International human rights and United States law: predictions of a courtwatcher

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For a number of years, international law scholars like Harold Koh and activists like Dorothy Thomas have admonished domestic civil rights lawyers to "bring international law home." Domestic activism is needed, according to Thomas, because the United States government has systematically tried to "shield itself from international accountability" by encouraging "a kind of learned insularity" of civil rights groups. As a result, civil rights groups that are adamant in calling for domestic reforms to address race and gender discrimination and other civil rights issues have rarely framed those demands within the international context of human rights, and have seldom linked arms with groups outside the United States in pressing those claims.

In large part, the approach of civil rights groups has been pragmatic. Civil rights lawyers have limited budgets, limited human resources, and must make hard decisions on how to focus their work. Until relatively recently, groups like the ACLU, the NAACP Legal Defense and Education Fund, and NOW Legal...
Defense and Education Fund, as well as other public interest legal groups, looked almost exclusively to litigation as the driving force of their work to expand and protect civil rights in this country.\(^3\) Legislative and media efforts have expanded in the past few years (and those efforts are more likely to have international components), but litigation is still at the core of civil rights legal work.\(^4\) Like other litigators, civil rights groups advocates look at judges, and assess what they will find persuasive. International law has not fit that criteria. Indeed, some litigators have been concerned that citations to international law would signal an essential weakness in their case under domestic law.

That status quo is rapidly changing, however, and that is what I want to explore with you today. First, I want to bring you up to date on the Supreme Court's rather sparse record of looking to international human rights law in ruling on domestic civil rights issues. Second, I will explain why it is important that the Supreme Court begin routine and regular examination of international and comparative law norms when it considers domestic civil rights issues. To be clear, I am not arguing that courts should cite international law as controlling authority, though that may sometimes be appropriate, but simply as persuasive authority. It seems to be a small step, but surprisingly it is one that the courts have yet to embrace. To support this argument, I will describe several analogous situations where United States courts have changed their approaches to decision-making in response to changes in society. Finally, I will discuss two recent Supreme Court cases to assess what impact, if any, this new approach might have on civil rights decisions rendered by United States courts.

\section*{International and Foreign Law in United States Courts}

The cases themselves tell the story. The Supreme Court famously ruled in \textit{The Paquete Habana} that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction,"\(^5\) but that principle has been very selectively applied. In a few areas, courts regularly look abroad. For example, the United States law on political asylum and refugee

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\footnote{See Helen Hershkoff & David Hollander, \textit{Rights Into Action: Public Interest Litigation in the United States}, in \textit{MANY ROADS TO JUSTICE} 89, 93 (Mary McClymont & Stephen Golub eds., Ford Foundation 2000) (noting the associate director of the NAACP Legal Defense and Education Fund marked 1980 as the end of expansive civil rights litigation).}
\footnote{\textit{Id.} at 111-19.}
\footnote{175 U.S. 677, 700 (1900).}
\end{footnotes}
status specifically incorporates international norms, which federal courts construe and apply on a daily basis.\textsuperscript{6} Similarly, both federal and state courts dealing with foreign defendants, particularly foreign sovereigns, often look to international legal doctrines and other countries' practices, as do courts examining issues involving the extent of United States' jurisdiction on the high seas.\textsuperscript{7}

In contrast, international human rights norms are cited much more rarely. Amicus briefs addressing international human rights law—like that filed in 1982 in \textit{Bob Jones University v. United States}\textsuperscript{8} by the International Human Rights Law Group\textsuperscript{9}—are typically ignored by the Supreme Court. Just last year Supreme Court Justice Ruth Bader Ginsburg noted that India's and Germany's Supreme Courts have looked at international precedents to evaluate affirmative action initiatives in their respective countries, but, she added, "[t]he same readiness to look beyond one's own shores has not marked the decisions of the court on which I serve."\textsuperscript{10}

When Justice Ginsburg spoke, the Supreme Court's most recent citation to the fifty-year-old Universal Declaration of Human Rights had been twenty-eight years before, in a dissenting opinion by Justice Marshall.\textsuperscript{11} Now there is a more recent citation, but one with even less precedential value. In 1999, Justice Breyer, dissenting from the Court's denial of certiorari in an Eighth Amendment challenge to the execution of a prisoner who had been on death row for more than twenty years, cited the courts of Canada, India, Great Britain, Zimbabwe, and the Universal Declaration of Human Rights that had found such prolonged delays to violate human rights.\textsuperscript{12} A United States Supreme Court majority


\textsuperscript{7} \textit{United States v. Alaska}, 503 U.S. 569, 588 n.10 (1992) (referring to international law principles regarding the impact of coastline alterations on international boundaries in an effort to resolve a federal-state territorial dispute); \textit{Aquamar S.A. v. Del Monte Fresh Produce N.A.}, 179 F.3d 1279 (11th Cir. 1999) (determining whether an Ecuadorian agency had waived sovereign immunity for the purpose of a third-party action against the agency).

\textsuperscript{8} 461 U.S. 574 (1983).

\textsuperscript{9} Motion for Leave to File Brief Amicus Curiae and Brief of the International Human Rights Law Group, \textit{Bob Jones University v. United States}, 461 U.S. 574 (1983) (Nos. 81-1, 81-3).


\textsuperscript{12} \textit{Knight v. Florida}, 120 S. Ct. 459, 463-64 (1999) (Breyer, J., dissenting).
"has never referred to any decisions of the European Court or Commission of Human Rights." 13 Indeed, some of the Justices are openly hostile to looking abroad. When Justice Breyer referred in a 1997 dissent to federal systems in Europe, the majority responded, "[w]e think such a comparative analysis inappropriate to the task of interpreting a constitution." 14 The majority opinion was written by Justice Scalia and joined by Chief Justice Rehnquist and Justice Kennedy, with concurrences by Justices O'Connor and Thomas. In 1999, again responding to Justice Breyer's citations of foreign and international authority, Justice Thomas suggested that if there was "any such support in our own jurisprudence, it would be unnecessary... to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council." 15

However, this demarcation between international human rights and domestic civil rights law is breaking down. A few state courts and lower federal courts are dabbling in comparative and international law as they consider civil rights issues. I predict that within the next five years, and perhaps much sooner, we will also see a change in the Supreme Court's treatment of international customary law, international conventions and other states' practices.

This change will be much less than the wholesale incorporation of international law that many internationalists have argued for, and which may yet come. Rather, in the near term, the Court will continue to police the limits of its judicial authority insofar as Congress and the Executive have generally deemed the conventions to which the United States is a signatory to be non-self-executing. That is, courts will not override that controversial designation by permitting private rights of action in domestic courts directly under international instruments that have not been independently implemented by Congress. But domestic courts, and particularly the Supreme Court, will begin to view international law in much the same way that social science data was first viewed by courts during the Progressive era—as useful and potentially persuasive authority outside of the narrow framework of precedent. And, like the chicken that precedes the egg, once the courts signal an interest in

15 Knight, 120 S. Ct. at 459 (Thomas, J., concurring).
international law, domestic civil rights groups will quickly re-allocate resources to follow suit.

THE IMPETUS FOR CHANGE

Why, after decades of resistance, are United States courts on the verge of this change in perspective? The issue is, for want of a better word, legitimacy. Globalization has now so pervaded our national culture and identities that a court that consistently ignores international precedents and experiences when considering human rights issues, even if merely for their persuasive or moral weight, risks irrelevancy. Historically, the United States judicial system has not ignored, but responded, to such threats to its legitimacy. Based on that history, it would be remarkable if a response to the changes marked by globalization and the breakdown of the dichotomy between national and international human rights law were not in the offing.

Contemporary examples of courts' responses to such challenges to legitimacy abound. In the 1980s and 1990s, federal and state courts responded to challenges of institutionalized bias by instituting race and gender bias task forces across the nation. Challenges to the racial, ethnic and gender composition of the judiciary have led to increased diversity on the bench. Cameras have been put in courtrooms across the country in part to permit broader access to this branch of government and as a way to head off further challenges to legitimacy.

One might argue that these changes are administrative rather than legal, and have little effect on the analysis in judges' actual decisions. But race and gender bias task forces identified a host of judicial practices that often do, in fact, have an impact on ultimate

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17 See Justice Ming W. Chin, Keynote Address: Fairness or Bias?: A Symposium on Racial and Ethnic Composition and Attitudes in the Judiciary, 4 ASIAN L.J. 181, 187 (1997) (observing that when courts are perceived as biased or unjust "the courts lose legitimacy as dispute resolvers and instead may be perceived as irrelevant or, worse, as instruments of oppression" (quoting Todd Peterson, Studying the Impact of Race and Ethnicity in Federal Courts, 64 GEO. WASH. L. REV. 173, 174 (1996))); Carl Tobias, Closing the Gender Gap on the Federal Courts, 61 U. CIN. L. REV. 1237 (1993).

18 See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980) (noting the "therapeutic" value that public access to criminal trials has for the community); Dolores K. Sloviter, If Courts are Open, Must Cameras Follow?, 26 HOPSTRA L. REV. 873, 886 (1998) ("[T]he open trial enhances the quality, and safeguards the integrity, of the fact-finding function, thereby serving as a check upon the judicial process.").
case outcomes. For example, in the California case of \textit{Catchpole v. Brannon}, \footnote{42 Cal. Rptr. 2d 324 (Cal. Ct. App. 1995).} the trial judge hearing a sexual harassment case concluded that, because the victim did not resist a sexual assault by her supervisor, it could be inferred that she pursued her supervisor. \footnote{Id. at 451.} When the litigant claimed on appeal that the decision was tainted by gender bias, the California Court of Appeals reversed and remanded for a new trial before a different judge. \footnote{Id. at 454.} According to the court,

[t]he court's remarks throughout trial show that its conception of the circumstances that may constitute sexual harassment were based on stereotyped thinking about the nature and roles of women... The average person on the street might therefore justifiably doubt whether the trial in this case was impartial.\footnote{Id.}

Further, even if bias were systematically eliminated from judicial proceedings, the composition of the bench itself can play a role in decision-making. As Justice O'Connor recognized in \textit{J.E.B. v. Alabama}, \footnote{511 U.S. 127 (1994) (O'Connor, J., concurring).} an attack on sex-based peremptory challenges, exclusion of one sex from the legal system can result in exclusion of experiences and perspectives that influence a court's approach. According to Justice O'Connor, "[w]e know that like race, gender matters... one need not be a sexist to share the intuition that in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case."\footnote{Id. at 148-49 (O'Connor, J., concurring); see also Chin, supra note 17, at 192 ("If our bench becomes more diverse, other areas of the judiciary are inevitably affected.").} In short, it would be wrong to say that courts' efforts to respond to challenges to their legitimacy, based on race and sex bias, and the composition of the bench, were superficial and unrelated to the core work of the courts.

But there is a better example: courts' deliberate decision in the early 1900s to begin examining social science data as an aid to reaching decisions. The so-called "Brandeis brief" submitted in \textit{Muller v. Oregon}, \footnote{208 U.S. 412 (1908).} decided in 1908, formalized that approach, but it did not come out of thin air. It was a direct response to the Progressive movement's theory of "scientific" governance. As early as the 1880s, urban settlement house residents were using social science techniques to gather sociological and demographic data with...
an eye toward influencing public policy. Information on the health of children in the ghettos, licensing of midwives, justice in the criminal courts, child labor, the work experiences of recent immigrants, and the housing conditions in tenements, were all gathered and reported, with the idea that such information would form the basis for a new enlightened and scientific approach to government.26

The Brandeis brief, prepared largely by settlement house activists Florence Kelley and Josephine Goldmark, collected social science data on women's work experiences and argued that legal limitations on hours of labor were necessary “for the protection of [women's] health and safety.”27 In reviewing the brief, the unanimous United States Supreme Court noted that the data cited “may not be, technically speaking, authorities, and in them there is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation . . . .”28 In its well-known conclusion, the Court stated, “[w]e take judicial cognizance of all matters of general knowledge.”29

The Muller v. Oregon Court accepted this social science data not because it was necessary to reach a decision, but because a decision which took this data into account would be better—more defensible as a matter of public policy, and responsive to the growing public expectation that decisions by all branches of government would reflect the growing body of social science knowledge as well as logical reasoning. Of course, Muller created a new (and still thriving) cottage industry in developing social science evidence to submit for judicial consideration. It led directly to the presentation of Kenneth Clark's psychological studies in Brown v. Board of Education,30 cited by the Supreme Court to support the claim that segregation had a detrimental effect on African American children.31

More recently, underscoring the continued level of acceptance that

28 Muller, 208 U.S. at 420.
29 Id. at 421.
31 See id. at 494 n.11.
social science data enjoys in the courtroom, the joint opinion of Justices O'Connor, Kennedy and Souter issued in Planned Parenthood v. Casey32 recites social science data on domestic violence as one of the factors to be weighed in determining whether requiring spousal notification prior to abortion constitutes an "undue burden." According to that opinion, "[t]his information... reinforce[s] what common sense would suggest... there are millions of women in this country who are victims of regular physical and psychological abuse at the hands of their husbands."33

One little discussed fact about the Brandeis brief in Muller v. Oregon is that it was not limited to social science data. The brief also included extensive citation of foreign laws, including the relevant laws concerning women's work of Great Britain, France, Switzerland, Austria, Holland, Italy, and Germany. The Supreme Court did not single out this information, but treated it as part of the "general knowledge" cognizable by the Court. Indeed, only eight years after the Court's decision in Paquete Habana, the Supreme Court in Muller likely viewed its citation of foreign law as one of the less controversial aspects of its ruling.

Subsequent analyses of the Brandeis brief have also skimmed over its reliance on foreign law. For example, the brief has been analyzed as illustrating the dichotomy between adjudicative facts—the facts presented by the parties before the court—and legislative facts, i.e., social science data that a legislature would consider.34 However, one would be hard-pressed to argue that foreign laws fall on either side of that dichotomy. Thus, though the Muller decision led to a now firmly established tradition of considering social science data, the decision did not establish that same tradition with respect to foreign and international law.

Today, however, the Court's continued legitimacy requires another principled response, on the order of the Court's decision in Muller. To maintain their legitimacy, courts—and particularly higher courts—considering human rights issues must routinely consider the practices of other nations and the international norms reflected in customary international law and international instruments.

33 Id. at 892-93.
The domestic changes in recent years that mandate this expanded view are obvious to all Americans. As New York Times reporter Barbara Crosette recently wrote, "national boundaries have become nearly as irrelevant to economic and political tides as they are to infectious diseases or popular music." Just as the social science data developed by Progressives changed public perspectives on American society, so globalization's impact on the individual and American society is shifting expectations and perspectives.

Nationally, our population is increasingly diverse: by the year 2050, almost half of all Americans—forty-seven percent—will be African American, Hispanic, Asian American, or Native American, many with strong and direct connections to other nations and cultures. In 1999, almost ten percent of the United States population was foreign-born. As of August 2000, more than half of Americans had a computer in their household, and forty-one and a half percent of households had access to the world through the internet. Americans are traveling abroad in record numbers, with 24,579,000 leaving the country in 1999. Of course, foreign visitors to the institutions of the United States are also routine; the United States had more than forty-eight million visitors in 1999.

Internationalization also extends to the legal world. Three times in the past few years, the American Bar Association has held its annual meeting outside the United States, twice in London and once in Toronto. A list of international legal events on the ABA website lists meetings in England, Argentina, Cuba, South Africa, Japan, Ireland, Mexico, and Jamaica over the next few months. And in the judicial world, Canadian Supreme Court Justice L'Heureux-
Dubé has described the growing personal contacts between members of the judiciary from different countries, including frequent contacts by e-mail.\textsuperscript{42} With each of these contacts, the internationalization of our society increases, laying the groundwork for domestic incorporation of international norms. Harold Koh identifies this process with what he calls "transnational norm entrepreneurs."\textsuperscript{43} As he describes it, international law is no longer—if it ever was—simply the province of international governments. Instead, individuals such as Jimmy Carter and the Carter Center, Princess Diana and her work on landmines—and at Albany Law School, Canadian Professor Donna Young and British Professor David Pratt—promote and incorporate international and comparative perspectives within the United States.

In resolving the civil rights disputes of such a globally-sophisticated constituency, United States courts cannot simply ignore international standards and practices. For example, as Justice Ginsburg recounted in her 1999 speech, many countries permit sex- or race-based quotas under much broader circumstances than does the United States.\textsuperscript{44} Indeed, even outreach criteria designed to create a diverse pool of job applicants are currently under attack in the District of Columbia Circuit Court of Appeals.\textsuperscript{45} When United States' policies in an area where it was once the acknowledged international leader are now 180 degrees apart from worldwide trends, the explanation "because this is the United States" is not sufficient.\textsuperscript{46}

United States courts' failure to situate their civil rights decisions in an international context also affects the perception of United States courts abroad. As long ago as 1954, in its amicus brief in \textit{Brown v. Board of Education},\textsuperscript{47} the United States government raised this specter in arguing that racial segregation in the schools.

\textsuperscript{42} See L'Heureux-Dubé, \textit{supra} note 13, at 26.
\textsuperscript{43} Koh, \textit{supra} note 1, at 646-47.
\textsuperscript{45} Maryland-District of Columbia-Delaware Broadcasters Ass'n, Inc. v. FCC, No. 00-1094 (D.C. Cir. filed March 15, 2000).
\textsuperscript{47} 349 U.S. 294 (1955).
should be struck down in part because it ran against international norms. According to the United States, "[f]oreign officials and visitors naturally judge this country and our people by their experiences and observations in the nation's capital."\textsuperscript{48} Further, the government asserted, "[i]t is in the context of the present world struggle between freedom and tyranny that the problem of racial discrimination must be viewed [and] . . . [t]he existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries."\textsuperscript{49}

Characteristically, the Court's opinion in \textit{Brown} ignored this international context for its decision, though presumably the opinion quelled the fears expressed by the federal government. Now, however, it is not the United States' substantive policies perse, but the nation's failure to submit its policies to examination in the larger context of international law that is adversely affecting its standing in the international community. This adverse affect can only be resolved through reference to international law.

I am not arguing that the courts can or should second-guess the United States' failure to ratify widely accepted treaties and abide by international norms. That is a foreign relations function reserved to the Executive and Congress.\textsuperscript{50} However, judicial legitimacy is a separate issue, which the Court can address by consistently recognizing the persuasive value of comparative and international law, and explaining its reasoning in that context. Failure to do so has already resulted in a loss of leadership and prestige of United States courts worldwide. In a remarkably frank address last year, Justice Claire L'Heureux-Dubé of the Canadian Supreme Court admonished the Rehnquist Court for failing to respond to the challenges of globalization, and suggested that "in general, the Rehnquist Court is less influential internationally than its predecessors."\textsuperscript{51} As empirical evidence of this waning influence, she noted that the number of Canadian Supreme Court citations to Rehnquist Court opinions is less than half the citations to Warren Court decisions and under one-third of the number of Burger Court

\textsuperscript{49} \textit{Id.} at 6.
\textsuperscript{50} According to Louis B. Sohn, the United States has already lost "prestige . . . by refusing to ratify generally accepted human rights treaties." \textit{Improving the Image of the United States in International Human Rights}, 82 AM. J. INT'L L. 319, 320 (1988).
\textsuperscript{51} L'Heureux-Dubé, \textit{supra} note 13, at 27.
cases. Further, she indicated, “a similar trend is easily discernable through reading judgments from other countries.”

The Supreme Court has only itself to blame for its isolation. Consider how different things are in other nations. In Israel, for example, the Supreme Court justices seek out foreign law clerks who will bring knowledge of other legal systems to bear on the work they do for the Court. Members of South Africa’s Constitutional Court addressing the constitutionality of the death penalty examined decisions from India, Zimbabwe, Jamaica, Germany, Canada, the United States, the European Court of Human Rights, Hungary, the United Nations Committee on Human Rights, Botswana, Hong Kong, and Tanzania. In contrast, reports Justice L’Heureux-Dubé, the Rehnquist Court has cited Canadian Supreme Court judgments on human rights issues only twice—once noting that the Canadian court was one of many around the world that had dealt with the question of assisted suicide, and once referring to a Canadian judgment on abortion.

In sum, the legitimacy of United States courts will be increasingly questioned here and abroad unless domestic judges change their approach to international human rights law.

THE DOMESTIC IMPACT OF INTERNATIONAL AND FOREIGN LAW

There are signs, however, that change is in the works. For example, state courts are accustomed to looking outside of their state boundaries for guidance from sister jurisdictions and, when construing state constitutions, from the federal constitution. A handful of state court judges have begun to examine international legal materials as another source of persuasive authority. In Moore v. Ganim, for example, the Connecticut Supreme Court analyzed a claim (ultimately rejected) that limitations on welfare benefits violated the state constitution. The concurring judge noted that

52 Id. at 29.
53 Personal communication, Deborah Isser, former law clerk to Israeli Supreme Court (Feb. 15, 2000).
54 L’Heureux-Dubé, supra note 13, at 21-22.
57 660 A.2d 742 (Conn. 1995).
there is wide international agreement on the right to subsistence.\footnote{Id. at 780-81.} Similarly, in \textit{Domingues v. State},\footnote{961 P.2d 1279, 1280-81 (Nev. 1998) (Springer, J., & Rose, J., dissenting).} two members of the Nevada Supreme Court dissenting from imposition of the death penalty on a juvenile specifically citing the International Covenant on Civil and Political Rights as indicative of international condemnation of such a sentence.

On the federal level, analysis of international and comparative law is overwhelmingly concentrated in immigration-related cases. Indeed, this term the Supreme Court will review the Ninth Circuit Court of Appeals’ decision in \textit{Ma v. Reno},\footnote{208 F.3d 815 (9th Cir. 2000), cert. granted, 121 S. Ct. 297 (2000).} a challenge to the indefinite detention of aliens in the United States, which cited the International Covenant on Civil and Political Rights for the proposition that prolonged and arbitrary detention violates international law.\footnote{See id. at 818-19 (holding that the Immigration and Naturalization Service lacks authority to detain an alien for “more than a reasonable time beyond the normal ninety day statutory period”).} But except for a few passing references in death penalty cases,\footnote{See, e.g., White v. Johnson, 79 F.3d 432, 439 (5th Cir. 1996) (distinguishing a death row inmate’s allegation of cruel and inhumane punishment in the form of keeping a prisoner waiting too long for his execution from the conclusion reached in the highest court of the United Kingdom in \textit{Pratt & Morgan v. Attorney General of Jamaica}, Privy Council Appeal No. 10 of 1993, slip op. at 16, 3 W.L.R. 995, 143 N.L.J. 1639, 2 A.C. 1, 4 All E.R. 769 (British Privy Council 1993) (en banc)).} citations of international law in civil rights cases have been primarily limited to recitations of the parties’ arguments, with little further analysis from the court.\footnote{See, e.g., Valeria G. v. Wilson, 12 F. Supp. 2d 1007, 1027 (N.D. Cal. 1998) (noting, but rejecting, arguments by an amicus that a ballot proposition to eliminate bilingual education violates the United Nations Charter, the International Convention on the Elimination of All Forms of Racial Discrimination, or the International Covenant on Civil and Political Rights).}

However, one type of claim arising outside of the immigration context is steadily educating federal judges about international and foreign human rights law: cases filed under the Alien Tort Claims Act. This eighteenth century law enables United States courts to exercise jurisdiction to hold aliens liable for torts committed in violation of the law of nations.\footnote{See generally Beth Stephens, \textit{Conceptualizing Violence Under International Law: Do Tort Remedies Fit the Crime?}, 60 Alb. L. Rev. 579, 594-603 (1997) (noting the dual purposes of the Alien Tort Claims Act, punishing wrongdoers and compensating plaintiffs).} Decisions in several dozen of these cases have been reported since 1980 by both district courts and courts of appeals.\footnote{See, e.g., Kadic v. Karadzic, 70 F.3d 232, 241-44 (2d Cir. 1995) (holding that the federal courts have jurisdiction over Karadzic under the Alien Tort Claims Act for allegations of participation in a plan of genocide, for war crimes, and for torture and summary execution);} The exposure to comparative and international
human rights law gained through handling these cases will only increase the likelihood that federal courts will accept the persuasive value of international human rights law in other circumstances.

A number of Supreme Court Justices have also signaled their interest in taking relevant international legal materials into account in human rights cases. As mentioned earlier, Justice Breyer has already cited such materials on several occasions, though not in a majority opinion. Justice Ginsburg’s 1999 speech on the international law of affirmative action certainly contained strong clues as to her inclusive perspective. Justice O’Connor commented in 1998, after an initial meeting with members of the European Court of Justice in Luxembourg that “[i]n the next century, we are going to want to draw upon judgments from other jurisdictions. We are going to be more inclined to look at the decisions of [the] European court—and perhaps use them and cite them.”66 A second meeting between Justices O’Connor, Ginsburg, Breyer, and Kennedy, and members of the European Court took place in New York in April of 2000. Significantly, women’s rights, including affirmative action, were on the agenda for discussion.67 Likewise, Justices Breyer and Kennedy are both enthusiastic participants in the comparative law programs run by the Supreme Court for visiting jurists,68 and Chief Justice Rehnquist served as faculty at Albany Law School’s internationally-focused Montreal program in 1999.

Assuming, then, that it is simply a matter of time before the courts begin to routinely recognize the persuasive and moral value of international norms and instruments when evaluating human rights issues arising in the United States, is this simply a cosmetic change, or will it have a substantive impact on decision making?

Obviously, civil rights lawyers will be most interested in promoting and expanding this approach if it leads to more victories for their clients. But putting domestic civil rights decisions in international context will not dictate any different results. Rather, an increased dialogue between United States judges and their counterparts abroad about human rights norms and standards will

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67 Id.
68 Personal Communication, Barry Ryan, Federal Judicial Fellow (October 17, 2000).
operate like a sunshine law that improves decision-making by improving the process for reaching such decisions. In the long term, the process likely will change the course of how those issues are viewed. In the short term, however, much of the change will be in the margins, as U.S. courts simply take the time to adjust their perspectives and explain their rationales in terms of international human rights. This is particularly true in the lower courts, where comparative and international law cannot be expected to override binding domestic precedent. Those courts are particularly past-dependent, and have little choice but to continue on the path already mapped out by the higher courts.

In fact, these new legal resources will be most valuable to state supreme courts and the United States Supreme Court as they grapple with cases of first impression. Even in those cases, however, the primary impact will be, as I have argued, not to change outcomes, but to legitimize the decisions of United States courts in the twenty-first century by improving their decision-making process. As Justice Breyer wrote in his dissent in Printz v. United States after citing comparative law examples, “[o]f course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem.”

By way of illustrating these impacts, I will examine two recent cases, speculating how the Supreme Court might have treated them differently had it been open to arguments based on international law. In one of the cases, the Court had before it a substantial amicus brief addressing the international law issues raised by the case. In the other case, the Court itself would have had to develop the international law argument; the parties did not present the argument. In both cases, the Court wholly ignored international law.

First, I want to focus on United States v. Morrison, the case in which the Supreme Court earlier this year struck down the civil

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72 Id. at 977 (Breyer, J., dissenting) (citations omitted).

73 120 S.Ct. 1740 (2000).
rights remedy of the Violence Against Women Act as exceeding Congressional authority under both the Commerce Clause and Section 5 of the Fourteenth Amendment. That case, an important test of federal power in the area of civil rights enforcement, generated twenty-one amicus briefs. One of those briefs was filed in support of petitioner Christy Brzonkala by a group of thirty-six international law scholars and human rights experts. The brief argued that the Violence Against Women Act constituted a valid exercise of both Congress's treaty power to implement the International Covenant on Civil and Political Rights and Congress's obligation to implement international customary law domestically. Congress had not mentioned either of these grounds in enacting the VAWA civil rights remedy. However, the amicus argued that Congress's own statements about the authority on which it relied were not binding, and that the Supreme Court must simply "discern some legislative purpose or factual predicate that supports the exercise of that power."

The Supreme Court has never relied on the ICCPR as a basis for decision, despite its ratification by the United States in 1992. The amicus argued, however, that the ICCPR requires the United States to take action against gender-based violence perpetrated by both states and individuals as "an extreme form of gender-based discrimination." According to amicus, the UN General Assembly in its Declaration on the Elimination of Violence Against Women cites the ICCPR as the source of the obligation to eliminate gender-based violence. In addition, the Human Rights Committee established to oversee state compliance with the ICCPR has "made it clear to dozens of states that providing remedies for gender-based violence is mandated under the Covenant." Perhaps most significantly in this domestic context, the United States' Executive branch had reported to the Human Rights Committee that VAWA was implementing legislation intended to meet U.S. obligations under the ICCPR.

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74 Id. at 1759.
77 Brief of Amici Curiae at 7, Morrison (Nos. 99-5 and 99-29).
78 Id. at 8.
79 Id. at 9.
80 Id. at 16.
Amici further argued that Congress had constitutional authority to enact VAWA to implement international customary law obligations. According to amici, this authority was contained in the Congressional constitutional power to “define and punish Piracies [and other offenses] . . . against the Law of Nations.” In addition, amici argued that the “necessary and proper” clause of article I, section 8, clause 18 supported application of international law.

The Court wholly ignored these arguments. Accepting them wholesale would likely have required a different result in the case. But adopting the modest step that I suggest, the Court could have acknowledged that international law constitutes persuasive and relevant authority, yet still concluded that domestic law nevertheless did not ultimately support Congress’s power to enact the Violence Against Women Act civil rights remedy.

For example, focusing on the section 5 aspect of the case, the Court was presented with the question of whether Congress could exercise its remedial authority to implement the Equal Protection Clause by enacting a statute directed against private actors. Two nineteenth century cases had largely restricted such authority, but two more recent Supreme Court decisions had brought those earlier decisions into question. As presented to the Court in _Morrison_, this could have been approached as an open constitutional question.

In its decision, relying on the older opinions as probative of Congress’s intent in crafting section 5, the Court in _Morrison_ concluded that Congress’s remedial authority is limited to state actors. Yet many international conventions and more recently adopted state constitutions take a different view. The Convention for the Elimination of All Forms of Discrimination Against Women, for example, permits governments to regulate private actors in order to promote equality between women and men. South Africa’s constitution and the European Convention on Human Rights likewise extend to private actors. The Supreme Court’s

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81 See U.S. CONST. art. I, § 8, cl. 10; Brief of Amici Curiae at 18-20, _Morrison_ (Nos. 99-5 and 99-29).
84 CEDAW, Article 2 (g).
opinion in *Morrison* would have been significantly enhanced had it acknowledged this international authority, explained how and why it differs from the domestic law applied by the Court, and why the Court doesn’t find the international approach persuasive under the circumstances.

Though requiring only a small difference in the Court’s approach to opinion-writing, this change would ensure a “transparency” of decision-making that is increasingly demanded from other branches of government. Further, it would give direction to Congress and as well as future litigants addressing the United States’ international obligations. Ignoring the arguments entirely ensures that the debate over the role of international law in adjudicating domestic human rights claims remains at a very basic, undeveloped level, and that the Court seems unresponsive to changes in the larger world.

In a second case, reference to international and comparative law examples would have necessarily affected the outcome because of their empirical contribution to the central issue in the case—whether a United States law reflected sex-based stereotyping. In *Miller v. Albright*, decided in 1998, the Court considered one of the few remaining sex-based federal laws—a citizenship law that distinguishes between mothers and fathers. Under 8 U.S.C.S. 1409, United States citizen mothers of out-of-wedlock foreign-born children must prove (1) maternity, (2) physical presence in the U.S. prior to the birth, and (3) U.S. nationality, in order to transmit citizenship at birth to their child. In contrast, fathers must prove paternity, physical presence and nationality, and in addition, must (4) produce a written statement of support prior to the child’s eighteenth birthday, and (5) formally legitimate or acknowledge paternity prior to the child’s eighteenth birthday.

This law was challenged by Lorelyn Miller, the non-citizen daughter of a citizen father and an alien mother. Her father had failed to meet the time deadlines imposed on fathers, and she sought to strike down these restrictions under the Equal Protection Clause. Writing a total of five opinions, the Court split on whether the daughter had standing to raise the challenge. However, a

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88 *Id.* at 429.
89 *Id.* at 424-25.
90 *Id.* at 426.
plurality opinion authored by Justice Stevens and joined only by Chief Justice Rehnquist rejected the dissenting Justices' views that the law reflected gender-based stereotypes. Instead, according to Justice Stevens, the law was based on realities about mothers' and fathers' opportunities to transmit the values of citizenship to their children.

Less high profile than the VAWA litigation, this case generated only a single amicus brief, which did not address any international case law in the area. However, had the Court looked even briefly for international precedents, it would have found a relevant case in neighboring Canada. In 1997, the Canadian Supreme Court considered a similar citizenship law in *Benner v. Canada.* Significantly, however, the Canadian law permitted fathers greater leeway to transmit citizenship than that given mothers. The notion in Canada, the opposite of the United States, was that fathers had the greatest ability to transmit the values of citizenship to their children. Acknowledging that the law was based on stereotypes, the Canadian court struck down the provision, mandating a gender-neutral regime henceforth.

Clearly, the United States would under no circumstances be bound by a decision of the Canadian Supreme Court. However, had the United States Court been open to learning of relevant international law norms, the Court could not ignore the Canadian case consistent with the principle of persuasive authority that I propose. The existence of stereotypes in domestic United States law is measured by whether the particular legal classification rests on assumptions about the sexes that are not always true, and that reflect historic social limitations placed on individuals because of their sex. Placed side by side, the Canadian law and United States law demonstrate that both laws rest on culture-bound stereotypes rather than biological truths. No country is closer to the United States in temperament or social practices, yet Canada assumed that fathers as patriarchs were best able to transmit the values of citizenship while the United States assumed that mothers,

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91 Id. at 424.
92 Id. at 438.
95 Id. at 365.
as caretakers, were best able to. Taking this into account, the members of the Supreme Court would be hard-pressed to find that the United States law did not reflect gender-based stereotypes, a finding that would in all likelihood change the result of the case.97

In conclusion, I would like to quote the words of Cherie Booth, QC, noted British barrister specializing in human rights and employment and the wife of British Prime Minister Tony Blair. In September 2000, Booth spoke in New York on the recent incorporation of the European Convention on Human Rights into English law through the Human Rights Act of 1998.98 According to Booth, "[a]s the world merges together . . . we're seeing the emergence of a body of jurisprudence that is truly international and that provides extraordinary opportunities. . . . We're going to live in a very interesting time in which our judges can take part in the community of nations and rule on the application of international law."99 To date, U.S. judges have stood back from these developments. As this isolationist approach continues, the legitimacy and relevance of U.S. judicial decisions will be increasingly open to question. However, as with the Court's response to the challenges of the Progressive era, the United States judicial system has always shown an ability to incorporate such paradigm shifts into its modes of decisionmaking. The Brandeis brief, in which the Court expanded its own purview to "all matters of general knowledge," reflects this ability. I believe that the same adjustment is about to take place now with respect to international and comparative law, and that within the next few years we will finally see the United States judiciary join the international dialogue on human rights issues. Once that happens, I can assure you, domestic civil rights groups will be the first in line to "bring human rights home."

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97 This term, the Supreme Court is considering Nguyen v. INS, which raises the identical issue without a standing impediment. An amicus brief addressing international law was filed in support of petitioner by Equality NOW, the International Commission of Jurists, the International Human Rights Law Group, and the International Federation of Women Jurists, among others. Brief of Amici Curiae of Equality Now and Others in Support of Petitioners, Nguyen v. INS, 121 S. Ct. 29 (2000) (No. 99-2071). In addition, the petitioners' brief cites the Canadian case. Brief of Petitioners at 13 n.4, Nguyen v. INS, 121 S. Ct. 29 (2000) (No. 99-2071).
