. Since courts will have to find such fits in cases often involving highly unanticipated fact patterns, to deny this possibility is to say that courts are engaged, at best, in legislating and, at worst, in a fraudulent usurpation of power. For under this view, law is simply treated as a patchwork quilt, and this article is just one more example of a particular set of biases sewing the patches together. But clearly there are many situations in which courts resolve cases with little controversy that are not strictly speaking the letter of the written law. And there are many very honest (without being delusional) attempts made by scholars to set forth frameworks in which the law might be understood. Given this criticism's seeming disrobing of all such attempts, it seems to defy credulity.

It simply cannot be the case that every rationalization is just a matter of bias or prejudice, especially when one considers that


judges often claim to render decisions they wish the law did not compel them to make. A better understanding of what courts do is that they find ways to establish rational connections between the issues they are likely to treat. This is one use of the canons of construction and one reason why courts search for principles behind the law. Evidence of what the legislature may have had in mind from committee reports, floor debates, and the preamble of a statute provide examples of a court following such a canon to make sense of what the legislature was aiming at. Here, although the legislature is a body of perhaps over four hundred representatives and one hundred senators, as in the United States Congress, it can be treated as having a collective consciousness much as we treat corporations as having a collective consciousness when we hold them accountable for intents that are reflective of their corporate purposes and institutional design.

To see how reason unifies ideas, consider the analogy to a child's puzzle or a filmstrip. A child learns how to put the pieces of the puzzle together the way a scientist considers a new hypothesis: by figuring out how they fit into the framework she is given. In the case of the scientist, fit may refer to showing the explanatory power of the theory, how it opens new vistas of inquiry, or how it can be tested via experiments with observable results. The way the puzzle will ultimately appear is an external shape imposed on the pieces, but still part of the puzzle itself. It is constitutive of the puzzle

405. It is a seemingly honest claim by some judges and jurisprudential thinkers that law constrains the decisions of the judiciary in ways that transcend their own particular whims and desires. Of course, there is always the possibility that this could be some multilayered set of illusions, but the key has to be whether arguments can be made that appear without bias.


408. But cf. Scalia, God's Justice, supra note 118, at 17--18 (arguing that a judge's duty is not to evolve the law, but to apply it as determined by legislators and regardless of her own moral convictions).

409. See Tara J. Radin, 700 Families to Feed: The Challenge of Corporate Citizenship, 36 Vand. J. Transnat'l L. 619, 651 (2003); see also Peter A. French, The Corporation as a Moral Person, 16 Am. Phil. Q. 207 (1979) (asserting that when persons within a corporation act to achieve a corporate-mandated end, the corporation itself assumes the property of a moral person).

410. I have in mind here a mental operation analogous to Kant's notion of the "uniformity of experience" or "consciousness in general" that he uses to
being just the sort it is regardless of the debates that may have occurred among the artists preparing the pieces. Similarly, each slide in a filmstrip is an independent picture from every other slide. But good editors assemble the many slides to exhibit a unity in presentation, a coherent story. The result of what these editors do is like what the courts do. They both take the raw material of their sources and try to make sense of what they are seeing. For film editing, it is the copy, illustration, camera angles, and directing technique that aid this process; for law, it is the rules, principles, policies, and purposes, along with some understanding of the human social condition operating under "a problem of social order" that help the judge image the nature of human finitude containing mixed personal interests.  

These rules, principles, policies, and purposes, in turn, structure the rational framework from which it is possible to obtain a coherent understanding of obligations, permissions, freedoms, and rights. So, it is simply not true that law defies rational unification; courts do this all the time.

Closer to home, the persuasiveness of the Gewirthian argument is that it starts from what any moral theory logically must presuppose, namely, that the persons it addresses are voluntary purposive agents. Even a religious view of ethics, because it sets forth directions for human action, presupposes that the persons it is addressing are voluntary and purposive beings. The theory may not claim these criteria as its starting points, as several theories already mentioned do not. Notwithstanding that, it presupposes the presence of these two features of human action to be a moral theory because it would not be otherwise prescriptive. If a theory affirmatively denied these criteria, it would not be a moral theory, although it might be a religious nonmoral view if it had other metaphysical claims such as

explain how experience is possible for us. The point here is to explain how we go from what is given to us subjectively under the forms of sensible intuition—space and time—to what we can know intersubjectively as experience. See Immanuel Kant, Critique of Pure Reason 36 n. (N. K. Smith trans., 1965). Donald Davidson had a similar idea when he said that it is impossible to talk about a conceptual scheme independent of its content because the content has no sense except as part of a scheme of concepts of which it is a part. See Donald Davidson, On the Very Idea of a Conceptual Scheme, in Inquiries into Truth and Interpretation 197 (1984).

411. Beyleveld & Brownsword, supra note 196, at 149--50.

412. See Hart & Sacks, supra note 406, at 162--71.

413. In Hard Cases, Dworkin presents various ways in which courts go about rationally unifying their constitutional, statutory and tort decisions. See Dworkin, supra note 128, at 105--23.
about the existence of a deity or creator. To make prescriptions or prohibitions is to presume that choice matters. This too is an illustration of Kant's "ought implies can" doctrine. Of importance also is that the theory be sufficiently general to avoid concerns over objectivity. Also, it must be sufficiently specific in its contents (as the Gewirthian analysis of purposive agency is), so as not to lead to indeterminacy. If this suggests that the theory will have to be impartial as to outcome, all the better for a theory meant to apply to law.

The last objection would, if true, be the most damaging of all. It says that reason itself is but one, often privileged, framework. In a world where different frameworks exist (faith, aesthetic rapture, feelings, intuitions), one cannot assume that the rational one is necessarily the best choice. Here there are a couple of things that can be said. First, in most forms of this challenge it is usually the method of reasoning itself that is utilized to raise the issue. But this means that the challenge is operating from within the very reason it is rejecting, which, if nothing else, affirms its ultimate governance over what choice is made. It simply begs the question to say by virtue of reason I cannot rely on reason. The most that one could say is that despite what reason shows me, I should nevertheless put that aside in favor of some other authority. But then it would be incumbent on the speaker to explain how that other authority is to be recognized and understood if it is not through the use of reason. Perhaps this runs contrary to some religious thinking in the area, but it seems this is the inevitable result unless one is willing to discover some other ground for knowledge, perhaps through faith or revelation. Then the question would still be how this other form of knowledge could be made known and understood generally. In other words, even if one could subjectively hold to such a belief, to afford it any objective status in its own right would require the use of reason, so we are back to where we started.

414. See Gewirth, Reason and Morality, supra note 7, at 23.
415. Perhaps there is some form of religious expression that does not follow the pattern; I have suggested, perhaps, it asserts some belief without making prescriptive claims at all. But that is not even typical of Buddhism, which claims "that intuitive wisdom follows upon moral conduct and mental discipline in accord with Buddhist precepts." The Cambridge Dictionary of Philosophy, supra note 191, at 91 (under "Buddhism"). On the question of the universality of reason in claiming, for example, certain texts as authoritative, "showing that your opponents' views are self-contradictory is a refutation within philosophical Hinduism as much as in Anglo-American analytic circles." Id. at 330 (under "Hinduism").
But let us cast this last response aside and take up the challenge in a different guise. Let us say one attacks the use of reason not by offering reasons why aesthetic rapture, for example should govern, but by simply asserting the aesthetic. In that case, puzzlement would befall the listener, especially if they did not share the same aesthetic, to have a fuller accounting of why they should accept this interpretation. True, there may be limits on how far one can interpret such things as art, but even there often the expectation is to connect it in some way to the human condition. Otherwise, why should we be concerned with it? More telling is when we move from considerations of the art to relations between persons, for then we need to account for changes in behavior. Laws that everyone ignores are not even laws on the old Austinian definition. Clearly, something is going on here in the way law operates to set limits or goals, that are, at least provisionally, thought to be good. In that sense, law more than art perhaps has to be governed by reason. Courts cannot just meditate on a case; they decide it in a way that helps current and future generations to have some sense of what is expected. Art need not do this. Law must do this.

Reason is the best guide in this process because it is the best objective determiner of truth. But it is also because a legal system is a normative system, which means it connects certain kinds of prescriptive oughts through the concepts of obligation, permission, and prohibition to certain historical facts about the society, like that on a certain occasion Congress passed and the President signed a particular bill into law. If the connection of those concepts could not be made, the distinction between fact and norm would itself evaporate.

This means that the assimilation of concepts to unschematized raw data in the world is itself a consequence of the mind's ability to draw congruence and continuity, along with

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418. I am reminded of Lon Fuller's point that a constitution is not self-executing. If it is accepted at all, it must be because it is at least provisionally thought to be good. See Lon Fuller, *Positivism and Fidelity to Law*, 71 Harv. L. Rev. 593, 622-24 (1958).
419. Gewirth argues that reason is the best human capacity because it is the best at attaining truth. See Gewirth, Self-Fulfillment, *supra* note 19, at 71-76.
These associations of ideas, which we traditionally say comprise the understanding, are connected with other propositions by the process of reasoning. So, a better question may be not whether reasoning can really operate in law, but whether a specific form of reasoning is more appropriate to performing certain legal activities, like jurors hearing evidence versus a judge interpreting the law. The former will be more inductive and become deductive only at the closing arguments. And it will always tap the jurors' experience of how human actions operate in the world. By contrast, the latter is sometimes deductive, sometimes following reasoning by analogy, and only when looking at legislative histories is it inductive. Still, when applying higher-ordered principles, the latter is deductive. It may be of an a priori sort, like in mathematics, that does not draw from specific experiences, but determines what the principles should be based on a conceptual analysis of what the concepts defining the norms themselves contain. This is just as true when interpreting principles of international or comparative law as it is when considering American constitutional principles. In both cases, the interpretation of the norm is governed by reason and, from what has already been argued, therefore, should be judged according to how well it conforms to the PGC.

VII. CONCLUSION

In this Article I have discussed three recent Supreme Court cases that made use of international and comparative norms in constitutional and statutory interpretation. In at least the first two cases, the Court was criticized for having brought in these outside norms, mostly because it was thought that they were outside the American constitutional setting, but also because of a worry that this might lead to judicial decisions being open to the private agendas of the justices. Against these criticisms, I sought a common language to bear down on the norms the Court might engage based in the human rights theory of the American philosopher Alan Gewirth. That theory, as was seen, provided a coherent framework in which these different norms could be situated. But it also provided a baseline set of minimal human rights protections that any system of law claiming to support human rights should want to protect.

In this sense, the article offers more than just a comparative framework for rationally understanding how the different norms might be connected. It also says what minimum expectation we should be able to expect from any system claiming to support human rights generally. In that effort, the theory took as its baseline the freedom and well-being necessary to maintain what all normative theories necessarily presume, namely, that the persons they address are voluntary purposive actors. By the same token, the theory kept the door open for the Court to sometimes go beyond this minimum in support of greater purposive fulfillment. In this way, the theory was not only able to provide a coherent explanation of why the Court in the instances presented chose to cite the international human rights norms that it did, but also to set forth a framework under which future cases might be decided. If the theory works, then it should be a contribution both to human rights generally and to the field of American constitutional and statutory interpretation in particular.\footnote{One other possibility I might add to this argument, which is beyond what I have done in the paper, is to suggest how one who does not want to buy into the Gewirthian framework as opposed to the Rawlsian or Millian harm principle approaches might come to reach a similar result. Here the idea is to construct a theory of overlap where each of the three models is compared to discover what outcomes they would agree upon. For example, Mill's harm principle might be understood to recognize as harms restrictions that one who was behind a veil of ignorance would not adopt, and that these two theories together could also agree that certain limitations on purpose fulfillment are not justified. As a result, by looking to where the three theoretical frameworks agree, one can find a dialog with minimal standards that most thinking people should be able to accept. Whether to do this or not would, of course, depend on how persuaded the reader was by my arguments for applying Gewirth's theory to constitutional interpretation. For my part, I think the approach as presented starts us in the right direction as is also shown by its compatibility with what arguably is the best thinking on applying international and comparative norms towards resolving most of the major controversies involving human dignity in American constitutional interpretation.} One final comment should be made to complete this discussion. The requirements that the theory places on the courts, in those few cases where fundamental rights issues are likely to arise, suggest that lawyers and judges need to be better equipped for handling philosophical matters as well as for doing comparative analyses of the norms from foreign jurisdictions and the international community. With respect to the latter, since the theory only recognizes for possible comparisons those international and comparative national norms that are not likely to be too different from our own, the approach that a court would likely take in mining
these various norms would not be all that different from the approach federal courts traditionally take in diversity jurisdiction cases.

What will be perhaps new is the need for translations of foreign statutes and case law, but we do this when we translate contracts and other foreign legal instruments. Better ways of data gathering and storage will also be needed, and many companies have already begun to provide these services, as law librarians will surely attest. Because some of the materials may sound and operate in different ways from domestic laws (international law is not set up in a hierarchy), there will no doubt be some new understandings associated with learning doctrines of *jus cogens* and *opino juris*, with which lawyers will need to gain competence. But here too there are some analogies to corporate persons and to partnerships, which operate with no single formal structure, but nevertheless have effects on those in and outside their structures. All of this suggests that law schools need to make international and comparative law courses and courses in jurisprudence and philosophy of law a standard part of the general curriculum.422 Law schools and law curriculum committees need to be robust in revamping their core subjects to reflect these new approaches as soon as possible.

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422. I discuss at some length the future of legal education in Justifying Judgment. See *supra* note 133, 179–219.