

RETHINKING THE USE OF FOREIGN LAW AND PUBLIC
CONSENSUS: THE U.S. SUPREME COURT'S INCONSISTENT
METHODS FOR DEFINING CONSTITUTIONAL RIGHTS

by
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The debate over the Supreme Court's citation of foreign law rages on. Does the Court have a constitutional license to consider foreign law? Does foreign law differ too much from our own to be of any value? Discussions of questions like these fill confirmation hearings, law reviews, and pages of the U.S. Reports. But a key piece of the debate is missing. This Article connects the use of foreign law with the ways in which the Supreme Court has used a domestic consensus to define constitutional rights. It argues that the decision to consider foreign law, or not, raises substantially the same moral-philosophical problems as the Court's use of a domestic consensus. These philosophical problems are particularly pronounced because the Supreme Court's doctrinal methods for defining constitutional rights rely upon consensus in inconsistent ways, all of which conflict with moral-philosophical theories about the source and meaning of our rights. The Article concludes by arguing that the Court has failed to justify its consensus-related jurisprudence and, in turn, has failed to explain how our rights come to fruition and what they actually mean.

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My claim . . . is that legal reasoning presupposes a vast domain of justification, including very abstract principles of political morality, that we tend to take that structure as much for granted as the engineer takes most of what she knows for granted, but that we might be forced to reexamine some part of the structure from time to time, though we can never be sure, in advance, when and how.**

I. INTRODUCTION

Anti-American. An impeachable offense. Narrow-minded. Ethnocentric. These are just a few of the sound bites from both sides of the debate over whether the U.S. Supreme Court should cite foreign and international law in its decisions. Obscured by this grandstanding is the untold story of the fundamental problems that plague every Supreme Court decision that considered or refused to consider an American or international consensus when interpreting constitutional rights.

First, the Court's methods for defining constitutional rights rely on consensus in inconsistent ways, all of which conflict with various moral-philosophical theories about the source and meaning of our rights. Second, this conflict matters because the validity of legal propositions derived from methods relying on a consensus (or not) depends upon the validity of certain moral claims—regardless of the moral-philosophical views of the Justice applying the method. Third, the Court has not discussed or acknowledged these problems, an approach that has disconnected the Court's methods for defining rights from the moral theories bearing on how the Court ought to define rights. The Court has therefore failed to justify its consensus-related jurisprudence and, in turn, has failed to explain how our rights come to fruition and what they actually mean. In other words, the Court's uses of consensus are doctrinally inconsistent and philosophically incoherent.

Grandstanding aside, the standard criticisms of constitutional borrowing stem from political and constitutional theory, empirical claims, and garden-variety cynicism. Some scholars conclude that citing foreign law violates democratic principles: “[W]hen the Court purports to consult evidence of contemporary public will, it should consult only those proxies that the American people can amend.”¹ Others make empirical claims that the foreign institutions from which courts cull their foreign citations materially differ from our own legal, political, and social

** RONALD DWORKIN, *JUSTICE IN ROBES* 56 (2006).

¹ Note, *State Law as “Other Law”: Our Fifty Sovereigns in the Federal Constitutional Canon*, 120 HARV. L. REV. 1670, 1684 (2007).

institutions, making foreign laws distinguishable and irrelevant.² Finally, some charge that judges rely on foreign law when it suits their cause, but ignore it when it does not.³

None of these critiques discusses the moral-philosophical implications of constitutional borrowing.⁴ For example, a metaethical

² See *id.* at 1686–88.

³ See *id.* at 1688; See also Antonin Scalia & Stephen Breyer, U.S. Ass'n of Constitutional Law Discussion at the American University Washington College of Law: Constitutional Relevance of Foreign Court Decisions, (Jan. 13, 2005), available at <http://domino.american.edu/AU/media/mediarelnsf/0/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument> (debate in which Justice Scalia argued that constitutional borrowing circumvents the American democratic process and Justice Breyer argued that looking to foreign opinion can be empirically useful).

⁴ Some authors have hinted at the fact that constitutional borrowing may raise moral issues. But none of them provide the legal or philosophical framework for understanding the moral-philosophical implications of constitutional borrowing. And none of them suggest that similar issues may arise when the Supreme Court cites or refuses to cite an American consensus in cases involving constitutional rights. See, e.g., Mary Ann Glendon, Op-Ed., *Judicial Tourism*, WALL ST. J., Sept. 16, 2005, at A14; Ken I. Kersch, *The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law*, 4 WASH. U. GLOBAL STUD. L. REV. 345, 353 (2005) (stating that moral-philosophical discussions of constitutional borrowing are chiefly engaged in by philosophers and philosophically oriented constitutional scholars); Joan L. Larsen, *Importing Constitutional Norms from a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283, 1284–85 (2004) (stating that the Supreme Court has failed to analyze the propriety of using foreign law to engage in moral fact-finding and, therefore, has failed to provide constitutional justification for constitutional borrowing); Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 772 (1997) (observing that "the global transformation [of constitutionalism] has not yet had the slightest impact on American constitutional thought"); see also Roger C. Cramton, *Beyond the Ordinary Religion*, 37 J. LEGAL EDUC. 509, 512–13 (1987) ("My point is that the approach of implicitly answering fundamental questions by not asking them pervades legal education Many teachers find it difficult or inappropriate to raise the fundamental questions. . . . Few law teachers have a background in moral philosophy or other disciplines that permits a confident approach to ultimate questions We pretend that we are technicians teaching technique in a value-neutral context in which everyone decides individually the uses to which technique is put.").

Other authors have not acknowledged these issues at all. See, e.g., Margaret H. Marshall, Speech, "Wise Parents Do Not Hesitate to Learn from Their Children": *Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. REV. 1633, 1655–56 (2004) (defining the question of constitutional borrowing not as whether judges should consider foreign law decisions, but whether missing out on the intellectual contributions of foreign courts is something we can afford given globalization); Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82, 84 (2004) (asserting that rights are "suprapositive"—they claim normative recognition independent of embodiment of positive law—but not comprehensively discussing the moral-philosophical implications of this recognition); Sandra Day O'Connor, *Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law*, FED. LAW., Sept. 1998, at 20 (stating that attorneys and judges tend to forget that other legal systems even exist); Randall R. Murphy, *The Framers' Evolutionary Perception of Rights: Using International Human Rights Norms as a Source for*

relativist would reject the notion that rights are universal and would instead claim that rights blossom locally. This philosophical theory suggests that constitutional borrowing should be severely curtailed or eliminated as a tool for interpreting the U.S. Constitution. In contrast, a realist holds an *a priori* view that rights reflect objective principles derived from a moral code, independent of public consensus. This code therefore embodies substantially similar or identical rights across cultural boundaries.⁵

Thus, my aim in this Article is to reframe the debate over constitutional borrowing,⁶ and the reliance on public consensus more generally, by discussing two questions: would any moral theory prohibit judges from interpreting the Constitution in light of an international or domestic consensus; and if so, should constitutional borrowing inconsistent with that moral theory stoke the flames of controversy?

My discussion of these questions raises both doctrinal and philosophical issues. At a doctrinal level, the U.S. Supreme Court has applied at least two inconsistent methods to define rights. In both substantive due process cases and cases involving constitutional borrowing, the Supreme Court has determined that the essential meaning of liberty dictated whether an alleged right exists. In contrast, the Court has also ruled that a right's existence turned upon the existence of a national consensus about the right. The relevance of international opinion sparks further debate: at least one Justice has adopted the view that an international consensus is never relevant to the task of interpreting the Constitution.⁷ Other Justices support the opposite position.⁸

Discovery of Ninth Amendment Rights, 21 STETSON L. REV. 423, 480 (1992) (arguing that universal, or international, norms should be constitutionally recognized because the author views them as good: "they are fundamentally important, and because they are fundamental they should not be subject to legislative variances").

⁵ Authors have made similar claims. See, e.g., Jordon J. Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 CORNELL L. REV. 231, 264 (1975) (stating that judges should apply universal values "discoverable in contemporary documentations of international human rights and expectations"). Some have justified or rejected constitutional borrowing without moral-philosophical analysis. See, e.g., Tim Wu, *Should the Supreme Court Care What Other Countries Think?*, SLATE, April 9, 2004, available at <http://slate.msn.com/id/2098559> (stating that Tom Feeney, representative from Florida, rejected constitutional borrowing because Americans have not consented to being ruled by foreign powers and tribunals, and even threatened impeachment for judges who ruled otherwise); See also David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 616 (2001) (arguing that constitutional borrowing is appropriate given the multicultural society that the United States has become).

⁶ See Matthew D. Adler, Comment, *Can Constitutional Borrowing Be Justified?* A Comment on *Tushnet*, 1 U. PA. J. CONST. L. 350 (1998) (describing constitutional borrowing as follows: "A constitutional provision, doctrine, structure, norm, or institution P is borrowed in C₂ from C₁ if the very same provision, etc., is adopted in C₂ in virtue of its performance in C₁").

⁷ See *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997) (Scalia, J.) ("[C]omparative analysis [is] inappropriate to the task of interpreting a constitution,

At a philosophical level, whatever method the Court ultimately chooses—if it ever makes such a choice—will implicate an important philosophical conflict between realists and relativists about the source and meaning of our rights. For example, finding that a right exists based on the essential meaning of liberty, despite the public controversy over the right's existence, rebukes the relativistic notion that a legal proposition's validity depends upon whether it is consistent with a societal consensus about the right. Likewise, when the Court determines that an alleged right does not exist because no public consensus exists, the Court has necessarily rejected the idea that liberty's essential meaning, independent of consensus, gives substance to the Constitution. Given these competing approaches, both in tension with at least one moral philosophy, the Court's varying decisions about the role of consensus remain unexamined, unexplained, and philosophically inconsistent.

We will most likely see these problems in cases defining fundamental rights.⁹ Indeed, rarely does the Court consider foreign law to interpret structural provisions of the U.S. Constitution.¹⁰ And some rights may be so embedded in American law, and yet unique to America, that international opinion will prove largely irrelevant in aiding those who interpret them. America's substantial protection of free speech is just one example. Thus, this Article focuses primarily on liberty interests.

though it was of course quite relevant to the task of writing one.”). This distinction between international consensus and domestic consensus highlights the moving pieces in this Article. We must consider the role of consensus generally, as well as the roles of international consensus and domestic consensus.

⁸ See, e.g., Anne E. Kornblut, *Justice Ginsburg Backs Value of Foreign Law*, N.Y. TIMES, April 2, 2005, at A10 (quoting Justice Ginsburg as saying in a speech that “[j]udges in the United States are free to consult all manner of commentary” and that American judges should, if anything, consider international law more often).

⁹ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 572–73 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring); *Atkins v. Virginia*, 536 U.S. 304, 316, n.21 (2002); *Washington v. Glucksberg*, 521 U.S. 702, 705–06, 718 n.16 (1997); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 381 (1995) (Scalia, J., dissenting); *Bowers v. Hardwick*, 478 U.S. 186, 196–97 (1986) (Burger, C.J., concurring). See generally *Roe v. Wade*, 410 U.S. 113, 130 (1973); see also Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 272 (2001) (suggesting that foreign constitutional law is of less help in interpreting structural doctrines like federalism than in interpreting constitutional terms that secure individual rights).

¹⁰ Jackson, *supra* note 9, at 245 (“[A] striking aspect of the current federalism cases is the Court’s assertion that it develops the law with virtual autonomy from other government actors, supported by invocation of its own ‘first principles.’”). Professor Jackson also asks us to recall Justice Kennedy’s statement that “[f]ederalism was our Nation’s own discovery” and to note that the cases of *Lopez*, *Alden*, and *Printz* all issue calls for a return to first principles, either expressly or by implication.” *Id.* at 246. An atypical case is *Printz*, where, in his dissent, Justice Breyer discussed European Union, Swiss, and German law vis-à-vis the issue of commandeering. 521 U.S. at 976–77 (Breyer, J., dissenting). Justice Breyer was the lone writer to cite foreign law on the issue. *Id.*

Part II analyzes four substantive due process cases and one example of the Supreme Court's reliance on foreign law. This Part discusses the Court's competing doctrines that guide its analysis of constitutional rights. On the one hand, a domestic or international consensus sometimes creates, or dooms, the right in question. On the other hand, a domestic or international consensus is sometimes merely evidence of the right's existence.

Part III describes metaethical relativism for the sole purpose of demonstrating that this moral philosophy (and several others) generally favors a particular role for consensus in shaping substantive rights—a limited role that directly conflicts with a realist's view of rights. In sum, under no circumstances would a relativist agree with a doctrine that overrides societal preferences—under the rubric of universal morality—about the substance and existence of a particular right.

Part IV demonstrates that this debate matters. The Supreme Court's inconsistent use of consensus raises fundamental questions about the source and meaning of our constitutional rights. These questions bear upon the appropriate judicial standards we ought to employ to decipher the Constitution. And they require us to confront the moral-philosophical implications of bringing international and domestic opinion to this task. The Court has implicitly answered these questions many times. But the answers are rarely the same and are never made explicit. Failing to explore these questions and the methods by which the Court interprets our constitutional rights means one thing: the Court fails to fully understand or explain the rights that it creates and defines.

Two general themes should emerge. First, the Court has oscillated between conflicting methods when defining rights, leaving the Court's jurisprudence in legal and philosophical disarray. Second, seemingly abstract philosophical principles have direct implications for adjudication because the validity of legal propositions developed in cases defining constitutional rights depends upon the validity of particular moral claims. In other words, rules are "mere labels for much more complex ideas,"¹¹ which the Court has yet to examine. The Court's failure to recognize and discuss these moral claims—these more complex background ideas—undermines several of the Court's constitutional decisions.

II. DOES A PUBLIC CONSENSUS CREATE RIGHTS OR IS IT EVIDENTIARY?

Many scholars have considered the propriety of constitutional borrowing. Only in the past few years, however, have scholars begun to address whether the Supreme Court's reliance on foreign law is

¹¹ T. M. SCANLON, WHAT WE OWE TO EACH OTHER 199 (1998).

rhetorical or substantive.¹² One of the first authors to address this issue analyzes five Supreme Court opinions and concludes that foreign precedent does little “work” in the Court’s decisions, a concept he defines as “mak[ing] it more likely that the Court or a Justice will rule in accordance with that precedent.”¹³ He therefore concludes that scholars ought to reframe the debate about constitutional borrowing to address how the Court actually uses foreign precedent, focusing their scholarly efforts primarily on the informational benefits of that precedent.¹⁴

The Supreme Court’s reliance on foreign law may appear rhetorical in many respects. But appearances can be deceiving. Supreme Court opinions that identify a consensus—whether international or domestic—to inform their substantive legal analyses reveal at least two distinct approaches to identifying and shaping constitutional rights. Specifically, (1) a consensus does not create rights, but merely evidences a preexisting right, or lack thereof; or (2) a consensus creates rights, and is not merely evidentiary.

An early statement of this issue arose in *Palko v. Connecticut*.¹⁵ In that case, Palko was indicted for first-degree murder but was instead convicted of second-degree murder.¹⁶ After the state’s successful appeal and a new trial, Palko was convicted of first-degree murder.¹⁷ The state appellate court affirmed this conviction, denying Palko’s argument that being tried for a second time violated his rights under the Double Jeopardy Clause.¹⁸ Palko then appealed to the U.S. Supreme Court.¹⁹

Palko had an upward trek to endure. Because the Bill of Rights comprises protections against the federal government, not the states, Palko needed to convince the Court to apply the Fifth Amendment’s Double Jeopardy Clause (through the Fourteenth Amendment) in a state murder trial. Responding to Palko’s argument, Justice Cardozo penned the famous test for incorporating a Bill of Rights provision into the Fourteenth Amendment: “[The rights Palko invokes] are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a ‘principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’”²⁰ The Court ultimately affirmed Palko’s conviction; it explained that refusing to apply the Double Jeopardy Clause in Palko’s case would not “violate those fundamental

¹² See, e.g., Osmar J. Benvenuto, Note, *Reevaluating the Debate Surrounding the Supreme Court’s Use of Foreign Precedent*, 74 *FORDHAM L. REV.* 2695, 2697 (2006).

¹³ *Id.* at 2742.

¹⁴ *Id.* at 2759.

¹⁵ 302 U.S. 319 (1937).

¹⁶ *Id.* at 320–21.

¹⁷ *Id.* at 321.

¹⁸ *Id.* at 321–22.

¹⁹ *Id.*

²⁰ *Id.* at 325 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

principles of liberty and justice which lie at the base of all our civil and political institutions.”²¹

Reviewing the Court’s famous test yields an unsettling conclusion: it is unclear what question the Court answered by applying this test. Had the Court determined that a consensus among the people evidences what is already a fundamental right? Or had the Court instead determined that a consensus creates the right itself—a right that achieves its status as fundamental only when it is rooted in the people’s conscience and traditions? Specifically, while the Court concluded that the “essence of a scheme of ordered liberty” does not encompass a prohibition against double jeopardy, it also observed that the “traditions and conscience of our people” do not support recognizing the alleged right as fundamental.²²

Perhaps the Court made this distinction to suggest that a consensus plays both a substantive and evidentiary role. As the Court explained, “[t]he exclusion of these immunities and privileges from the privileges and immunities protected against the action of the states has not been arbitrary or casual. It has been *dictated* by a study and appreciation of the *meaning, the essential implications, of liberty itself.*”²³ But, as the Court further explained, other factors can also shape our rights. We created the process of incorporating rights into the Fourteenth Amendment based on a shared *belief* that liberty would otherwise cease to exist: “[T]he process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed.”²⁴ So if a general consensus created the process that has enhanced our right to be free from certain state intrusions, and if our beliefs can enlarge the domain of liberty,²⁵ then, it seems, a consensus may function to create rights—not just confirm their existence in the meaning and essential implications of liberty itself.

However we read Justice Cardozo’s language in *Palko*, the Court seemed to choose sides in *Benton v. Maryland*,²⁶ where the Court overruled *Palko* by holding that the Double Jeopardy Clause applies against the states.²⁷ According to *Benton*, two things had changed in the thirty-two years since *Palko* was decided. First, the Supreme Court rejected the approach to constitutional rights that *Palko* endorsed, “that basic constitutional rights can be denied by the States as long as the totality of the circumstances does not disclose a denial of ‘fundamental fairness.’”²⁸ Rejecting this principle meant that a Bill of Rights guarantee

²¹ *Palko*, 302 U.S. at 328 (internal quotation marks omitted).

²² *Id.* at 325 (quoting *Snyder*, 291 U.S. at 105) (internal quotation marks omitted).

²³ *Id.* at 326 (emphasis added).

²⁴ *Id.*

²⁵ *Id.* at 327.

²⁶ 395 U.S. 784 (1969).

²⁷ *Id.* at 787.

²⁸ *Id.* at 795.

applied against the states once the Court found the right “fundamental to the American scheme of justice.”²⁹ Second, every state incorporated some form of the Double Jeopardy Clause into its constitutional or common law.³⁰

Importantly, *Benton* addressed the crucial question of how a particular right becomes fundamental to the American scheme of justice. The Court’s first distinction of *Palko* may seem to suggest that rights stem from the nature of justice itself, regardless of public sentiment. *Benton* also asserted that “[t]he fundamental nature of the guarantee against double jeopardy can hardly be doubted.”³¹ But *Benton* implied that a right becomes fundamental only when it is widely viewed as such:

Today, every State incorporates some form of the prohibition in its constitution or common law. As this Court [has put it before], “[t]he underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense”³²

Further highlighting the substantive role of consensus, the Court noted that the double-jeopardy prohibition has existed as part of our constitutional tradition since the very beginning and had recently found its way into the laws of every state.³³ *Benton* therefore appears to adopt at least two important principles: the widespread consensus about the Double Jeopardy Clause made the right fundamental; and it is the American consensus alone—the American scheme of justice—that matters for the purpose of creating rights.

*Bowers v. Hardwick*³⁴ followed *Benton*’s lead. In *Bowers*, the Supreme Court was called upon to decide whether a statute outlawing sodomy infringed a homosexual’s due process rights. The Court first made clear that the alleged right to engage in homosexual sodomy bore no resemblance to previously recognized privacy rights, such as the right to purchase contraceptives or the right to privacy in one’s familial relationships.³⁵ Narrowing the right at issue to this extent—the right to engage in homosexual sodomy—all but preordained the result. The alleged right was not “deeply rooted in this Nation’s history and tradition” or “implicit in the concept of ordered liberty,” because sodomy was a criminal offense under the common law, forbidden by the original thirteen states, and outlawed by twenty-four states when the Court rendered its decision.³⁶ Public consensus won the day.

²⁹ *Id.* (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)).

³⁰ *Id.* at 795.

³¹ *Id.*

³² *Id.* at 795–96.

³³ *Id.*

³⁴ 478 U.S. 186 (1986).

³⁵ *Id.* at 190.

³⁶ *Id.* at 191–94 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

Chief Justice Burger's concurrence implicitly highlights the majority's use of consensus as proof that the right did not exist. The Chief Justice agreed that "there is no such thing as a fundamental right to commit homosexual sodomy."³⁷ And he, too, briefly paid homage to a history stacked against the right. But Burger ultimately grounded his views in higher principles: "Condemnation of [homosexual] practices is firmly rooted in Judeo-Christian moral and ethical standards" and it would "cast aside millennia of moral teaching" to hold that the act of homosexual sodomy is protected as a fundamental right.³⁸

Justice Blackmun's dissent in *Bowers* foreshadowed the approach the Court would take nearly two decades later in *Lawrence v. Texas*.³⁹ Justice Blackmun stated, "the fact that the moral judgments expressed by statutes like [the one challenged] may be 'natural and familiar . . . ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.'"⁴⁰

In *Lawrence*, the Court overruled *Bowers*: "*Bowers* was not correct when it was decided, and it is not correct today."⁴¹ This statement raises an important question: how does *Lawrence* square with the evidence of public opinion about homosexual acts when *Bowers* came down? In other words, how can Justice Kennedy ignore *Bowers*'s powerful observation that until 1961 every state in the Union outlawed sodomy? And how can he ignore that only about half of the states had repealed these laws when the Court issued its decision in *Lawrence*? *Lawrence*'s observation that ancient laws outlawing sodomy did not single out homosexual conduct does not by negative implication show that the right was fundamental, especially given what Justice Kennedy recognized as "centuries . . . [of] powerful voices [that] condemn[ed] homosexual conduct as immoral."⁴² Nor could the Court plausibly conclude, if it was thinking in terms of rights creation, that the repeal of sodomy laws in only twenty-six states meant that the right to engage in homosexual acts became sufficiently rooted in our nation's conscience so as to be ranked fundamental.

The answer to these questions lies in the Court's decision to frame its inquiry broadly: "Our obligation is to define the liberty of all, not to mandate our own moral code."⁴³ The Court then broadly described the liberty at stake as "whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due

³⁷ *Id.* at 196 (Burger, C.J., concurring).

³⁸ *Id.* at 196-97.

³⁹ 539 U.S. 558 (2003).

⁴⁰ *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting) (citing *Roe v. Wade*, 410 U.S. 113, 117 (1973) (quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting))).

⁴¹ *Lawrence*, 539 U.S. at 578.

⁴² *Id.* at 571.

⁴³ *Id.* (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

Process Clause of the Fourteenth Amendment to the Constitution.”⁴⁴ The precedents before and after *Bowers* answered a resounding “yes.” The powerful voices condemning homosexual acts, however, were far less powerful nearly twenty years later, a fact confirming that the right to engage in private sexual conduct was indeed implicit in the concept of liberty itself. In the Court’s view, the fact that a widespread foreign consensus recognized the right only buttressed its conclusion that the right was an integral part of human freedom.⁴⁵

The divide between *Bowers* and *Lawrence* is clear: *Bowers* rested its holding on what it understood to be the prevailing historical and then-present view about homosexual conduct, while *Lawrence* found guidance in its understanding of liberty’s essential meaning. Both opinions, as well as Chief Justice Burger’s concurrence in *Bowers*, represent different ways of understanding the genesis of our constitutional rights.

In *Roper v. Simmons*,⁴⁶ the Justices’ opposing views about rights continued to clash. The *Roper* Court set out to decide whether the Eighth Amendment, as incorporated into the Fourteenth Amendment, forbids executing a juvenile offender who was older than fifteen but younger than eighteen when he committed a capital crime.⁴⁷ After noting that it must look to the Constitution’s text, history, tradition, and precedent, the Court reaffirmed the principle that “evolving standards of decency that mark the progress of a maturing society” inform its decisions about which punishments are cruel and unusual and thus constitutionally proscribed.⁴⁸ The Court summarized several cases and facts supporting its view that our nation’s evolving standards of decency reflect a consensus against executing juveniles, and the Court therefore held that the Fourteenth Amendment prohibits the states from executing offenders who were under eighteen years of age when they committed a capital crime.⁴⁹

No controversy arose from the Court’s decision to shape the right against cruel and unusual punishment by searching for a national consensus, because settled precedent required the Court to assess this consensus before reaching its conclusion. It was the Court’s reliance on a different consensus that inflamed the dissenters: the Court also cited foreign law in an effort to prove that “the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”⁵⁰ The Court noted, however, that the world

⁴⁴ *Id.* at 564.

⁴⁵ *See id.* at 572–73.

⁴⁶ 543 U.S. 551 (2005).

⁴⁷ *Id.* at 555–56.

⁴⁸ *Id.* at 560–61.

⁴⁹ *Id.*

⁵⁰ *Id.* at 575. The Court cited foreign and international law from the following countries, geographical regions, and international law documents: African Charter on the Rights and Welfare of the Child; American Convention on Human Rights; Pact of San Jose; Costa Rica; Canada; China; Commonwealth countries; continental

community's opinion only confirmed the Court's independent conclusions;⁵¹ international law allegedly did not control the outcome.⁵²

The Court justified its reliance on foreign law in two ways: first, the Court observed that it had cited foreign law in prior cases;⁵³ and second, the Court claimed that citing foreign law would not lessen its fidelity to the Constitution, but would instead underscore the rights that fall centrally within our heritage of freedom.⁵⁴

Justice O'Connor was sympathetic to these justifications,⁵⁵ stating that she also found international law relevant to interpreting the Eighth Amendment: "[T]his Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries."⁵⁶ Thus, Justice O'Connor would provide at least a confirmatory role to other countries' opinions should an American consensus emerge.⁵⁷ But she disagreed with the Court's claim that international law confirmed the correctness of its analysis in this particular case:

Because I do not believe that a genuine *national* consensus against the juvenile death penalty has yet developed, and because I do not believe the Court's moral proportionality argument justifies a categorical, age-based constitutional rule, I can assign no such *confirmatory* role to the international consensus described by the Court.⁵⁸

Thus, from Justice O'Connor's perspective the majority based its decision upon "its independent moral judgment that death is a disproportionately severe punishment for any 17-year-old offender."⁵⁹ If Justice O'Connor was correct, Justice Kennedy relied upon the international consensus just as he did the domestic and foreign consensus in *Lawrence*—to confirm his independent moral judgment about our fundamental protections against governmental conduct.

Like Justice O'Connor, Justice Scalia found that no national consensus against juvenile executions existed.⁶⁰ He asserted that the Court employed foreign sources to set aside a centuries-old practice—letting the jury decide whether a defendant's youth allows him or her to avoid the death penalty—despite the absence of a national consensus.⁶¹

Europe; the Democratic Republic of Congo; England; International Covenant on Civil and Political Rights; India; Iran; Nigeria; Pakistan; Saudi Arabia; United Nations Convention on the Rights of the Child; and Yemen. *Id.* at 576–77, 622.

⁵¹ *Id.* at 578.

⁵² *Id.* at 575.

⁵³ *Id.* at 575.

⁵⁴ *Id.* at 578.

⁵⁵ *Id.* at 604–05 (O'Connor, J., dissenting).

⁵⁶ *Id.* at 605.

⁵⁷ *Id.*

⁵⁸ *Id.* at 604.

⁵⁹ *Id.* at 588.

⁶⁰ *Id.* at 610 (Scalia, J., dissenting).

⁶¹ *Id.* at 628.

Thus, also like Justice O'Connor, Justice Scalia concluded that the Court's holding rested on its independent judgment that juvenile murderers are not sufficiently culpable to deserve the death penalty.⁶² He explained that the international consensus took center stage to affirm "the Justices' own notion of how the world ought to be, and their diktat that it shall be so henceforth in America."⁶³ When addressing constitutional borrowing, however, Justices Scalia and O'Connor parted ways. Justice Scalia explained, "I do not believe that approval by 'other nations and peoples' should buttress our commitment to American principles any more than (what should logically follow) disapproval by 'other nations and peoples' should weaken that commitment."⁶⁴

The role of consensus in *Roper* splintered the majority and the dissenters just as it divided *Bowers* and *Lawrence*. But the conflict had an additional layer in *Roper*. Justice Kennedy still took "guidance from the views of foreign courts and legislatures" when forming his conclusion about the Eighth Amendment.⁶⁵ Justice Scalia's dissent, however, mixed in a new approach. Although *Palko*, *Benton*, *Bowers*, *Lawrence*, and *Roper* all searched for a domestic or international consensus, albeit for different reasons, Justice Scalia argued that international and foreign opinions are irrelevant—they should neither confirm our judgments about American law nor shape our substantive conclusions about American law. His empirical objection to constitutional borrowing—that "[i]t is beyond comprehension why we should look . . . to a country that has developed . . . a legal, political, and social culture quite different from our own"—appeared to leave room for looking to the laws of similarly situated countries.⁶⁶ But Justice Scalia has rejected the notion that any international consensus should inform the Court's decisions.⁶⁷

⁶² *Id.* at 615.

⁶³ *Id.* at 628.

⁶⁴ *Id.* at 628.

⁶⁵ *Id.* at 608 (Scalia, J., dissenting).

⁶⁶ *Id.* at 626–27. Scholars have made similar arguments, although they have not necessarily agreed with Justice Scalia's conclusion. See, e.g., Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1231 (1999) (addressing whether courts may need a constitutional license to consider comparative constitutional sources); MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 4–5 (2d ed. 1994) ("Variations in the political, moral, social and economic values which exist between any two societies make it hard to believe that many legal problems are the same for both except on a technical level."). Similarly, some authors have argued that courts that engage in constitutional borrowing regard their constitutions as speaking in a dialogue with the international community, and courts that are reticent to accept constitutional borrowing perceive their constitutions as unique to their society. See, e.g., *Developments in the Law—International Criminal Law, The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation*, 114 HARV. L. REV. 2049, 2073 (2001).

⁶⁷ *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997) (Scalia, J.) ("[C]omparative analysis [is] inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.").

These opinions differ over the method we ought to employ when interpreting the U.S. Constitution. For example, if Justice Scalia correctly described Justice Kennedy's approach in *Roper*, the Court relied on various international and foreign sources—certainly not limited to sources from similarly situated countries—to shape its judgment about the Eighth Amendment right to be free from cruel and unusual punishment. And while *Bowers* relied on a consensus among the states to reject the alleged right to engage in homosexual sodomy, even though states also have unique historical, legal, political, and social forces, *Lawrence* grounded its holding in what it understood to be the fundamental meaning and requirements of liberty.

The Court and relevant scholarship have failed to discuss how this controversy implicates competing moral-philosophical theories about rights, such as moral realism and relativism.⁶⁸ The next Part of this Article therefore describes one such moral philosophy so we can observe how the Justices' divergent approaches to considering consensus conflict with at least one moral-philosophical theory. This conflict matters, because the validity of a legal proposition developed by reference to a domestic or international consensus depends upon the validity of a moral claim.⁶⁹

III. RELATIVISM ABOUT RIGHTS

A. *Metaethical Relativism: General Principles*

Although the idea that rules are relative to social conditions exists in mainstream legal analysis, critical discussion of the idea does not exist in the context addressed here.

A general version of moral relativism views moral beliefs as relative to the particular societies in which they exist.⁷⁰ Judge Richard Posner, a self-

⁶⁸ These views are by no means exhaustive. For example, one could be a moral pluralist instead of a moral realist, believing that we cannot know which actions are morally correct because we necessarily violate one moral rule by acting in accordance with another moral rule. See generally ISAAH BERLIN, LIBERTY 5–6 (Henry Hardy ed., 2002). Moreover, one may be an anti-realist about morality but still not be a relativist. According to Allan Gibbard's non-cognitivism, when we say that certain acts are "good" or "bad," we are expressing a commitment to norms according to which praise and reward, or blame and punishment, are appropriate responses to these acts. See generally ALLAN GIBBARD, WISE CHOICES, APT FEELINGS (1990). Thus, one may adopt the view that Gibbard correctly describes what we do when we call acts good or bad, but also commit oneself to norms that apply across cultures, and therefore reject relativism. For example, one could be an anti-realist/non-cognitivist, but still be committed to norms dictating blame and punishment for those who engage in genocide, regardless of whether one's own cultural norms permit genocide. The key point here is that there are different views about whether a connection exists between anti-realism and relativism, and this article discusses one moral philosophy for illustrative purposes only.

⁶⁹ See *infra* Part IV.

⁷⁰ Any variation of the term "society" when referencing a "society's moral code," or a similar construction, is used for convenience. The use of the term "society" does

described relativist,⁷¹ asserts that there are tautological moral universals (e.g., murder is wrong), but that morality is local: “[N]o moral code can be criticized by appealing to norms that are valid across cultures, norms to which the code of a particular culture is a better or a worse approximation.”⁷² According to this view, moral claims cannot be compared to an objective standard of moral truth, but instead reflect societies’ varying social, institutional, cultural, and political circumstances. Thus, a moral claim might be acceptable in one society but unacceptable in another. Under this view, “[a]ny meaningful moral realism is therefore out, and moral relativism (or rather a form of moral relativism . . .) is in.”⁷³

Metaethical relativism, a more specific form of relativism, also holds that the truth of a moral claim cannot be tested by comparison to an objective standard. Instead, moral judgments stem from societal or individual standards. So when one claims that a particular action is “good” or “bad,” “moral” or “immoral,” the metaethical relativist would understand these claims to mean that the action is so classified according to the convention or preferences of the particular society in which the action was undertaken. The metaethical relativist would reject the notion that these moral concepts reflect universal moral standards against which we can compare our conduct for compliance. This view therefore informs the way in which a metaethical relativist reasons about one’s ethical obligations. A metaethical relativist would not accept a method of ethical reasoning in the same way that he or she would accept deductive logic; even a seemingly sound method of reasoning cannot prove that a particular ethical judgment is correct outside of the society in which the judgment is made.⁷⁴ In essence, a moral relativist may think that two societies can disagree about a moral belief or standard because the notion of a universal body of moral truths is implausible or because there

not reject the possibility that a political-theory component of a relativist theory might justify recognizing the majority’s moral code as society’s moral code. A relativist could therefore imagine individual societies within a larger society, like the states within a union, each with majorities that hold different moral views from the other states and the union itself. Likewise, a relativist could imagine these moral views extending across geographical boundaries between states or nations with similar legal, political, and social forces.

⁷¹ *But see* RONALD DWORKIN, JUSTICE IN ROBES 75–104 (2006) (arguing that Posner’s views are “remarkably implausible” and that Posner is not governed by moral relativism, but by “an inarticulate, subterranean, unattractive but relentless moral faith” called “Darwinian Pragmatism”).

⁷² Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1640 (1998).

⁷³ *Id.* at 1641.

⁷⁴ Richard Brandt, *Ethical Relativism*, in 3 THE ENCYCLOPEDIA OF PHILOSOPHY (Paul Edwards ed., 1967), reprinted in MORAL RELATIVISM 25, 27 (Paul K. Moser & Thomas L. Carson eds., 2001).

is no such thing as a true moral belief, an argument one may support by noting the significant disagreements about morality.⁷⁵

One may attempt to refute the theory that there is no such thing as a true moral belief by arguing that moral disagreements are analogous to disagreements between mathematicians about the answer to a math problem: the mere fact that mathematicians disagree about the answer does not mean that one true answer does not exist, but only that at least one mathematician has erred.⁷⁶ We better understand a more moderate version of relativism, however, by knowing the difference between factual statements and their relationship to truth on the one hand, and moral standards and their relationship to truth on the other.⁷⁷ Metaethical relativism concerns a society's process of converging upon a moral principle that it holds to be correct for that society, not with finding principles that it can compare to an objective factual background and, if necessary, invalidate for being inconsistent with that background.⁷⁸ Thus, unlike the mathematicians' disagreement, the form of relativism discussed in this Article is about a disagreement over the standards for evaluating individuals' conduct.

To make sense of this claim in a discussion about legal theory, the relativism described here must hold that moral claims are binding upon and valid as to all citizens in the particular society in which the moral claims are made; thus, a particular moral claim (X) is superior to competing moral claims when the society has accepted X as part of its

⁷⁵ Thomas L. Carson & Paul K. Moser, *Introduction to MORAL RELATIVISM* 3 (Paul K. Moser & Thomas L. Carson eds., 2001).

⁷⁶ Charles Fried, *Scholars and Judges: Reason and Power*, 23 HARV. J.L. & PUB. POL'Y 807, 824 (2000) (stating that "[a] mathematician does not say that a prior theorem was correct in its time but now another has taken its place. The earlier theorem might have seemed correct, or been close enough for the uses to which it was put, but the assertion of the new, contradictory theorem necessarily revises or displaces the earlier one.").

⁷⁷ For a further philosophical discussion of the distinction between judgments about facts and judgments about standards, see Karl Popper, *Facts, Standards, and Truth: A Further Criticism of Relativism*, in 2 KARL POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* (5th ed. 1971), reprinted in *MORAL RELATIVISM* 32–33 (Paul K. Moser & Thomas L. Carson eds., 2001).

⁷⁸ There might appear to be an exception for a theory that evaluates individuals' conduct by referring to a consequentialist standard. But the statement-standard distinction still applies because the consequentialist theory—such as utilitarianism—typically considers the standard (e.g., the action that results in the greatest net social benefit is morally right) as the guide to making moral decisions and the statement (e.g., nuclear attacks cause more harms than benefits) as the factual circumstances that are analyzed under the moral standard. So, for example, the above statement would be considered in light of the above standard, and we would determine that nuclear attacks are immoral for the particular society employing the standard. This moral judgment could be invalidated if the empirical statement about nuclear attacks turned out to be false. But this would not invalidate the moral principle; it would just demonstrate that the moral principle can yield inaccurate conclusions when applied to dubious data.

moral code. The relativist would deny, however, that X is objectively true or superior as a general moral principle applicable in all societies.

B. Using Metaethical Relativism to Develop an Approach to Constitutional Borrowing

From this general framework, a metaethical relativist can derive a theory outlining the appropriate use of foreign and international law and domestic consensus when interpreting the Constitution.

As noted, a metaethical relativist's central belief is that no one ethical principle is correct for all societies.⁷⁹ So if a particular society condemns an action as wrong, then it is wrong for the people living in that society to engage in that action. But other societies are not necessarily subject to that particular society's proscription because socially relative reasons might require a different moral standard to prevail. So a particular society's power to shape its own conception of morality, not a universal body of moral imperatives, generates the moral duties that apply in that society.

Applying these principles, a metaethical relativist's approach might permit constitutional borrowing, but through a different method and for a different reason than a moral realist would accept.⁸⁰ The relativist would contend that an opinion's reliance on foreign law does not incorporate a universal moral principle into our law; there is no such thing.⁸¹ Instead, constitutional borrowing permits courts to test their own conclusions about relative rights and wrongs by challenging the premises of their conclusions with the empirical results of decisions in other societies' courts.⁸² Put otherwise, such a process may strengthen the

⁷⁹ See, e.g., Brandt, *supra* note 74, at 27–28 (describing metaethical relativism).

⁸⁰ The fact that numerous variations of relativism exist prevents this Article from describing all of the ways in which moral relativism would treat foreign and international law when shaping rights jurisprudence. More radical theories of relativism may reject any consideration of foreign and international law. Further, numerous other competing accounts of morality could have been the grist for the discussion here, as noted above. See *supra* note 68. Thus, the framework explained here is one of several variations of how moral-philosophical reasoning can shape the role of consensus.

⁸¹ Cf. Neuman, *supra* note 4, at 88 (“[T]he Supreme Court has reason to examine international human rights norms and decisions interpreting them for the normative and functional insights that they may provide on analogous issues of constitutional right. They certainly cannot control constitutional interpretation, but they may inform it.”); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191, 201 (2003) (stating that the most frequent rationale advanced by judges regarding constitutional borrowing is that it provides a broader range of ideas and experience dealing with problems analogous to those the judge confronts).

⁸² Whether this is practically possible is subject to controversy. See, e.g., Tushnet, *supra* note 66, at 1265–69 (explaining that the presence of several variables in comparative constitutional analysis makes learning from other constitutional traditions a difficult task); Cf. Kornblut, *supra* note 8, at A10 (describing Justice Ginsberg’s assertion that the decisions of foreign courts have been applied to “help untangle legal questions domestically”).

reasoning and coherence of the opinion produced, potentially creating a more accountable judicial body,⁸³ in only one way: by providing empirical data about the implications of other courts' solutions to similar problems.

The end result of the relativist's analysis may be consistent with the foreign law or consensus that it considered. But the relativist would not follow the foreign law based on an understanding that moral rules are universal or that international norms are otherwise morally relevant to shaping its own society's laws. A relativist's standards for determining what counts as reasoning and coherence on the one hand, and defective reasoning on the other, are relative to the particular culture, except insofar as moral judgments may turn on objective assessments of what the facts are. A court that borrows anything beyond empirical data from foreign courts is just importing new and different norms that are wrong according to the old norms of that court's native culture. Thus, relativists may consider adopting a foreign judgment only when they realize that their society's accepted moral standard for evaluating the conduct at issue was based upon what they now perceive as faulty empirical evidence. In essence, this view rejects the claim that law and morality are linked ontologically.

A similar analysis applies when relying on domestic consensus. One might think that each state has its own legal, political, and historical forces that frequently result in divergent conceptions of morally acceptable conduct: "[T]he fundamental values and character of the people of the various states actually differ, both from state to state and as between the state and national polities."⁸⁴ *Lawrence* arguably provides one example, where the states were nearly equally divided about whether sodomy should be outlawed. A metaethical relativist could therefore view individual states as distinct entities for the purpose of creating moral standards and reject the Supreme Court's reliance on its independent moral judgment to create constitutional rights. Unless the states' views are uniform, a traditional federalism would prevail: states would serve as laboratories for "novel social . . . experiments,"⁸⁵ thereby creating a constitutional structure in which state legislation and the common law replace national majoritarianism and independent moral judgments as sources of rights. A Supreme Court Justice "cannot [just] 'enforce

⁸³ See Jackson, *supra* note 9, at 260–61 (arguing that constitutional borrowing can contribute to a better quality product and impose the discipline of explanation upon the decision-maker).

⁸⁴ James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 816 (1992) (describing this view as a corollary of state constitutionalism, and then rejecting it). See Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421 (1996) (rejecting Gardner's claim that States hold significantly similar fundamental values).

⁸⁵ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

whatever he [or she] thinks best,”⁸⁶ because his or her view might not comport with whatever relative moral principle has taken hold in the society at issue.

In contrast, a relativist might conclude that states themselves are sufficiently similar so we can justifiably develop relative moral principles from a domestic consensus. Thus, a relativist might argue that “constitutional judges throughout the United States are engaged in a common enterprise, are colleagues in the effort to shape and explicate a common tradition of political morality.”⁸⁷ From this framework, the relativist’s method would precisely parallel *Bowers’s* approach: a majority view among the states creates or dooms the right at issue, even if the states do not unanimously agree. Of course, this version of relativism differs from the one described above because it views the source of our rights as a broader society than individual states. So if *Lawrence* did not claim that it was uncovering the essential meaning of liberty, and then identify an international consensus to confirm its opinion, we might justifiably conclude that *Lawrence* conforms to this different version of relativism. *Lawrence* ignored the divisiveness that the right in question generated, however, and instead relied on international consensus to confirm its independent moral judgment.

The lesson from these varying relativist theories about consensus is that the relativist would reject the idea of universal morality and, therefore, view a consensus as creating rights—unlike the realist, who views moral truths as transcending mere opinion and would thus rely on a consensus only to the extent it evinces morality’s essential nature. As between the relativists, the only question here would be the lens through which the Court should view the role of consensus—either a national consensus creates the right regardless of unanimous agreement, or, absent complete agreement, the decision to create the right resides with individual states.

IV. THE COURT’S RELIANCE ON CONSENSUS: REALISM VS. RELATIVISM

A. *Comparing and Contrasting the Court’s Divergent Approaches to Rights*

Arguments about right and wrong find their way into everyday conversation about abortion, the death penalty, and gay marriage. As demonstrated above, our lay assumptions and conclusions about these topics will fall somewhere along the spectrum between moral realism and

⁸⁶ Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2389 (2006) (reviewing STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005)).

⁸⁷ See Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 973 (1985) (describing this idea of unity as attractive to some and distinguishing many differences between states as strategic as opposed to value-based distinctions).

relativism, or will align with some other moral-philosophical theory. The Supreme Court's decisions are no different. We can better understand the Supreme Court's use of consensus, and its approach to interpreting constitutional rights, by considering the Court's decisions in light of these moral theories and the approaches to constitutional borrowing that can be derived from these theories.

Bowers and *Lawrence* represent opposing views on the source of our rights. *Bowers* refused to consider whether the right to engage in homosexual sodomy had a universal moral grounding. The Court focused its analysis on domestic consensus, essentially holding that the right did not exist because the people so concluded, which was evidenced by American legislative and historical sources. The Court decided *Lawrence* less than two decades after deciding *Bowers*, yet the Court's views about the source of our rights had changed dramatically in that time. Although nearly half of the states still outlawed sodomy, the Court injected its own views into the roiling debate over the right to engage in homosexual sodomy.⁸⁸ According to the Court, the concept of liberty itself, regardless of the public's moral judgments, required the states to recognize the right at issue. Indeed, the Court rejected Justice Scalia's argument that "[w]hat Texas has chosen to do is well within the range of traditional democratic action."⁸⁹ In other words, *Lawrence* implicitly rejected the relativistic notion that Texas's choice to criminalize gay sex represented a valid cultural variation within the nation, therefore implying that Texas was outvoted or that it was morally wrong, or both. Given the Court's conclusion that *Bowers* was incorrectly decided, even though no consensus existed at that time, *Lawrence* suggests at least that Texas was morally wrong.

In sum, Justice Scalia purported to stay out of the culture war over the right to engage in homosexual sodomy. In his judgment, the majority of Texans may choose to implement their own moral code and its attending implications for homosexuals. But *Lawrence* denied Texas this opportunity based on its conclusion that Texas's moral judgment conflicted with the requirements of liberty. Thus, for the *Lawrence* Court, the source of the right did not arise from consensus, and the scope of the right extended across state boundaries.

It is more difficult to align *Roper* with a particular moral philosophy, because we would first need to determine whether the majority actually thought that a national consensus existed. If Justice Kennedy relied on international opinion as mere evidence of the alleged right, but he knew that there was no national consensus, then his views about the source of our rights had changed little since *Lawrence*. Under this scenario, Justice Kennedy found the source of our rights in his understanding of universal moral principles, which were confirmed by international opinion. Yet if

⁸⁸ *Lawrence v. Texas*, 539 U.S. 558, 602 (Scalia, J., dissenting) (stating that "the Court has taken sides in the culture war").

⁸⁹ *Id.* at 603.

Justice Kennedy actually thought that international opinion confirmed the correctness of a national consensus against executing juveniles, then his approach in *Lawrence* differed from his approach in *Roper*.

It makes no difference how we resolve these issues, however, because the philosophical and doctrinal problems are still with us. If the Court's approaches in *Lawrence* and *Roper* are inconsistent—one interpreting the right in light of liberty's requirements, the other interpreting the right by reference to national opinion—the Court's doctrinal equivocation requires correction, and its philosophical incoherence puts *Lawrence* in conflict with relativism and *Bowers* in conflict with realism.

Of course, Justice Kennedy may attempt to reconcile *Roper* and *Lawrence* by asserting that the two legal doctrines at issue required different analyses. The Eighth Amendment required *Roper* to consider the standard of decency adopted by a well-ordered society, which arguably may include any society, whereas *Lawrence* asked whether the right at issue was fundamental.⁹⁰ But this distinction should trigger at least three objections. First is Justice Scalia's response that international opinion should neither confirm nor undermine the validity of American legal principles.⁹¹ In other words, a well-ordered society means a well-ordered American society. Second, as in *Palko*, it is unclear whether *Lawrence* should have been evaluating, as a matter of precedent, the essential meaning of the right at issue or the public consensus about the right. And most important, even if Justice Kennedy can fend off these attacks, *Roper* would still raise the same philosophical issues as *Bowers*—that is, whether public consensus ought to be the basis for creating constitutional rights and, if so, whether individual states share “a common tradition of political morality”⁹² so that we can justifiably develop moral principles from a national consensus.

The inconsistencies in *Bowers*, *Lawrence*, and *Roper* reveal only the tip of the iceberg. As demonstrated in Part II, the wide-ranging views about the appropriate role of consensus complicate the issues even further:

- Some language in *Palko* suggests that consensus matters for the purpose of creating a constitutional right, while other

⁹⁰ In his dissent, Justice Scalia asserted that *Lawrence* applied rational-basis review, therefore suggesting that the Court was not interpreting a fundamental right. *Id.* at 594. *But see* Posting of Eugene Volokh to The Volokh Conspiracy, http://volokh.com/2003_07_13_volokh_archive.html#105846348887661956 (July 17, 2003) (“Some people—including, in some measure, Justice Scalia in his dissent—have argued that *Lawrence v. Texas* doesn't really recognize sexual autonomy as a fundamental right, and that restrictions on sexual behavior are still permissible simply if they have a rational basis. I don't think that's right.”). *Lawrence* brought its independent moral judgment to bear on the meaning of liberty, however, and so the debate over whether the right was fundamental has little relevance here.

⁹¹ See *Roper v. Simmons*, 543 U.S. 551, 628 (2005) (Scalia, J., dissenting).

⁹² See Sager, *supra* note 87, at 973.

language suggests that consensus only evidences what is already a constitutional right;⁹³

- *Benton* considered national consensus as a basis for determining whether the right existed;⁹⁴
- *Bowers* followed *Benton*'s approach;⁹⁵
- *Lawrence* overruled *Bowers*, and then ignored relative understandings of the right;⁹⁶
- *Roper* defined the right either by employing first principles, as in *Lawrence*, or by relying on a national consensus to define the right, as in *Bowers*;⁹⁷
- Chief Justice Burger's concurrence in *Bowers* relied on his moral and religious views about the right at issue;⁹⁸ and
- Justice Scalia refused to consider international or foreign consensus in *Roper*, even as evidence about a particular way in which the right has been understood.⁹⁹

It may be true that the Justices who advanced these various views were influenced by their moral beliefs. As Karl Popper has noted about scientists, which equally applies to judges, the scientist's point of view is provided "by his theoretical interests, the special problem under investigation, his conjectures and anticipations, and the theories which he accepts as a kind of background: his frame of reference, his 'horizon of expectations.'"¹⁰⁰ Similarly, Stephen Gottlieb has asserted that the Justices decide cases based on their own non-instrumental moral judgments.¹⁰¹ He claims that "there is a division among the justices that they do not discuss but that is so basic to their thought that it comes out as a set of implicit assumptions that drive a very large proportion of what they do."¹⁰² For example, although Gottlieb argues that the Rehnquist Court's conservative bloc of Justices rejected relativism, thereby creating a gateway to defining right and wrong, he notes that the Justices have denied that their jurisprudence reflected their personal ideologies.¹⁰³

⁹³ See *supra* notes 15–25 and accompanying text.

⁹⁴ See *supra* notes 26–33 and accompanying text.

⁹⁵ See *supra* notes 34–36 and accompanying text.

⁹⁶ See *supra* notes 43–45 and accompanying text.

⁹⁷ See *supra* notes 46–66 and accompanying text.

⁹⁸ See *supra* notes 37–38 and accompanying text.

⁹⁹ See *supra* notes 65–67 and accompanying text.

¹⁰⁰ KARL R. POPPER, *Science, in* CONJECTURES AND REFUTATIONS (1965), reprinted in CHALLENGES TO EMPIRICISM 128, 143 (Harold Morick ed., 1980).

¹⁰¹ See STEPHEN E. GOTTLIEB, *MORALITY IMPOSED* (2000).

¹⁰² *Id.* at xiv–xv.

¹⁰³ *Id.* at 26–27. See also *id.* at xii (arguing that Justice Scalia's views do not uniformly comply with his textualist approach to interpretation); DWORKIN, *supra* note 71, at 131 (arguing that "Scalia wants to be seen to embrace fidelity, but he ends by rejecting it"); JACKSON, *supra* note 9, at 265 (expressing her own skepticism about whether Justice Scalia's textualism constrains judges as much as he thinks it does). For a discussion of textualism, see generally Justice Scalia's *A Matter of Interpretation*.

This Article does not add another voice to that debate. Whatever the validity of those arguments, assume for our purposes here that Justice Scalia refuses to consider foreign laws because using them effectively would be nearly impossible. Assume that Justice Scalia refused to join *Lawrence* based, in part, on his conclusion that the Court has expanded the Due Process Clause well beyond the Framers' original intent and the constitutional text, not because he rejects realism. Also assume that we can explain the other Justices' views with similar theories. In other words, assume that the Justices' views reflect claims about the Constitution's text and the empirical usefulness of consulting foreign and international opinions—not about a particular moral-philosophical view.¹⁰⁴

Given these assumptions, one may wonder how moral philosophy still matters to the debate about constitutional borrowing. One may argue that a justice can maintain his or her position as a realist, but reject the proposition that constitutional borrowing sheds an empirical light on the content of universal moral truths. One could also argue that the Court may shun constitutional borrowing out of a concern for its proper role in a democracy even if it believed that realism is correct.¹⁰⁵ In particular, the Justices might recognize that moral issues are inherently controversial and conclude that they have no special claim to the authority that the public lacks. So even if they think that moral questions have objective answers, they might still defer to public opinion rather than impose their own views about what those objective answers are. Or, they might remain agnostic about realism and think that regardless of whether morality is objective or relative, in their role as justices they should defer to public opinion.

These objections lack force for a variety of reasons, including the fact that none of the objections can justify the Court's failure to adopt a consistent method for defining constitutional rights. Nor can they explain decisions like *Lawrence*, where the Justices did impose their independent moral judgments. But these arguments, which were advanced in Part II, are secondary to this Article's two key points: first, the methods the Court has chosen implicate and often conflict with various moral-philosophical theories; and second, the method the Court chooses to define an alleged right dictates whether the right exists and, if it does, what the right means, regardless of the moral-philosophical views

ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1997); *see also* Tushnet, *supra* note 66, at 1228–29 (discussing how one's view of the nature and function of a particular constitution will influence the way in which one interprets that constitution).

¹⁰⁴ In responding to Judge Richard Posner's claim that judges frequently "duck" moral questions and instead justify their positions by making "claims 'about the political or judicial process,'" Dworkin asserts that judges actually make "moral judgments about how the powers of government should be distributed and exercised, and when, if at all, these powers should be limited out of respect for individual moral rights." DWORKIN *supra* note 71, at 86–87.

¹⁰⁵ *See generally* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (2d ed. 1986) (arguing that the Supreme Court should make rulings consistent with an emerging public consensus).

of the Justices applying the method. The first key point was discussed in Parts II and III above. Let's now turn to the second key point.

B. Validity of a Legal Claim Based on the Existence of a Consensus Turns on the Validity of a Moral Claim

Legal rules do not exist in a vacuum. The policies, principles, and standards that prompted and informed the creation of the rules matter. As Ronald Dworkin has argued, a doctrinal concept—that is, “the law’ of some place or entity”¹⁰⁶—is an interpretive concept,¹⁰⁷ by which he means that the process of creating legal rules requires that we develop a set of “values that best justifies the practice [in which the concept figures] and that therefore should guide us in continuing the practice when at the next stage we frame truth conditions for discrete propositions of law.”¹⁰⁸

The key question is how we ought to uncover those values. According to Dworkin, we do that by studying an aspirational concept of law,¹⁰⁹ which he defines as the “ideal of legality or the rule of law.”¹¹⁰ For example, while some philosophers hold that the rule of law is upheld when officials are required to and do act consistently with established standards, others argue that legality holds when the established standards respect certain basic rights of individual citizens.¹¹¹

Once we have these values in place, “we construct an account of the truth conditions of propositions of law” in the light of these values,¹¹² which, in turn, makes the truth of particular legal propositions depend upon the value we have identified.¹¹³ In other words, legal reasoning “is an exercise in constructive interpretation, that our law consists in the best justification of our legal practices as a whole, that it consists in the narrative story that makes of these practices the best they can be.”¹¹⁴ Thus, attorneys argue about legal obligations and rights by making use of standards that operate not as rules, but as principles and policies.¹¹⁵ Importantly, these principles are “to be observed, not because [they] will advance or secure an economic, political, or social situation deemed desirable, but because [they are] a requirement of justice or fairness or some other dimension of morality.”¹¹⁶

This general process of constructing legal doctrines reveals how the validity of the Court's varying uses of consensus depends upon the validity of a moral claim. The relativist's aspirational concept of law—his

¹⁰⁶ DWORKIN, *supra* note 71, at 2.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 13.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 5.

¹¹¹ *Id.*

¹¹² *Id.* at 13.

¹¹³ *See id.* at 13–14 (providing an example of this process).

¹¹⁴ RONALD DWORKIN, *LAW'S EMPIRE* at vii (1986).

¹¹⁵ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22 (1977).

¹¹⁶ *Id.*

or her ideal of legality—would require that fundamental rights be interpreted in light of the preferences and conventions of the Court’s native culture, not a purported conception of universal moral rules. Thus, the relativist will have constructed an account of a legal proposition’s validity consistent with his or her important relativistic moral values. The doctrinal theory based on this approach—consensus as rights creating versus consensus as evidentiary—will make the validity of particular legal propositions, and the method for developing those propositions, depend upon how well they comply with the already-identified value.

It follows that a person’s particular moral-philosophical view of rights partly dictates whether he or she would make a legal proposition’s validity depend upon an international or domestic consensus, because the realist thinks that rights transcend consensus whereas the relativist thinks that a consensus creates rights.¹¹⁷ Dworkin described a similar distinction in a different context, his critique of originalism:

We have to choose between an abstract, principled, moral reading [of the Eighth Amendment] on the one hand—that the authors meant to prohibit punishments that are *in fact* cruel as well as unusual . . . ; and a concrete dated reading on the other—that they meant to say that punishments widely thought cruel as well as unusual *at the time they spoke*, or discriminations *then generally understood* to reflect unfair distinctions, are prohibited.¹¹⁸

The Court has made choices like this many times. It has defined rights based on its beliefs about the essential meaning of liberty, and it has defined rights based on its assessment of public opinion. The various paths the Court has chosen determined whether the right at issue existed and, if it did, what the right meant. For example, the *Lawrence* Court would have held in *Bowers* that the meaning of liberty itself prohibited the states from violating the right to engage in homosexual sodomy, despite the lack of a consensus. The outcome of these cases turned on the fact that *Lawrence* purported to uncover the essential meaning of liberty, not whether the alleged right was rooted in our people’s

¹¹⁷ I say “partly” because even though our moral judgments weigh heavily on this choice, we must also justify our choice in a particular conception of our Constitution. That conception might not parallel our individual moral judgments. *See, e.g.*, Posner, *supra* note 72, at 1696 (stating that there is no convincing evidence that the Framers “were doing philosophy” when they drafted the Constitution). *But see* DWORKIN, *supra* note 71, at 85–86 (arguing that judges necessarily decide moral questions when deciding many cases). A legal realist may criticize this conception of law, arguing that law depends on a judge’s subjective views and not certain truth conditions. This critique would not undermine this Article’s argument, however, because developing the law based on one’s subjective views still puts the ultimate legal conclusion in tension with a particular moral philosophy. This tension is especially obvious when the subjective views that the judge relies upon include a particular moral theory.

¹¹⁸ DWORKIN, *supra* note 71, at 121 (emphasis added).

conscience, whereas *Bowers* guided its inquiry by turning to the public's consensus, not to a transcendent conception of liberty.¹¹⁹

Thus, the relativist's aspirational concept of law closely parallels the principles that underpin *Bowers*.¹²⁰ *Bowers* attempted to synthesize national opinion to determine whether the right at issue existed. If the right did exist, it existed because a majority of the population said so. The opinion did not consider whether broader moral truths might justify a different outcome. Nor did *Bowers* compare the alleged right against a particular catalog of moral rules. In sum, *Bowers*'s sociological claim about morality (hardly anyone believed that engaging in homosexual sodomy should be a protected right) dictated its claim of morality itself (the right did not exist).¹²¹ In contrast, the realist's aspirational concept of law is consistent with the method applied in *Lawrence*.¹²² *Lawrence* recognized the right to engage in homosexual sodomy based on its view that the inherent meaning of liberty required the Court to recognize the right. This conception of liberty trumped any opposing views. Cultural variations became irrelevant.

Put simply, a relativist who thinks that each state's opinion represents an equally valid cultural variation will reject *Lawrence*'s approach, because the legal proposition sought to be imposed nationally—that a law prohibiting homosexual sodomy violates the Due Process Clause—could not have been valid when the states were so widely divided. But a realist may approve of *Lawrence* based on the view that rights ought to be defined after studying liberty's essential meaning, not by nose-counting those with views about the right in question.

Roper presents similar issues.¹²³ If we take *Roper* at its word, a national consensus shaped the Eighth Amendment's meaning, in which case the aspirational concept of law that undermines *Bowers* would also undermine *Roper*. But if Justices O'Connor and Scalia were correct that *Roper* defined the Eighth Amendment by allowing international and foreign opinion to shape its independent moral judgment,¹²⁴ *Roper* used international consensus only as evidence of the constitutional right, in which case *Roper* raises substantially the same problems as *Lawrence*.

All of this is to say that a person's willingness to accept the validity of *Bowers*, *Lawrence*, and *Roper* will depend upon whether the holdings of these decisions conform to the values that the person identifies when studying his or her aspirational concept of law. Should we leave these decisions to the states and their equally valid cultural variations—a new political-question exception to the principle of judicial review? Or should

¹¹⁹ See *supra* notes 41–45 and accompanying text.

¹²⁰ See *supra* notes 34–36 and accompanying text.

¹²¹ See DWORKIN, *supra* note 71, at 75–76 (distinguishing between the domain of moral sociology and claims of morality itself).

¹²² See *supra* notes 41–45 and accompanying text.

¹²³ See *supra* notes 46–54 and accompanying text.

¹²⁴ See *supra* notes 58–64 and accompanying text.

we attempt to synthesize those individual states' judgments because the meaning of liberty and morality equal the sum of these parts? Perhaps we should disregard popular opinion based on the belief that liberty's essential meaning transcends a consensus. In the end, the relativist would reject the notion that we can derive liberty's essential meaning from a universal moral code, therefore eliminating an approach that treats substantive rights as objective truths. And the right to be free from cruel and unusual punishment will mean something different to Justice Scalia, who is unwilling to look to foreign or international opinion and would prefer to ground the right in a national consensus,¹²⁵ than it will to Justice Kennedy, who arguably based his decision on his independent moral judgment. In any event, Justice Kennedy relied upon international and foreign opinion when explaining his conclusions.¹²⁶

C. Failure to Understand the Methods Used to Define Constitutional Rights Is Failure to Understand the Rights Themselves

The method chosen to define a constitutional right determines whether the right exists, what the right means, and how broadly the scope of the right extends. As discussed, the methods chosen to define constitutional rights also come with particular moral-philosophical assumptions about rights. Yet neither judicial opinions nor scholarship discuss the Justices' various methods in light of realism or relativism, or any other moral-philosophical theory. In essence, "the approach of implicitly answering fundamental questions by not asking them pervades" this subject.¹²⁷ "Many teachers find it difficult or inappropriate to raise the fundamental questions . . . [and f]ew . . . have a background in moral philosophy or other disciplines that permits a confident approach to ultimate questions."¹²⁸ Thus, an information gap exists between what our constitutional rights mean and how the Court perceives their meanings.¹²⁹

¹²⁵ *Roper v. Simmons*, 543 U.S. 551, 608 (2005).

¹²⁶ *Id.* at 575–78.

¹²⁷ See Cramton, *supra* note 4, at 512 (making this argument about legal education).

¹²⁸ *Id.* at 512–13.

¹²⁹ Bernard Williams discusses a similar distinction between the considerations one accounts for when attempting to make a virtuous decision and the way in which one would define virtue during reflective argumentation. See generally BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 7–21 (1985). Williams notes that the considerations will not necessarily be identical or similar to the substance of the argumentation that attempts to define virtue. *Id.* It does not follow from Williams' position that reflective argumentation about ethics is contradictory to or in tension with practical moral decision-making. The current state of constitutional borrowing, however, creates an irreconcilable division between rights as they are perceived through the lens of American law and constitutional borrowing, and the actual meaning of rights as they are shaped by unexamined moral-philosophical theories.

The Court has created this gap by glossing substantive constitutional provisions with judicially manageable standards designed to interpret and apply the Constitution.¹³⁰ For example, *Palko* described two tests for determining whether a right was incorporated into the Fourteenth Amendment, and *Lawrence* and *Bowers* applied different tests when deciding whether the Constitution recognized the right to engage in homosexual sodomy.¹³¹ The methods employed, those relying on consensus as evidentiary versus those relying on consensus as rights-creating, implicate competing values that affect the validity of the legal propositions derived from applying those methods.

Although these methods implicate competing moral-philosophical views, the Court continues to define rights without explicitly recognizing or explaining the competing theories that may justify or undermine its conclusions.¹³² By failing to recognize and address this problem, the Court has disconnected the various methods that it has employed from the moral theories bearing on how it ought to define rights. This disconnect creates confusion about the source and meaning of our rights and continues to perpetuate an inadequate and ever-changing theory of consensus as a basis for interpreting the Constitution.

V. CONCLUSION

The problems identified in this Article have been with us since the Court began considering consensus to shape substantive rights. But neither commentators nor courts address the fact that judges necessarily implicate moral-philosophical problems when they choose to consider or ignore foreign law in decisions shaping fundamental rights. Likewise, a similar problem arises when relying (or not) on a domestic consensus. Thus, the decision whether to rely on domestic or international consensus continues to rest on often inconsistent and always unexamined premises.

Given the importance of these issues, we must ask ourselves where to go from here. Some scholars suggest that discussing the propriety of constitutional borrowing in court decisions is quite remarkable.¹³³ Others

¹³⁰ See generally Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006) (describing how courts use judicially manageable standards to interpret and apply constitutional provisions that themselves would not pass muster as judicially manageable standards).

¹³¹ See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); *Lawrence v. Texas*, 539 U.S. 558, 571 (2003); *Bowers v. Hardwick*, 478 U.S. 186, 191–92 (1986).

¹³² See Larsen, *supra* note 4, at 1285 (“New forms of constitutional argument have a way of perpetuating themselves.”); Jackson, *supra* note 9, at 263 (“[I]f Justices refer more to the constitutional decisions of other courts, this practice to some extent will become self-legitimizing, a phenomenon that is already occurring around the world.”).

¹³³ See, e.g., Fried, *supra* note 76, at 818 (observing and commenting on the significant fact that the debate over constitutional borrowing has been brought from law reviews into the Supreme Court’s opinions).

have argued that we ought to rely on an “incompletely theorized” approach to law, thereby shunning high-level moral philosophy in adjudication.¹³⁴ Similarly, some philosophers have claimed that modern moral philosophy is incapable of addressing problems posed by the modern world.¹³⁵ In contrast, Dworkin rejects the idea that moral philosophy has no place in our judicial decisions. After rejecting moral relativism as a “deeply confused” albeit popular position, Dworkin implores us not to act like ostriches:

I agree with the critics that not all judges are trained in philosophy. But if my arguments are sound we have no choice but to ask them to confront issues that, from time to time, are philosophical. The alternative is not avoiding moral theory but keeping its use dark, cloaked under all the familiar legal phlogistons like the mysterious craft of lawyer-like analogical reasoning. . . . [Ostriches] belong in the desert and perhaps on the table But they do not belong on the bench.¹³⁶

Clarity in judicial decision-making is usually a virtue. Clear, consistent Supreme Court opinions can provide lower courts with the guidance they need to decide thousands of cases. People can order their affairs knowing the consequences of their actions. And governments can predict what actions would violate a person’s constitutional rights. We rely on judicial decisions every day, sometimes knowingly and other times by conforming our conduct to socially acceptable behavior that itself became that way, in part, because of judicial decisions. Our legal system requires more than an unpredictable body of rights that expands and contracts along with the Court’s inconsistent doctrinal choices. But crafting a way forward presents a host of issues beyond the scope of this Article. These issues implicate core questions about the proper role of an unelected Supreme Court that decides cases in a democracy. We should not necessarily demand that our legal principles parallel our moral principles. But we must justify how the Supreme Court can make moral decisions—does a fetus have a right to life; does an adult have the right to decide how to die—and then choose to ignore the complex moral-philosophical theories that bear directly on these questions. And if we hold the opposite view of the Supreme Court’s role, we must locate the Court’s authority to impose its own moral judgments.

The Supreme Court will continue to face other vexing problems regarding the role of international and foreign law in our

¹³⁴ CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 38–41 (1996); *see also* Posner, *supra* note 72, at 1696 (stating that there is no convincing evidence that the Framers intended that judges interpret the Constitution in accordance with moral theory).

¹³⁵ *See, e.g.*, WILLIAMS, *supra* note 129 (criticizing the rationality-based focus of modern moral philosophy and arguing that it is incapable of satisfying the demands of the modern world—but allowing for the possibility that ancient philosophy is up to the task).

¹³⁶ DWORKIN, *supra* note 71, at 73.

jurisprudence.¹³⁷ To take but one example of a problem that may arise, consider the paradox in legal positivism concerning what a positivist judge should do when the statute or constitutional provision he or she is interpreting literally says, “judges should apply natural law in applying this provision.” If the judge applies natural law, is the judge being a positivist because the positivist text sanctioned resort to natural law? Or should the judge refuse to apply natural law on the theory that it is inherently inappropriate for a legal positivist ever to do so? The Supreme Court may confront a similar paradox with respect to constitutional borrowing: what happens if an American law literally incorporates by reference international or foreign standards, or otherwise requires the Court to evaluate the existence of a consensus in cases involving constitutional rights? What if a precedent or federal law prohibited the Court from considering such a consensus?¹³⁸

These problems remain unsolved. And until we solve them, the Court’s approach to consensus jurisprudence—ignoring the controversial theories lurking beneath its decisions—will hardly embody the transparent, comprehensive, and coherent approach to adjudication that we have come to respect and ought to demand.

¹³⁷ See Martha Minow, Op-Ed, *High Stakes for Legal Issues*, THE BOSTON GLOBE, July 21, 2005, at A13.

¹³⁸ See, e.g., H.R. Res. 473, 111th Cong. (2009) (stating that “the meaning of the Constitution of the United States should not be based on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution of the United States.”).