JUDICIAL RELIANCE ON FOREIGN LAW

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

DECEMBER 14, 2011

Serial No. 112–73

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE

71–624 PDF WASHINGTON : 2012

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

LAMAR SMITH, Texas, *Chairman*

F. JAMES SENSENBRENNER, JR., Wisconsin
HOWARD COBLE, North Carolina
ELTON GALLEGLY, California
BOB GOODLATTE, Virginia
DANIEL E. LUNGREN, California
STEVE CHABOT, Ohio
DARRELL E. ISSA, California
MIKE PENCE, Indiana
J. RANDY FORBES, Virginia
STEVE KING, Iowa
TRENT FRANKS, Arizona
LOUIE GOHMERT, Texas
JIM JORDAN, Ohio
TED POE, Texas
JASON CHAFFETZ, Utah
TIM GRIFFIN, Arkansas
TOM MARINO, Pennsylvania
TREY GOWDY, South Carolina
DENNIS ROSS, Florida
SANDY ADAMS, Florida
BEN QUAYLE, Arizona
MARK AMODEI, Nevada

JOHN CONYERS, JR., Michigan
HOWARD L. BERMAN, California
JERROLD NADLER, New York
ROBERT C. "BOBBY" SCOTT, Virginia
MELVIN L. WATT, North Carolina
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
MAXINE WATERS, California
STEVE COHEN, Tennessee
HENRY C. "HANK" JOHNSON, JR., Georgia
PEDRO R. PIERLUISI, Puerto Rico
MIKE QUIGLEY, Illinois
JUDY CHU, California
TED DEUTCH, Florida
LINDA T. SÁNCHEZ, California
JARED POLIS, Colorado

SEAN MCLAUGHLIN, *Majority Chief of Staff and General Counsel*
PERRY APELBAUM, *Minority Staff Director and Chief Counsel*

SUBCOMMITTEE ON THE CONSTITUTION

TRENT FRANKS, Arizona, *Chairman*
MIKE PENCE, Indiana, *Vice-Chairman*

STEVE CHABOT, Ohio
J. RANDY FORBES, Virginia
STEVE KING, Iowa
JIM JORDAN, Ohio

JERROLD NADLER, New York
MIKE QUIGLEY, Illinois
JOHN CONYERS, JR., Michigan
ROBERT C. "BOBBY" SCOTT, Virginia

PAUL B. TAYLOR, *Chief Counsel*
DAVID LACHMANN, *Minority Staff Director*

CONTENTS

DECEMBER 14, 2011

JUDICIAL RELIANCE ON FOREIGN LAW

WEDNESDAY, DECEMBER 14, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:10 a.m., in room 2141, Rayburn Office Building, the Honorable Trent Franks (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, Smith, King, Nadler, Scott, and Quigley.

Staff present: (Majority) Holt Lackey, Counsel; Sarah Vance, Clerk; (Minority) Heather Sawyer, Counsel; and Veronica Eligan, Professional Staff Member.

Also Present: Representative Adams.

Mr. FRANKS. Well, good morning, and welcome to this Constitution Subcommittee hearing on "Judicial Reliance on Foreign Law."

Without objection, the Chair is authorized to declare a recess of the Committee at any time. And I want to extend our welcome to Mrs. Adams, the gentlelady from Florida, for being with us this morning as well.

Today the Subcommittee renews inquiry into a topic we first explored over 7 years ago, the reliance on foreign law by American courts when interpreting American law. Now, as then, modern foreign law cannot tell us anything relevant about the original meaning of our Constitution. But since this Subcommittee's last hearing in 2004, the trend toward the internationalization of American constitutional law has only accelerated.

In two cases, the Supreme Court expanded the rights of juvenile felons based in part on how other countries punish juvenile offenders. In the 2005 *Roper* case, the Court reversed the death penalty of a 17-year-old Missouri murderer, who plotted and executed a plan to break into an innocent woman's home, bind her, wrap her entire face in duct tape, drive her to a bridge, and throw her into the river.

In holding that no offender under 18 should ever be subject to capital punishment, no matter how heinous the crime, the Court relied on international opinion and specifically the UN Convention on the Rights of the Child, a treaty the that United States has never ratified.

Last year, the Court extended this holding and, again, cited international opinion and the unratified Convention on the Rights of the Child to find that "the standards of American society have

evolved such that" life without parole is now cruel and unusual punishment for even the worst juvenile, non-homicide defendants.

The Court's decision was clearly more concerned with global than American standards of decency, because at the time of the decision, 37 States, the District of Columbia, and the Federal criminal courts all allowed life sentences for some teenage felons.

This term, the Court will hear two cases that present the question of whether a State may impose life without parole on a juvenile who commits capital murder. Again, global practice and American practice on this question differ. The real question will be whether Americans or "the global community" decides what violates the Eighth Amendment.

When the Committee last visited this issue, reliance on foreign law had only begun to crop up in a few majority opinions. Since that time, it has become a standard feature of the current Court's majority and their Eighth Amendment jurisprudence. The transnational approach to constitutional law has thus moved from academic theory, to minority judicial philosophy, to now commanding majority support on the Court in many cases.

President Obama's appointments to the Supreme Court are likely to solidify this trend toward reliance on foreign law. In a speech to the ACLU of Puerto Rico, Justice Sotomayor said that "International law and foreign law will be very important in the decision of how to think about the unsettled issues in our own legal system," particularly "as a source of ideas, informing our understanding of our own constitutional rights."

Despite a confirmation hearing conversion in which she professed that "American law does not permit the use of foreign law or international to interpret the Constitution," Justice Sotomayor, once on the bench, joined the majority opinion using foreign law in *Graham v. Florida*.

Disturbingly, there is reason to believe that the current Administration wants to advance transnational law beyond courts and into the policy arena. Law professors Harold Koh and Anne-Marie Slaughter were both given senior positions in the State Department. Koh is a self-described transnationalist who strongly advocates the integration of international standards into American law. Slaughter has advocated for global governance based on coordination between national courts on issues such as human rights. Predictably, State Department policy has followed the transnational views of the Department's personnel.

The Administration has increased American engagement with organizations like the Human Rights Council and the International Criminal Court that seek to internationalize various legal issues.

This march toward transnationalism must end. America's independence and democracy have been hard won and preserved by the sacrifice of generations of patriots going back to Lexington and Concord. The United States Constitution, with its Federal structure seen in the checks and balances, protection of individual rights, and commitment to representative democracy, is the greatest system for making wise and just laws that the world has ever known. The Constitution and laws of the United States and the several States are sufficient. We do not need to go abroad to download legal rules from other countries.

At its core, the issue is whether Americans will remain a sovereign, self-governing people or whether we will be governed by an elite caste of judges, imposing rules based on the supposed preferences of the so-called international community. In the words of Justice Scalia, "I do not believe that the meaning of our Constitution should be determined by the subjective views of five members of the Supreme Court and like-minded foreigners." I do not know how it could be said better.

And with that, I yield now to the Ranking Member of the Subcommittee, Mr. Nadler, for his opening statement?

Mr. NADLER. Thank you, Mr. Chairman.

We have been here before. In 2004, my Republican colleagues held a hearing on this issue to rail against the Supreme Court's decisions in *Lawrence v. Texas* and *Atkins v. Virginia*. Then, as now, they claimed that these decisions represented an alarming new trend of judicial reliance on foreign law, and argued that Congress needs to curtail this practice. But there is nothing new and nothing alarming about justices educating themselves about the laws and practices of other nations.

In 1804, for example, Chief Justice John Marshall wrote in *Murray v. Schooner Charming Betsy*—I assume that is the name of a ship; interesting name—that acts of Congress "ought never to be construed to violate the law of nations if any other possible construction" exists.

In the unfortunate, and now infamous, 1857 Dred Scott decision, the majority cited to discriminatory practices of European nations that had existed at the time of this Nation's founding, while the dissent referenced then contemporary European practices and international law.

We may dislike or disagree with the underlying decisions in these or other cases, but they undoubtedly demonstrate that judicial reference to foreign law is not a new phenomenon.

Not only is this not a new practice, it also fails to alarm my Republican colleagues, unless the Court issues an opinion with which they disagree. After all, the Supreme Court majority in *Bowers v. Hardwick* in 1986 upheld laws criminalizing same-sex sodomy by, among other things, concluding that such prohibitions have "ancient roots." The sources cited for that conclusion references the practice of ecclesiastical courts in ancient Roman law, the English Reformation, and Blackstone. Where was the congressional outcry from my colleagues in 1986? It was non-existent until the Supreme Court in *Lawrence* had the audacity to test the *Bowers* Court's assertion by, shockingly enough, looking to the laws and practices in England and elsewhere to show that *Bowers* was wrong in its citation of foreign law.

The only thing that explains the different treatment of reference to foreign law in *Bowers* and in *Lawrence* is the ultimate outcome, not the means of getting there.

None of us can force the courts to rule our way in every case, nor should we be able to do so. That is the blessing and burden of our constitutional system, which creates and values an independent judiciary. Efforts to attack that independence, as exhibited in H.R. 973, the bill introduced by our colleague from Florida, Ms.

Adams, that would ban courts from "deciding any issue on the authority of foreign law," should trouble all of us.

I suppose it is possible that H.R. 973 and like efforts are not intended to reach a judge's references to foreign law as a non-binding, but relevant, resource, as was the case in *Lawrence*, and in *Atkins v. Virginia*, and in *Roper v. Simmons*, two additional cases often cited by those who criticize judicial reliance on foreign law. But Representative Adams' use of these cases to explain the need for her bill in a March 2011 opinion piece indicates otherwise.

Of course, in addition to instances where a judge may look to foreign law as non-binding but informative, courts sometimes must consider and be bound by foreign law in reaching a decision. For example, courts sometimes resolve contract claims based on choice of law provisions through which the parties agree to have the contract interpreted under the laws of another country, or, as is sometimes the case, for example, in prenuptial agreements or with internal church disputes, by reference to religious law.

What might a proposal like Ms. Adams' mean for a corporation doing business internationally, and, for that matter, for religious liberty? And what sources would be off limits to judges who, by virtue of the supremacy clause of the Constitution, Article VI, Clause II, are bound to interpret and enforce our treaty obligations? These examples illustrate that while this debate might be dismissed as "much ado about nothing," a reference to a foreign comedy that, at least for today, I remain free to make, the proposed solution poses significant and potentially unintended dangers and consequences.

Since the founding of or constitutional system, judges have used many sources to test claims made by litigants and to assess the potential impact of possible rulings. These sources include law review articles, social science research, and the laws and decisions of States, other Federal circuits, and sometimes other countries.

Congress should not be in the business of telling the courts what tools they get to use when interpreting our laws. On this point, even Justice Scalia, one of the current Court's most outspoken critics when his colleagues reference foreign law, agrees. Speaking in 2006 to an audience that included Members of Congress, Justice Scalia explained that "As much as I think that it is improper to use foreign law to determine the meaning of the Constitution, I don't think it is any of [Congress'] business . . . If you can tell us not to use foreign laws, you can tell us not to use certain principles of logic."

It is nonsensical to argue that our judges should be less, not more, educated, and that they must blind themselves to certain resources that might help them to reach a fully informed judgment. The notion that the wisdom to be gained from looking at the laws and practices of other nations is an evil to be avoided, not even on a par with looking at a law review article written by a professor or any other source that a judge freely may consult, is ridiculous.

I yield back the balance of my time.

Mr. FRANKS. And I thank the gentleman. And I now recognize the distinguished Chairman of the full Committee, Mr. Smith, for his opening statement.

Mr. SMITH. Thank you, Mr. Chairman. The accelerating trend of American judges citing and relying on foreign law threatens our

dedication to government of the people, by the people, and for the American people.

Two hundred and thirty-five years ago, America declared its independence from Great Britain. America was founded on the self-evident truth that governments derive their just powers from the consent of the governed. British rule denied Americans the right to make their own laws, a main reason for the Revolution. One of the Declaration's specific indictments was that King George II had subjected the colonists to "a jurisdiction foreign to our Constitution and unacknowledged by our laws."

Article VI of the Constitution provides that this Constitution and the laws of the United States, which shall be made in pursuance thereof, shall be the supreme law of the land.

Our republic was founded on the principle that law that governs America should be made by Americans, and throughout our history, we have protected this heritage of self-government.

Unfortunately, in recent decades, some courts have increasingly relied on foreign sources of law to interpret the meaning of the American Constitution. Reliance on foreign law exacerbates judicial activism and empowers judges to impose their own policy preferences from the bench. Judges who rely on foreign law can pick and choose the sources of foreign law that reinforce their own personal or political biases.

Foreign law tells us nothing about the original meaning of the American Constitution and laws. For example, decisions by courts in Strasburg interpreting the European Convention on Human Rights, courts in Tehran interpreting Sharia law, or courts in Beijing applying Chinese law, should have no effect on how American courts interpret the Constitution.

Citing foreign law undermines democracy and self-government. The American people have no control over foreign law. If we are to continue to govern ourselves, then foreign law should have no control over us. As Justice Scalia has stated, "Reliance on foreign law to strike down American laws renders the views of our own citizens essentially irrelevant."

Our system of government is based on the idea that Americans should make their own laws through the democratic process. This has made us the strongest, most prosperous Nation in the world. Our courts should affirm this American democratic tradition, not abandon it in favor of the views of the so-called international community. This is especially true when many in the international community do not share the same commitment to freedom, justice, and equality that are enshrined in the American Constitution. If we dilute these constitutional guarantees with foreign legal concepts, we weaken our republic.

I appreciate the Constitution Subcommittee holding this hearing today, and I thank Congresswoman Sandy Adams of Florida for requesting this hearing, and look forward to working with her, Subcommittee Chairman Franks, and the other Members of this Committee who have led the effort to protect the American legal system from the undue influence of foreign law.

Thank you, Mr. Chairman. I yield back.

Mr. FRANKS. And I certainly thank the gentleman. And without objection, the others Members' opening statements will be made part of the record.

[The prepared statement of Mr. Nadler follows:]

Prepared Statement of the Honorable Jerrold Nadler, a Representative in Congress from the State of New York, and Ranking Member, Subcommittee on the Constitution

Thank you, Mr. Chairman.

We've been here before. In 2004, my Republican colleagues held a hearing on this issue to rail against the Supreme Court's decisions in *Lawrence v. Texas* and *Atkins v. Virginia.* Then, as now, they claimed that these decisions represented an "alarming new trend" of judicial reliance on "foreign" law and argued that Congress needs to curtail this practice.

But there is nothing new and nothing alarming about judges educating themselves about the laws and practice of other nations. In 1804, for example, Chief Justice John Marshall wrote in *Murray v. Schooner Charming Betsy* that acts of Congress "ought never to be construed to violate the law of nations if any other possible construction" exists. In the unfortunate and now-infamous 1857 *Dred Scott* decision, the majority cited to discriminatory practices of European nations that had existed at the time of this nation's founding while the dissent referenced contemporary European practices and international law. We may dislike or disagree with the underlying decisions in these or other cases, but they undoubtedly demonstrate that judicial reference to "foreign law" is not a new phenomenon.

Not only is this not a new practice, it also fails to alarm my Republican colleagues unless the Court issues an opinion with which they disagree. After all, the Supreme Court majority in *Bowers v. Hardwick* upheld laws criminalizing same-sex sodomy by, among other things, concluding that such prohibitions have "ancient roots." The source cited for that conclusion references the practice of ecclesiastical courts in ancient Roman law, the English Reformation, and Blackstone.

Where was the congressional outcry from my colleagues in 1986? It was non-existent until the Supreme Court in *Lawrence* had the audacity to test the *Bowers'* Court's assertion by, shockingly enough, looking to the laws and practices in England and elsewhere to show that *Bowers* was wrong in its citation of foreign law. The only thing that explains the different treatment of reference to "foreign law" in *Bowers* and in *Lawrence* is the ultimate outcome, not the means of getting there.

None of us can force the courts to rule our way in every case, nor should we be able to do so. That is the blessing and burden of our constitutional system, which creates and values an independent judiciary. Efforts to attack that independence—as exhibited in H.R. 973, the bill introduced by our colleague from Florida, Ms. Adams, that would ban courts from "decid[ing] any issue . . . on the authority of foreign law"—should trouble all of us.

I suppose it's possible that H.R. 973 and like efforts are not intended to reach a judge's references to "foreign law" as a non-binding but relevant resource—as was the case in *Lawrence* and in *Atkins v. Virginia* and in *Roper v. Simmons,* two additional cases often cited by those who criticize judicial reliance on foreign law. But Representative Adams' use of these cases to explain the need for her bill in a March 2011 opinion piece indicates otherwise.

Of course, in addition to instances where a judge may look to foreign law as nonbinding but informative, courts sometimes must consider and are bound by foreign law in reaching a decision.

For example, courts sometimes resolve contract claims based on choice-of-law provisions, through which the parties agree to have the contract interpreted under the laws of another country or—as is sometimes the case, for example, in pre-nuptial agreements or with internal church disputes—by reference to religious law. What might a proposal like Ms. Adams' mean for a corporation doing business internationally and for religious liberty?

And what sources would be off-limits to judges who, by virtue of the Supremacy Clause of our Constitution (Article VI, Clause 2), are bound to interpret and enforce our treaty obligations?

These examples illustrate that, while this debate might be dismissed as "much ado about nothing"—a reference to a foreign comedy that, at least for today, I remain free to make—the proposed solution poses significant and potentially unintended dangers and consequences.

Since the founding of our constitutional system, judges have used many sources to test claims made by litigants and assess the potential impact of possible rulings.

These sources include law review articles, social science research, and the laws and decisions of states, other federal circuits, and sometimes other countries. Congress should not be in the business of telling the courts what tools they get to use when interpreting our laws.

On this point, even Justice Scalia—one of the current Court's most outspoken critics when his colleagues reference foreign law—agrees. Speaking in 2006 to an audience that included Members of Congress, Justice Scalia explained that "as much as I think that it is improper to use foreign law to determine the meaning of the Constitution, I don't think it's any of [Congress's] business . . . if you can tell us not to use foreign laws, you can tell us not to use certain principles of logic."

It is nonsensical to argue that our judges should be less, not more, educated and that they must blind themselves to certain resources that might help them reach a fully informed judgment. The notion that the wisdom to be gained from the laws and practices of other nations is an evil to be avoided, not even on par with a law review article written by a professor or any other source that a judge freely may consult, is ridiculous.

I yield back the balance of my time.

[The prepared statement of Mr. Smith follows:]

Prepared Statement of the Honorable Lamar Smith, a Representative in Congress from the State of Texas, and Chairman, Committee on the Judiciary

The accelerating trend of American judges to cite and rely on foreign law threatens our dedication to government of the people, by the people and for the American people.

Two-hundred and thirty-five years ago, America declared its independence from Great Britain. America was founded on the self-evident truth that governments derive "their just powers from the consent of the governed."

British rule denied Americans the right to make their own laws, which was one of the main reasons for the revolution. One of the Declaration's specific indictments was that King George II had subjected the colonists to "a jurisdiction foreign to our constitution, and unacknowledged by our laws."

Article VI of the Constitution provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."

Our Republic was founded on the principle that the law that governs America should be made by Americans. And throughout our history, we have protected this heritage of self government.

Unfortunately, in recent decades some courts have increasingly relied on foreign sources of law to interpret the meaning of the American Constitution.

Reliance on foreign law exacerbates judicial activism and empowers judges to impose their own policy preferences from the bench. Judges who rely on foreign law can pick and choose the sources of foreign law that reinforce their own personal or political biases.

Foreign law tells us nothing about the original meaning of the American constitution and laws. For example, decisions by courts in Strasbourg interpreting the European Convention on Human Rights, courts in Tehran interpreting Sharia law or courts in Beijing applying Chinese law should have no effect on how American courts interpret the Constitution.

Citing foreign law undermines democracy and self-government. The American people have no control over foreign law. If we are to continue to govern ourselves, then foreign law should have no control over us.

As Justice Scalia has stated, reliance on foreign law to strike down American laws renders "the views of our own citizens essentially irrelevant."

Our system of government is based on the idea that Americans should make their own laws through the Democratic process. This has made us the strongest, most prosperous nation in the world.

Our courts should affirm this American democratic tradition, not abandon it in favor of the views of the so-called "international community." This is especially true when many in the "international community" do not share the same commitment to freedom, justice and equality that are enshrined in the American Constitution.

If we dilute these constitutional guarantees with foreign legal concepts, we weaken our Republic.

I appreciate the Constitution Subcommittee holding this hearing today. I thank Congresswoman Sandy Adams of Florida for requesting this hearing and look for-

ward to working with her, Subcommittee Chairman Franks and the other members of this Committee who have led the effort to protect the American legal system from the undue influence of foreign law.

[The prepared statement of Ms. Adams follows:]

Rep. Sandy Adams Statement for the Record

Judiciary Subcommittee on the Constitution Hearing on Judicial Reliance on Foreign Law

December 14, 2011

I would like to thank Chairman Franks for holding a hearing on the subject of foreign law in our courts. Foreign law poses a very real threat to the American judicial system. In recent years, Supreme Court justices have allowed foreign and international law to permeate our court systems, interjecting it into their rulings and creating an environment of disregard for national sovereignty. Our Constitution laid the foundation for our nation's judicial system, and I believe referencing or using foreign law in American courts will lead to its erosion. Each case citing a foreign law is another opportunity to set precedent and for our Constitution to be challenged, and eventually, overrun.

That is why I introduced legislation, H.R. 973, to amend Title 28 of the United States Code to prevent the misuse of foreign law in our federal courts. H.R. 973 simply states, "in any court created by or under Article III of the Constitution of the United States, no justice, judge, or other judicial official shall decide any issue in a case before that court in whole or in part on the authority of foreign law, except to the extent the Constitution or an Act of Congress requires the consideration of that foreign law."

In recent years, Supreme Court justices have interjected international law into their rulings, creating an environment of disregard for national sovereignty and threatening the institutions put in place by our forefathers. There are three particular Supreme Court cases where judges have cited foreign and international precedent: *Lawrence v. Texas*, where the court overturned state anti-sodomy statutes; *Atkins v. Virginia*, where the court held against the execution of mentally retarded capital defendants; and *Roper v. Simmons*, where the court outlawed application of the death penalty to offenders who were under 18 when their crimes were committed. International and foreign laws were cited in all three cases by our Supreme Court justices in reaching their decisions, setting precedent for future rulings.

This disconcerting trend has gained traction across the country, sparking national concern, not only in our federal and state court systems, but among members of our colleges and universities as well. State Department counsel Harold Koh, who coined the term, recently stated, "Domestic courts must play a key role in coordinating U.S. domestic constitutional rules with rules of foreign and international law." Additionally, questions about the issue of foreign law in our courts have become a fixture of the confirmation process for Supreme Court justices. In her 2010 confirmation hearing, Supreme Court Justice Elena Kagan was questioned by Senator Charles Grassley about whether she thought international law should factor into a federal court's

decision-making process. She confirmed that she did, stating: "I think it depends. There are some cases in which the citation of foreign law, or international law, might be appropriate."

Not only is using international precedent a transparent disregard for the Constitution, but it could be used to advance a judge's personal political agenda over the best interests of the nation. Judges have a responsibility to interpret the laws of the land, not legislate from the bench, and the practice of referring to foreign law puts their underlying motives into question. Currently there are over a dozen states that have introduced legislation banning foreign law on the state level, including my home state of Florida.

I respectfully ask my colleagues on the Judiciary Committee to consider, whether we going to allow our court systems to dictate our policymaking process based off of foreign sources instead of going to go through the proper channels prescribed by our Constitution?

We must remember that we have an American judicial system in place for a reason; it is based off of our country's rich history and it is intentionally unique to our great nation. As we move forward as a country, we must work to protect it.

Mr. FRANKS. I would like to welcome our witnesses here this morning. And our first witness is Mr. Andrew Grossman. He is a visiting legal fellow in the Heritage Foundation's Center for Legal and Judicial Studies, where he researches and writes about constitutional issues. In addition to his work at Heritage, Mr. Grossman is a litigator in the Washington office of the global law firm Baker & Hostetler.

Our second witness, Professor David Fontana, is a professor at the George Washington University Law School where his research focuses on constitutional law, comparative constitutional law, and the legal profession. Before coming to GW, Professor Fontana clerked for the Honorable Dorothy W. Nelson of the U.S. Circuit of Appeals for the Ninth Circuit.

Our third and final witness, Professor Jeremy Rabkin, is on the faculty at George Mason University School of Law, where he joined in 2007 after 27 years at Cornell University. His scholarship and several of his books focuses on issues of national sovereignty. He holds a Ph.D. from the Department of Government at Harvard University, and currently serves on the board of directors of the United States Institute of Peace.

And we want to, again, welcome all of you here today. And each of the witnesses' written statements will be entered into the record in its entirety. I ask that each witness summarize his testimony in 5 minutes or less. To help you stay within that time, there is a timing light on your table. When the light switches from green to yellow, you will have 1 minute to conclude your testimony. When the light turns red, it signals that the witness' 5 minutes have expired.

And before I recognize the witnesses, it is the tradition of this Subcommittee that they be sworn. So, if you would please stand.

[Witnesses sworn.]

Mr. FRANKS. Please be seated. And I thank you, and I recognize our first witness, Mr. Grossman, for 5 minutes.

TESTIMONY OF ANDREW M. GROSSMAN, VISITING LEGAL FELLOW, THE HERITAGE FOUNDATION

Mr. GROSSMAN. Mr. Chairman, Ranking Member Nadler, Members of the Subcommittee, thank you for holding this hearing today.

My written testimony presents a taxonomy of the circumstances in which it is appropriate and inappropriate for U.S. Federal courts to apply foreign law, and describes the enormous challenges that courts face in attempting to even ascertain the substance of foreign law, much less to apply it correctly. But in the interest of brevity, I will skip the whole taxonomy this morning and make just three points.

First, the present practices of foreign nations, international organizations, including laws and treaties, are simply irrelevant to interpreting and applying the United States Constitution. The Constitution should be interpreted according to its original meaning. It is contrary to the Constitution's own supremacy clause for the courts to elevate foreign statutes or court decisions to the supreme law of the land, superior to U.S. statutory law, and even the constitutional text. It is perverse.

Reliance on foreign laws is also anti-democratic. Judge Richard Posner has put this point particularly well. He wrote, "Judges in foreign countries do not have the slightest democratic legitimacy in the U.S. context. The votes of foreign electorates, the judicial conformation procedures, if any, in foreign nations, are not events in our democracy. To cite foreign decisions in order to establish an international consensus that should have weight with U.S. courts

is like subjecting legislation enacted by Congress to review by the United Nations' General Assembly."

Another problem is that the Supreme Court is simply incompetent at determining what it calls the climate of international opinion. The Court's typical approach to applying foreign law has been to count the noses of foreign nations on any particular issue. It does this poorly. For example, capital punishment is popular in many countries where political actors have actually abolished it. Another example, Supreme Court justices have taken at face value self-serving claims by the Soviet Union and Zimbabwe concerning their penal system's humane practices. This naiveté does not inspire confidence.

Finally, one cannot help but wonder whether the decisive factor governing the citation of foreign law is simply, as the Supreme Court often puts it, "our own judgment." What Justice Scalia has said about the citations of legislative history applies equally here. The trick is to look over the heads of the crowd and pick out your friends.

When the Court does cite foreign law, it picks and chooses its friends, mostly in old Europe. The Court also picks and chooses those instances in which it considers foreign law at all. In areas where foreign law is more conservative than U.S. constitutional law, such as separation of church and State and the admission of illegally obtained evidence, foreign law is apparently irrelevant. The reason may be that it would not help reach the justices' preferred outcome.

My second point is that the use of foreign law undermines federalism. In every case but one where the Court has decreed that a particular punishment is constitutionally impermissible, the losing party has been a State. To be clear, in each of these cases, the Supreme Court struck down a State law or practice in part because it conflicted not with any Federal statute or explicit limitation on State power in the Constitution, but because it conflicted with foreign laws and practices that, according to the Court, somehow have the force and effect of Federal constitutional law.

Some justices even consider foreign law to be directly relevant to interpreting the 10th Amendment's limitations on Federal power. In *Prince v. United States*, the Supreme Court held that the Federal Government could not commandeer State officials to enforce Federal gun laws. Justice Breyer dissented on the grounds that they do things differently in Germany and Switzerland. But, of course, we do things differently here. That was the point of our written Constitution.

International law, in the form of expansive treaties, presents a similar threat to federalism. In a case that is pending now in the Third Circuit, the Federal Government claims that the treaty clause power is not subject to the limitations of the 10th Amendment. Indeed, some clever law professors, have suggested that Congress could reenact the gun control provisions struck down in *Prince* and *Lopez* by tying them to one or another broadly worded treaty. This is a radical position, one that reaches far beyond the Supreme Court's holding in *Missouri v. Holland*, and yet it is the position of the Obama Administration.

Frankly, it is not inconceivable that foreign and international law will play some role in the Supreme Court's consideration of currently pending challenges to the Patient Protection and Affordable Care Act's individual mandate. European countries, after all, are saddled with national health care systems, and some law professors read the UN Universal Declaration of Human Rights to make medical care a human right that the United States government has an obligation to enforce on its citizens. I will bet a couple of justices would go along with this.

My third point is that it is not always judges that are to blame for these problems. Sometimes it is Congress that mandates the use of foreign and international laws. Two quick examples. The alien tort statute gives Federal courts jurisdiction over cases alleging violation of the law of nations, and the Lacey Act criminalizes violation of the laws concerning wildlife of every single country in the world. These laws put Americans at risk of unjust prosecution and conviction through the difficulty of ascertaining foreign law and complying with it. Gibson Guitars, I think, is a recent victim of this phenomenon.

Let me conclude with four recommendations for Congress. First, Congress should concede limits on the treaty clause power so as to protect our system of federalism and to protect Americans' rights. Second, Congress should reform or repeal the alien tort statute. Third, Congress should reform the Lacey Act and other acts that incorporate foreign or international law. If a law imposes requirements on Americans, those requirements should be considered by Congress or an agency, and they should be spelled out in the law. There should be no outsourcing. Fourth, where U.S. statutes do incorporate foreign or international law, Congress should provide administrative safe harbors by which law-abiding citizens can obtain a binding opinion on how they may comply with the law and avoid punishment.

Again, I thank the Committee for the opportunity to offer these remarks, and I look forward to your questions.

[The prepared statement of Mr. Grossman follows:]

Congressional Testimony

Judicial Reliance on Foreign Law

Testimony before the

Subcommittee on the Constitution,
Committee on the Judiciary,
United States House of Representatives

December 14, 2011

Andrew M. Grossman
Visiting Legal Fellow
The Heritage Foundation

My name is Andrew Grossman. I am a Visiting Legal Fellow in the Center for Legal and Judicial Studies at The Heritage Foundation. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

The Subcommittee is to be commended for holding this hearing today to consider the proper role of foreign and international laws in United States courts and the consequences to the nation when foreign and international laws are improperly elevated above our own laws and, in particular, the original meaning of the United States Constitution. This issue, however, extends beyond constitutional law to many other areas of legal practice, including criminal law and family law, where Americans' rights are no less at stake. Those legal academics who complain that too much attention has been paid to the use of foreign law are wrong; an issue that implicates our system of democratic self-government and the balance of power between the branches of the federal government, and between the federal government and the states, deserves attention and consideration. One suspects that those who attempt to downplay the importance of this issue do so merely because they do not quarrel with, or even support, the policies that tend to result when the will of the people is thwarted by the arbitrary application of foreign law.

In this testimony, I begin by presenting a brief taxonomy of the uses and abuses of foreign and international law. (Note that, by "foreign law," I refer to the laws of other nations; by "international law," I refer to treaties and the law of nations.) In several contexts, such as the law of contracts, the use of foreign or international law is perfectly legitimate. In other contexts, including certain tasks of constitutional interpretation, to reference such laws is to abuse both them and our own laws—it is illegitimate.

After those general remarks, I will briefly discuss three specific issues that have received far too little attention from legal scholars and from Congress. First is that the abuse of foreign and international law has, as a practical matter, primarily served to undermine our system of federalism by arrogating the reserved powers of the states. Second is that Congress's practice of "outsourcing" U.S. law through the implementation of treaties that have significant domestic effects undermines our usual democratic processes for lawmaking, reduces accountability, results in bad law, and puts Americans' liberties at risk. The third issue is a hopeful one: while the misuse of foreign and international law is often attributable to the courts, Congress does have the power to address this problem in several ways.

Abusing Foreign and International Law

It is useful to define, with some precision, those areas where the use of foreign or international law has proven controversial. The one which has appropriately been subject to the greatest criticism is the use of foreign legal materials in the interpretation of the U.S. Constitution. To be clear, in this, I do not refer to old English law, Roman law, and those practices, cases, and treatises which established the background principles of common law and the law of nations to which the Framers of the Constitution referred in their work. Without resort to this body of law, we would struggle to identify the substance and boundaries of such constitutional terms as "habeas corpus," "bill of

attainder," and "letters of marque and reprisal." These sources are legitimate because they elucidate the meaning of the Constitution as it was originally understood and give us insight into the structure and purpose of its provisions. These sources thereby serve to limit judicial discretion by fixing the meaning of the constitutional text. This, in turn, delineates the space in which the political branches of government, as well as the states, may act in response to public will.

But lacking all such legitimacy is the citation of more recent foreign precedents, which the Supreme Court has applied in a perfectly contrary manner, to unmoor, rather than to fix, constitutional meaning and thereby to broaden judicial discretion, at the expense of the powers of the political branches and the states. In their authoritative article reviewing two hundred years of Supreme Court citations to foreign sources of law[1], Steven Calabresi and Stephanie Dotson Zimdahl trace the Court's "modern" usage of foreign law to Chief Justice Warren's plurality decision in *Trop v. Dulles*, in which the Court held that forfeiture of citizenship as punishment for wartime desertion violated the Eighth Amendment's proscription against cruel and unusual punishment. 356 U.S. 86, 101-103 (1958). That proscription, stated Chief Justice Warren, "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," thereby introducing that loose standard into the Court's jurisprudence. *Id.* at 101. And by example, he indicated that the practice of foreign nations is relevant to ascertaining the present state of these "standards of decency":

> The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime. It is true that several countries prescribe expatriation in the event that their nationals engage in conduct in derogation of native allegiance. Even statutes of this sort are generally applicable primarily to naturalized citizens. But use of denationalization as punishment for crime is an entirely different matter. The United Nations' survey of the nationality laws of 84 nations of the world reveals that only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion. In this country the Eighth Amendment forbids that to be done.

Id. at 102-03 (footnote omitted).

And so the die was cast. The citation to foreign and international materials soon became a regular feature of the Court's Eighth Amendment cases, particularly regarding limitations on capital punishment. *See Coker v. Georgia*, 433 U.S. 584, 592 n.4, 596 n.10 (1977) (citing "the legislative decisions . . . in most of the countries around the world" and "the climate of international opinion" to support the holding that imposition of the death penalty for rape was cruel and unusual punishment); *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (citing the decisions of various countries to abolish the doctrine of felony murder to support the holding that imposition of the death penalty for vicarious felony murder was cruel and unusual punishment); *Thompson v. Oklahoma*, 487 U.S. 815,

[1] Steven Calabresi and Stephanie Dotson Zimdahl, The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision, 47 Wm. & Mary L. Rev. 743, 846-47 (2005).

830 (1988) (citing "the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community," as well as Soviet law, to support the holding that imposition of the death penalty on a person less than 16 years old at the time of his offense was cruel and unusual punishment); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (citing the alleged views of the "world community," as well as polling data, to support the holding that imposition of the death penalty on mentally retarded offenders was cruel and unusual punishment); *Roper v. Simmons*, 543 U.S. 551, 575-78 (2005) (citing the United Nations Convention on the Rights of the Child and other countries' practices to support the holding that imposition of the death penalty on minors was cruel and unusual punishment).

Two recent decisions citing to foreign law outside of the death penalty context bear special mention. *Graham v. Florida*, 130 S. Ct. 2011 (2010), an Eighth Amendment case, is notable for applying the Court's approach to foreign law to hold that life-without-parole sentences may not be imposed for crimes committed by juvenile offenders other than homicide. It remains to be seen whether this case is an aberration or whether it signifies the breach of the firewall that had limited the application of foreign law, and the loose "evolving standards" inquiry that gives it putative relevance, to capital punishment. An early indication may come soon, as the Court has agreed to hear two cases this term that present the question of whether a teenage murderer may ever be sentenced to life without parole. *Miller v. Alabama*, No. 10-9646; *Jackson v. Hobbs*, No. 10-9647.

In *Lawrence v. Texas*, 539 U.S. 558, 576-77 (2003), the Court struck down Texas's anti-sodomy statute as violating of the Fourteenth Amendment's Due Process Clause. In reaching this decision, the Court cited to judgments of the European Court of Human Rights, as well as claims that "[o]ther nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct." Unlike in the Eighth Amendment context, the Court was somewhat clearer in *Lawrence* in stating that its decision relied on these sources: "The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent." *Id.* at 577. *Lawrence's* approach, it should be noted, is consistent with the Court's reasoning in *Roe v. Wade*, 410 U.S. 113, 137-38 (1973), which placed significant weight on recent developments in English statutory law in reaching its conclusion that state criminal abortion laws also violate the Fourteenth Amendment's Due Process Clause. No logical limiting principle, of which I am aware, cabins the application of foreign law, through the Due Process Clause, to striking down the laws at issue in *Lawrence* and *Roe*. This method will, no doubt, be put to use in future cases concerning hot-button social issues that divide public opinion, particularly where elite opinion may be less balanced.

Why has the Supreme Court's citation to foreign law and international law materials in these opinions attracted such opprobrium? I think the objections can be classified into four basic propositions:

- **Foreign law is constitutionally irrelevant.** The Constitution should be interpreted according to its original public meaning. The present-day practices of foreign nations do not elucidate that meaning, particularly with respect to the Eight Amendment or the Fourteenth Amendment's Due Process Clause. (The same is true of treaties that the United States has declined to sign or ratify.) Indeed, in the usual case, the present-day practices of foreign nations are inconsistent with, or contrary to, original public meaning. Discussion of foreign law therefore distracts the Court from its core interpretive task. It is also contrary, in both form and appearance, to the Supremacy Clause, by elevating foreign statutes or court decisions to "the supreme law of the land," superior to U.S. statutory law and even the constitutional text.

- **Reliance on foreign law is anti-democratic.** The Constitution establishes and preserves systems of representative government (at the state and federal levels, respectively), but the Court's use of foreign law services to limit the range of permissible policy choices that may be made by the people's representatives, and establishes these limitations based on the preferences or political decisions of peoples not entitled to any say in our governance. Judge Richard Posner put this point particularly well: "Judges in foreign countries do not have the slightest democratic legitimacy in a U.S. context. The votes of foreign electorates, the judicial confirmation procedures (if any) in foreign nations, are not events in our democracy. To cite foreign decisions in order to establish an international consensus that should have weight with U.S. courts is like subjecting legislation enacted by Congress to review by the United Nations General Assembly."[2]

- **The Court is incompetent at canvassing "the climate of international opinion."** The Court's typical approach to applying foreign law, particularly in the Eighth Amendment context, has been to "count the noses" of foreign nations on any particular issue, but the Court seems unaware, or uninterested in, exactly what it is counting. Foreign laws and institutions differ in meaningful ways from their domestic counterparts, such that counting statutes or court decisions may not be an accurate means to gauge world opinion. In many instances, for example, foreign practice does not reflect the will of foreign peoples—for example, capital punishment retains widespread public support in many countries where political actors have abolished it. *See* Josh Marshall, Europeans Support Capital Punishment Too, *The New Republic*, Jul. 31, 2000. In that case, does foreign practice reflect "evolving standards of decency" or simply the preferences of a relatively small group of political elites? Then, there are basic factual inquiries that are beyond the Court's institutional competence and role. Does the Court know, for example, "that every foreign nation — of whatever tyrannical political makeup and with however subservient or incompetent a court system — in fact *adheres* to a rule of no death penalty for offenders under 18"? *Roper*, 543 U.S. at 623 (Scalia, J. dissenting). Evidence suggests that the justices have, at times, been misled or mistaken on basic factual points concerning foreign practices. *See,*

[2] Richard A. Posner, *Foreword: A Political Court*, 119 Harv. L. Rev. 31, 88-89 (2005).

e.g., Knight v. Florida, 528 U.S. 990, 996 (Breyer, J., dissenting from denial of certiorari) (citing Zimbabwe's humane practices).

- **The Court's citation of foreign law is opportunistic.** The Court's citation of foreign law has been arbitrary in two respects that suggest opportunism is at play. First, what Justice Scalia has said about the citation of legislative history applies equally to foreign law: "the trick is to look over the heads of the crowd and pick out your friends." *Enmund* discusses the law of a few Commonwealth and European countries, while *Lawrence* fixates on a decision of the European Court of Human Rights. And *Thompson* is almost comical in its arbitrary survey of foreign practices: "Although the death penalty has not been entirely abolished in the United Kingdom or New Zealand (it has been abolished in Australia, except in the State of New South Wales, where it is available for treason and piracy), in neither of those countries may a juvenile be executed." 487 U.S. at 830-31. Second is the Court's choice of those areas of law in which to cite to foreign law. For example, as Calabresi and Zimdahl note, "Foreign law is more conservative than U.S. constitutional law with respect to separation of church and state, admission of illegally obtained evidence, and allowance of governmental restrictions on speech."[3] In these areas, foreign law is (apparently) irrelevant, for reasons unknown. At best, the Court's haphazard practice may indicate that its citations to foreign law are simply "interpretive bricolage," "essentially a random, playful, and perhaps even unconscious process of reaching into a grab bag and using the first thing that happens to fit the constitutional problem at hand."[4] At worst, the Court is being selective in its choice and application of law to reach its preferred outcomes. One cannot help but wonder whether the decisive factor governing the citation of foreign law is, in the final analysis, simply "our own judgment." *E.g., Coker*, 433 U.S. at 597.

For these reasons, Congress, and all Americans, should be concerned that the Supreme Court's abuse of foreign law continues apace and appears to be gradually expanding to reach more punishments under the Eighth Amendment and more hot-button issues of social controversy. One can predict, with reasonable confidence, that one or another justice on the Court—perhaps even in a majority opinion—will, within the next several terms, rely on irrelevant foreign laws to justify his or her position on life without parole for juvenile murderers; life without parole for adults; same-sex marriage; permissible delays in the administration of capital punishment; and possibly even universal health care. To the extent that the Court relies on foreign laws to decide these and other issues, it gives short shrift to our Constitution, our representative institutions, and the will of the American people in favor of the opinion of foreign elites who are unaccountable to the American people and pledge no fealty to our Constitution or laws. And to the extent that the citation of foreign law is just a fig leaf to cover or "confirm" the Court's application of its own preferences in place of the rule of law, the rule of law suffers no less.

---

[3] Calabresi and Zimdahl, *supra*, at 751.

[4] Roger Alford, *Misusing International Sources To Interpret the Constitution*, 98 Am J. Int'l L. 57, 64 (2004).

Using Foreign and International Law

It is also useful to delineate those areas where the citation and application of foreign or international law is appropriate in principle and less controversial in practice, so as to understand the challenges presented by such citation (when it is, conceptually, legitimate) and to narrow debate to those areas where there is actual controversy and disagreement. These can be grouped into several broad classes.

The first, representing probably the largest classes of cases in the federal court applying foreign law, is private law. These cases often implicate contracts that specify a choice of law under which they are to be interpreted and applied or tort claims (or the like) that arose abroad. Consider, for example, a lawsuit to enforce a contract that was struck in France and is, by its terms, subject to French law. This may appear to be straightforward and even mechanical: the court is charged to determine the applicable law, determine the meaning of the contract in light of that law, and then measure the facts and circumstances of the case against the obligations specified in the contract. But even in this simple case, there may be pitfalls. For example, the contract, and the law upon which it rests, may be contrary to our own public policies, in which case it may be, in whole or in part, unenforceable. And even where there is no issue of public policy, there is the matter of ascertaining the substance of the foreign law itself, which is no easy task. (A recent opinion by Judge Frank Easterbrook, of the United States Court of Appeals for the Seventh Circuit, illustrates as much, in the course of applying French law to a routine contract dispute. *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624 (7th Cir. 2010)). And even where the law can be ascertained and is found enforceable, the courts must also take account of the difficulties in translating and applying foreign legal concepts divorced from their institutional settings. *See id.* at 631; *id.* at 635-37 (Posner, J., concurring). These tasks becomes only more difficult, and fraught with error, the more wide-ranging the court's inquiry, such as when the Supreme Court attempts to determine world opinion on some broad question of law.

The second class concerns the interpretation and application of international law. This includes treaties to which the United States is party, which in some instances have been interpreted by the courts of other nations or by international tribunals. *See Medellin v. Texas*, 128 S. Ct. 1346, 1357-58 (2008) (citing cases). But even here, where courts of different nations are called upon to construe and apply the same text (though perhaps in translation, which presents its own difficulties), they may arrive at very different results. A treaty, though creating an international law obligation on the United States, may still not constitute binding federal law enforceable in United States courts. *Id.* at 1356-57. That is, it may not be self-executing. And in some instances, the United States may have entered into reservations or understandings that alter a treaty's domestic effect. The Vienna Convention on the Law of Treaties defines a reservation as "a unilateral statement . . . made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." Under the convention's formulation, reservations are effective so long as they are not prohibited by the treaty or incompatible with its "object and purpose." Understandings serve to notify other parties to the treaty of a nation's interpretation of specific terms, particularly as those terms

apply to its laws. Both reservations and understandings may alter the application of a treaty's terms to a particular party. So may subsequent actions by Congress or the Executive Branch. For example, subsequent statutory enactments will be construed so as not to conflict with international obligations only "where fairly possible" to do so. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1936).

A third, and related, area is where U.S. law incorporates foreign or international law. For example, the Alien Tort Statute gives federal courts jurisdiction over "any civil action by an alien, for a tort only, committed in violation of the law of nations." 28 U.S.C. § 1350 (2006). The Supreme Court has taken this language to authorize "any claim based on the present-day law of nations [that] rest[s] on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized [i.e., violation of safe conducts, infringement of the rights of ambassadors, and piracy]." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004). The vagueness of the ATS continues to sew confusion over the precise nature and substance of the claims recognized under it. Though there has not been a flood of judgments under the ATS, there has been a flood of complex, slow-moving litigation that has proven burdensome to the courts and expensive to litigants. The law that courts apply under the ATS is underdetermined, and this has been a recipe for inconsistent and arbitrary rulings. Congress would do well to clarify and limit the ATS, or simply to repeal it.

A more typical example of the incorporation of foreign law is the Lacey Act, which criminalizes the importation, possession, or transfer of any wildlife in violation of any treaty or where the wildlife was taken, possessed, transported, or sold in violation of any foreign law. 16 U.S.C. § 3372. In this way, the Lacey Act incorporates into U.S. law both the broad species listings made under the Convention on International Trade in Endangered Species ("CITES") and the laws and regulations concerning the possession and export of flora and fauna of *every country in the world.* In some cases, these laws do not even address conservation. For example, it was under the auspices of the Lacey Act that the federal government dispatched heavily armed federal law enforcement officers to raid Gibson Guitar factories this past August to seize woods from India that, under the U.S. Department of Justice's interpretation of Indian law, may have been illegally exported because they were not finished by workers in India. *See, e.g.*, Deborah Zabarenko, Gibson Guitar CEO slams U.S. raids as "overreach," Reuters, Oct. 12, 2011. I have written previously about the misuse of CITES listings to protect commercial interests and the heavy personal toll that this practice imposed on a U.S. orchid dealer whose home was raided and who was ultimately imprisoned for importing orchids that are plentiful in the wild and easily bred. Andrew M. Grossman, The Unlikely Orchid Smuggler, Heritage Foundation *Legal Memorandum* No. 44, Jul. 27, 2009, at http://bit.ly/tSPeQc.

While it is usually not controversial that court would apply foreign or international law in this context—after all, Congress has mandated as much—

"outsourcing" U.S. law in this manner to foreign countries and international bodies is usually bad policy, for reasons that I discuss below.[5]

The Abuse of Foreign And International Law Undermines Federalism

One telling feature shared by all but one of the cases discussed as "abuses" of foreign law is that the losing parties were states. Put more directly, in each case, the Supreme Court struck down a state law in part because it conflicted not with any valid and proper federal statute or explicit limitation on state power under the Constitution, but because it conflicted with foreign laws and practices that, according to the Court, effectively have the force of federal constitutional law. In effect, the usage of foreign law in this manner serves to aggrandize federal power at the expense of the states' retained police power—that is, their power to provide laws to protect the public welfare and to enforce those laws. In this way, the Court's abuse of foreign law is yet another area in which the structural balance of power between the states and the federal government has been tilted decisively in the federal government's favor. This undermines the instrumental purposes of federalism: to safeguard individual freedom, to provide for responsive government closest to the people, and to encourage local experimentation.

It may also serve to knock away what limitations remain on the federal government's power. In *Printz v. United States*, 521 U.S. 898 (1997), the Court held that the Tenth Amendment precluded federal commandeering of state officials. This decision was based on the structure of the Constitution and longstanding historical practice. Justice Breyer, who dissented, would have elevated over those sources the practices of other nations. *Id.* at 976-78. "The federal systems of Switzerland, Germany, and the European Union," he explained, "all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central 'federal' body." *Id.* at 976. While acknowledging that "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," Justice Breyer posits that these other nations' experience "may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem—in this case the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent governmental entity." *Id.* at 977. The "problem" that Justice Breyer identifies is the correct one (or, at least, one of the correct ones), but it is not one that is empirical in nature—the Constitution rarely is. Instead, the Framers themselves provided a categorical answer, as the majority opinion convincingly explains. Justice Breyer, by contrast, would revisit limitations on federal power on a case-by-case basis, relying on the experiences of foreign states whose institutions, circumstances, and values differ markedly from our own. The inevitable result would be a federal plenary power, with the states relegated to the role of Washington's deputies—after all, it is America that

[5] That this practice may be uncontroversial, in the main, does not mean that it is lawful. *See* Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 Minn. L. Rev. 71 (2000); John C. Yoo, *New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 Const. Comment. 87 (1998).

is exceptional in its form of government, meaning that, empirically-speaking, our distinct practices and limitations on government are likely to be outliers.

International law presents a similar threat, under the Department of Justice's current view of the Treaty Clause power. Consider the case of Carol Bond, the Pennsylvania woman who, after smearing caustic chemicals on the mailbox and car-door handle of her husband's paramour, was prosecuted under federal law implementing the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction. This was a routine domestic dispute—no injury resulted—and the chemicals were taken from her employer and purchased through Amazon.com. Bond's offense is within the heartland of those matters reserved to the states under their general police power, but the Department of Justice argues that the Convention empowers it to address any conduct involving a toxic chemical. (At oral argument before the Supreme Court, the federal government suggested that it could, for example, make a federal offense of an act involving the use of vinegar to poison a goldfish or could enforce a nationwide ban on vinegar.) The federal government claims that the Treaty Clause power is not subject to the limitations of the Tenth Amendment. This is an extreme position, one that reaches far beyond the Supreme Court's holding in *Missouri v. Holland*, 252 U.S. 416 (1920), which attempted to balance the state and national interest, while limiting its holding to "valid treaties"—that is, those addressing issues traditionally considered to be the proper subjects of international law.[6]

It is not unthinkable, and it may even be likely, that foreign and international law will play some role in the Supreme Court's consideration of currently-pending challenges to Congress's power to enact the Patient Protection and Affordable Care Act's individual mandate. Those countries whose laws are cited most often by the Court's internationalists generally have national healthcare systems, sometimes even administered or governed by law at a federal level—for example, Canada. Surely, it could be argued, their experience demonstrates empirically that a national healthcare system and federalism may coexist. International treaties—in particular, the U.N.

---

[6] *Bond* is not an aberration. In a recent oral argument before the Supreme Court, the Solicitor General argued that the Berne Convention for the Protection of Literary and Artistic Works provided a basis for the federal government to expand copyright protection beyond that which may be allowed by the Copyright Clause and perhaps even to abrogate First Amendment rights. Transcript, *Golan v. Holder*, No. 10-545 (Oct. 5, 2011), at 31-32. Pressed by Justice Scalia, the Solicitor General refined his remarks, but without fully repudiating that view. *Id.* at 32. To the contrary, he argued consistently that the promise of securing greater protection for the works of domestic authors abroad legally justified the "price of admission"—that is, changes to domestic law to remove from the public domain works whose copyrights had expired. While the restoration of expired copyrights may be authorized by the Copyright Clause—I take no position on the issue—the Solicitor General's argument is independent of the Clause and would be unchanged if, for example, the "price of admission" were to reenact and enforce the provision of the Gun-Free School Zones Act struck down in *Lopez*.

Universal Declaration of Human Rights and the U.N. International Covenant on Economic, Social, and Cultural Rights—have been read by activists and others to declare medical care a human right that the U.S. government has an obligation to provide to its citizens. Of course, those treaties do not establish any such obligation, and Canadian law, which differs so greatly from our own, is irrelevant to the task of constitutional interpretation. But these are only minor impediments to judges who are willing to cite, as legal authority, treaties that the United States has never even ratified, *Roper*, 543 U.S. at 576, and Soviet law on capital punishment, *Thompson*, 487 U.S. at 831.

The Problems with Outsourcing U.S. Law

Judges are not always to blame for the problems caused by excessive reliance on foreign and international law. At times, they are merely following Congress's directives, and Congress has directed them to apply foreign or international law, despite that it may be vague, obscure, ill-suited to the task at hand, incompatible with U.S. norms, or simply unwieldy. Congress should be very wary of "outsourcing" U.S. law to foreign and international bodies. Two examples of this practice are discussed above, the Alien Tort Statute and the Lacey Act. As to the former, blame the first Congress for its enactment, but more recent Congresses share in the responsibility for its persistence after it was rediscovered by legal activists thirty years ago. As to the latter, its breadth has been repeatedly expanded by Congress over the years. There are many other examples.

As an initial matter, vesting power to determine U.S. law in foreign or international bodies raises grave constitutional doubts with respect to delegation. For reasons of accountability, legislative power is vested in Congress, and individuals who exercise delegated power to make policy are subject to the requirements of the Appointments Clause of Article II. Dynamically incorporating foreign or international bodies of law into U.S. law hands significant policymaking discretion to individuals who are not Members of Congress and have not been properly appointed.[7] Indeed, they are subject to no political check recognized by the U.S. Constitution. Incorporation of such bodies of law is therefore constitutionally suspect.[8]

Second is the difficulty of ascertaining and applying foreign law. I already described the difficulty in applying French commercial law in a typical contract case. But what about foreign laws and environmental regulations, particularly where the stakes are high and the penalty for noncompliance is imprisonment? In one instance, individuals importing Honduran lobsters into the United States were charged, in U.S. courts through the Lacey Act and conspiracy statute, with violation of Honduran regulations that had either been repealed or had never even gone into effect and which the Honduran government claimed had never, in any case, been violated. No matter, four businessmen were sent to jail, despite that their conduct was not unlawful under Honduran law (and thus should not have been unlawful under U.S. law) and despite that

[7] Static incorporation—that is, the incorporation of a particular body of law at a particular point in time—would not run afoul of this limitation.
[8] *See* Yoo, *supra*.

the lack of any evidence evincing an intent to violate the law.[9] In this way, incorporation of foreign and international law exposes honest, law-abiding individuals to criminal liability, without providing them any notice of how they may comply with the law and avoid the risk of prosecution.

A third, and related, problem is vagueness. The Alien Tort Statute, as discussed above, provides jurisdiction over torts "committed in violation of the law of nations." 28 U.S.C. § 1350. The courts have struggled to define the "law of nations" and, even where its contours may be apparent, its details are uncertain at best. This results, again, in liability risks, a lack of guidance to the law-abiding, and extensive legal wrangling.

Fourth, these laws are not subject to the usual give-and-take politics of our representative democracy. Important American interests may go unrepresented (to say the least) when, for example, we incorporate Indian trade-protection law into our criminal code. International bodies are less responsive to public opinion and U.S. interests. Why should we adopt laws that are not only difficult to ascertain and apply, but are also inconsistent with, or even contrary to, our preferences, values, and interests?

Fifth, in large part because foreign law is anti-democratic, it is also likely to be inferior to laws devised by this Congress and by the states' representative institutions. That is the insight of John McGinnis and Ilya Somin, in a recent article in the *Stanford Law Review*. Surveying the means by which law is made in domestic and international bodies, and analyzing the incentives facing policymakers in those bodies, they conclude:

> Both American law and raw international law are imperfect. But there are strong reasons to believe that the latter is systematically more flawed than the former. The political processes that produce U.S. law have stronger democratic controls and are less vulnerable to interest group capture than those that produce what we have called "raw" international law. This comparison provides a strong argument that Americans will be better off under a legal regime that rejects the use of raw international law to override domestic law. Only those international obligations that have been validated by domestic political processes should be part of our law because they alone can avoid the democracy deficit of raw international law.

John McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 Stan. L. Rev. 1175, 1246 (2007). But when lawmaking is outsourced wholesale to foreign and international bodies, this crucial check goes undone.

---

[9] *See* Trent England, A Lobster Tale: Invalid Foreign Laws Lead To Years in U.S. Prison, November 2003, http://www.overcriminalized.com/CaseStudy/McNab-Imprison-by-Foreign-Laws.aspx.

Recommendations for Congress

Although Congress cannot address all of the problems that arise when federal courts apply foreign laws—in particular, Congress probably lacks the power to preclude the courts from citing to current foreign materials in interpreting the provisions of the Constitution—it can and should make meaningful improvements to U.S. law to reduce dependence on foreign and international legal sources and thereby enhance the rule of law. To correct the specific problems discussed in this testimony, Congress should:

- **Concede limits to the Treaty Clause power.** To prevent the courts from interpreting treaties and legislation implementing treaties as impinging on the rights retained by the states and the people, Congress should legislate a rule of interpretation that its legislative acts are not to be construed to rely on the Treaty Clause power and do not rely on that power. This would, at the least, ensure that laws implementing treaties are consistent with both the limitations of Article I and those provisions of the Constitution that protect individual rights, including the Bill of Rights. Congress should also make clear that this is its interpretation of the Treaty Clause. Although that interpretation would not be binding on the courts, it would be due consideration and some deference as the view of a co-equal branch.

- **Reform or repeal the Alien Tort Statute**. Congress could reform the ATS by specifying those causes of action to be recognized within its jurisdictional grant—for example, violation of safe conducts, infringement of the rights of ambassadors, and piracy. It should clarify that the ATS is not an open-ended grant of lawmaking (or law-discovering) authority to the courts, but a limited and bounded grant of jurisdiction over a finite set of claims by aliens that, for historical reasons, may be properly heard in U.S. federal courts. In the alternative, Congress could simply repeal the ATS, which would, in effect, return the law to its pre-1980 state.

- **Reform the Lacey Act and other acts incorporating foreign or international law**. Outsourcing lawmaking to foreign or international bodies raises grave constitutional doubts and, as a matter of policy, is likely to produce bad results. Congress should reject such incorporation, particularly when violations of incorporated laws may give rise to criminal liability, and should instead define in the text of the statutes that it passes what conduct is prohibited. For example, rather than incorporate the CITES appendices into the Lacey Act, Congress should list those species that it believes should be covered or, at the least, require a U.S. administrative agency to undertake that task based on the evidence before it. If Congress is to retain provisions that incorporate foreign or international law, it should ensure that those provisions provide strong *mens rea* protections to guard against unjust liability.

- **Provide administrative safe-harbors to protect the law-abidiug.** Uncertainty regarding the content or application of foreign and international laws that are incorporated into U.S. laws plagues U.S. citizens and businesses. In every instance where Congress has incorporated foreign or international laws into U.S. law, it should create a process by which parties subject to those laws may seek a

determination of the law that is binding on the federal government. This process must be cost-effective—that is, in routine cases, it should not require extensive legal representation and complicated administrative process—and expedient, to accommodate the needs of individuals and business.

Conclusion

There are good reasons to be wary of judicial reliance on foreign and international law. The present laws and practices of foreign nations have no place in constitutional interpretation. The citation of such laws serves to constrain the legitimate range of democratic action and to empower the federal government (and in particular, judges) at the expense of the people and the states. This is also the trend in international law, which increasingly seeks to dictate domestic policies. Even where the use of foreign or international law may be constitutionally permissible, it is difficult to apply, creates enormous legal uncertainty, and threatens Americans' liberty. In general, the use of such law is anti-democratic and leads to poor results.

Congress need not accept the status quo in this area. It can limit the application of foreign and international law and should take action to do so.

***

The Heritage Foundation is a public policy, research, and educational organization operating under Section 501(c)(3). It is privately supported and receives no funds from any government at any level, nor does it perform any government or other contract work.

The Heritage Foundation is the most broadly supported think tank in the United States. During 2010, it had more than 710,000 individual, foundation, and corporate supporters representing every state in the U.S. Its 2009 income came from the following sources:

Individuals	80%
Foundations	17%
Corporations	3%

The top five corporate givers provided The Heritage Foundation with 1.6% of its 2009 income. The Heritage Foundation's books are audited annually by the national accounting firm of McGladrey & Pullen. A list of major donors is available from The Heritage Foundation upon request.

Members of The Heritage Foundation staff testify as individuals discussing their own independent research. The views expressed are their own and do not reflect an institutional position for The Heritage Foundation or its board of trustees.

Mr. FRANKS. Well, thank you, Mr. Grossman.

And, Professor Fontana, you are now recognized, sir, for 5 minutes?

TESTIMONY OF DAVID FONTANA, ASSOCIATE PROFESSOR OF LAW, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Mr. FONTANA. Thank you for having me. Chairman Franks, Ranking Member Nadler, Members of the Subcommittee, thank you for having me today to discuss this very important issue. I want to make three quick points summarizing my testimony.

First of all, banning entirely the use of foreign law in American Federal courts in all cases would be very damaging to American business. Second, banning entirely all foreign law in all cases in American courts would hurt courts in their attempt to answer the questions that come before courts in deciding constitutional cases. And, third of all, and very importantly I think, there is quite a consensus across ideological lines and over the history of the Supreme Court that some use of foreign law in some cases is perfectly appropriate within our constitutional jurisprudence, and within our constitutional traditions.

So, first of all, I want to emphasize the point separate from the use of foreign law in interpreting the Constitution. Foreign law plays a central role in allowing American corporate to compete in a global economy. As we know, American businesses compete internationally now, and as part of that, they have to have the freedom of contract. They have to be able to enter into contracts with companies overseas, who, quite often, will want there to be some part in the contract that allows the disputes to be settled using the law of some country other than the United States.

My concern about banning foreign law in Federal courts is that this would prevent this from happening, which would really put American corporations at a disadvantage in making contracts and engaging in transactions with foreign companies.

Second of all, in the constitutional context, foreign law is quite often helpful factual evidence to help courts decide the constitutional issues that all people agree they must decide. So, the original understanding of the Constitution and the text of the Constitution, earlier cases that courts have decided, get you part of the way to an answer in a judicial decision, but they do not get you all the way. In every case that raises complicated constitutional issues, there are questions about whether or not what the government is doing is the appropriate means to further an appropriate ends. And it is long established across ideological lines that in deciding these issues, Federal courts look to lots of different kinds of evidence. They look to State laws, and often they look to foreign laws. If they are trying to decide if there is another policy way of pursuing an important goal, it is helpful to know what other policy options there are out there. If they want to know if this policy goal will actually succeed, it is help to see whether in States in or in other countries whether this policy has proven successful.

Finally and briefly, but importantly, I think that there has been a misunderstanding in this discussion in all different circles about how kind of controversial this issue has been over history and on the current Court.

So, Justice Scalia, who is often cited as the strong proponent or strongest opponent of using foreign law, is on the record as saying that foreign law is helpful in deciding constitutional cases and making factual determinations. Indeed, he cited to foreign law in his dissent in *Lawrence v. Texas*. He cited to foreign law in his opinion just last year in a gun rights case. Justice Alito has cited to foreign law. Justice Thomas has cited to foreign law. And, again, this is not new. The Federalist Papers reference several dozen foreign countries as part of their understanding of the new Constitution. In deciding *Marbury v. Madison*, a case we all know that established the American tradition of judicial review, Chief Justice John Marshall cited to British constitutional practice, not at the time of the founding, but at the time of *Marbury*.

So, my concern about banning foreign law entirely in Federal courts is that this would make illegal immediately, as a matter of Federal law, a practice that was engaged in by people from John Marshall to Antonin Scalia. And I think we should be hesitant about banning something that has been so established across so many ideological lines over such a long history.

Thank you.

[The prepared statement of Mr. Fontana follows:]

Testimony of David Fontana

Associate Professor, George Washington University Law School

United States House of Representatives Committee on the Judiciary

Subcommittee on the Constitution

"Judicial Reliance on Foreign Law"

Wednesday, December 14, 2011 at 10 a.m.

2141 Rayburn House Office Building

Thank you for your very kind invitation to appear before your Subcommittee today to testify on this very important issue.

I am an Associate Professor of Law at George Washington University Law School, where I teach primarily in the areas of constitutional law and comparative constitutional law. I have published articles in scholarly journals as well as in general interest publications on the use of foreign law in our federal courts, and these writings form the basis for my testimony before you today. Once a year, I convene a discussion group of scholars interested in American and comparative constitutional law.

There are several concerns I have with the proposed legislation, but in my testimony I will focus on what the legislation means for federal courts deciding constitutional issues. Foreign law can be helpful to courts as they decide the issues they must decide to resolve constitutional cases, and so using foreign law has been accepted across the ideological spectrum and throughout the history of the Supreme Court. My statement is not meant to argue that foreign law is an emerging and controversial part of deciding constitutional cases. Instead, my statement is meant to demonstrate that

considering foreign law has been and largely remains an accepted practice, and this legislation could dangerously interfere with that practice by banning it entirely.

I. Preliminary Questions about the Meaning and Breadth of the Statute

Before I address my concerns about how this legislation would prevent federal courts from deciding constitutional issues, I want to address two issues related to the meaning (what does the legislation apply to?) and breadth (how far does it extend?) of the legislation. It is important to clarify what I take this legislation to mean before I express my apprehensions about it.

First, let me address some ambiguities with the legislation. The legislation prevents courts from looking to foreign law "in whole or in part" as a form of "authority." Does the legislation simply prevent courts from looking to foreign law as a *binding* legal precedent—in other words, does it prevent courts from considering foreign law in the same sort of obligatory way courts might treat their own earlier decisions or any decision by a higher court? If the legislation simply prevents courts from looking to foreign law as a binding legal precedent, it would have very little or no effect. This is because most would agree that courts hardly ever—if ever at all—look to foreign law in that fashion.[1]

[1] There appears to be broad agreement with this proposition. During the hearings this Subcommittee held on March 25, 2004 about a previous, related resolution, Representative Nadler stated that of the decisions by the Supreme Court being discussed in that hearing, "none of these decisions have turned on a foreign citation, nor have any been treated as binding." *See Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing On H.Res. 568, Before the Subcommittee on the Constitution, House Judiciary Committee*, 108th Cong. 44-45 (2004), *available at* http://judiciary.house.gov/legacy/92673.PDF [hereinafter 2004 Hearing]. There have been more Court decisions citing foreign law since then, but they are structured similarly to the decisions Representative Nadler and others were discussing during that hearing. One of the witnesses more negative about the use of foreign law, Professor Michael Ramsey of the University of San Diego School of Law, made similar remarks later in the same hearing. *See id.* at 45 ("I think it's probably correct so far to say that these

The legislation would be preventing a practice that does not exist, and I imagine Congress wants to target its legislation at a range of practices that do exist.

Alternatively, does this legislation prevent federal courts from looking to foreign law as *any* part of their process of deciding constitutional cases? If the legislation is meant to prohibit federal courts from looking to foreign law even as persuasive authority—as authority that does not bind courts in a formal sense but only affects courts in so far as it convinces them[2]—then the legislation would prevent courts from looking to foreign law in important ways. I will therefore address that understanding of the legislation in my statement.

A final relevant ambiguity in the legislation relates to its use of the phrase "foreign law." Based on remarks made by those on this Subcommittee in previous, related hearings—and the cases that most troubled members of this Subcommittee and have lead to proposed resolutions and now legislation—I will assume that "foreign law" is referencing the full range of foreign legal materials. This means that the proposed legislation would even prohibit the use of foreign legal *experience* as this experience is utilized in a foreign legal case and in other discussions in foreign countries. As I will highlight below, I think this usage of foreign legal experience is quite common and accepted in American federal courts. Because this usage appears to be what the legislation is designed to address, and because this is how foreign law is often utilized, it is this usage of foreign law I will address in my remarks.

---

citations of foreign authority haven't had a substantial role in decisions that have been made."). Professor Ramsey still believed this issue to be an emerging issue, however. Of course, there is still some disagreement about whether or not foreign law is being used in a more binding fashion in these cases. For an illustrative example, see Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005).

[2] For my discussion of the use of foreign law as persuasive authority, see David Fontana, *Refined Comparativism in Foreign Law*, 49 UCLA L. REV. 539, 557-59 (2001).

Second, because I am focusing exclusively on how this would affect constitutional decisions, I will bracket entirely the disruptive effects this legislation could have on international business transactions. The legislation could be read to apply quite broadly in ways that would stifle not just federal judicial decisions in the area I will discuss (constitutional law) but also in a range of other areas, most notably international business transactions. American companies participating in the global economy often make contracts with foreign companies that require American courts to apply foreign law to decide a commercial dispute. The requirement in this legislation that all (including commercial) disputes in federal courts be resolved only by looking to American law could significantly deter foreign companies from engaging in commercial transactions with American companies. It is for this reason that several pieces of state legislation similar to the legislation you have before you today have specified exceptions for business transactions.[3]

With these questions about what the statute covers aside, let me turn to the principal focus of my remarks: how this legislation threatens to undermine the ability of federal courts to decide constitutional cases.

II. Foreign Law Can Be Helpful for Courts Deciding Constitutional Issues

Foreign law can be an important part of deciding the constitutional issues that federal courts must address, and excluding foreign law entirely threatens to exclude legal materials that are both helpful and probative in deciding constitutional cases. There are

[3] *See, e.g.*, S. 97, 88th Gen. Assemb., Reg. Sess. (Ark. 2011) ("This section shall not apply to a corporation, partnership, or other form of business association.").

certain questions courts must answer in deciding constitutional cases—questions that liberals and conservatives almost all agree are important questions—that call for the kinds of insights that foreign law can provide. For instance, in deciding whether or not a race-conscious governmental program violates the Equal Protection Clause, courts must address whether or not these programs are "narrowly tailored measures that further compelling governmental measures."[4] In other words, as part of assessing whether or not the program was "narrowly tailored," courts must address whether there are other policy alternatives that would pursue the same goals but treat groups more equally. Foreign law can be helpful here: in surveying the practices of not just governments in the United States, but governments elsewhere, are there other ways to pursue these goals without having to make distinctions based on race?

Another part of this question the Court has to answer in these cases is whether race-conscious programs serve "compelling governmental measures." Do these programs actually further important goals? Again, this is a factual question that calls for all relevant information. It might be that foreign law shows that race-based programs work very poorly, or work very well. Either way, that answer is relevant to answering the factual question of whether or not these programs further important goals.

There would be no reason to instruct federal courts as a matter of federal law that they cannot consider at all the "percent plans" adopted by states like Texas that guarantee the top percentage of graduating classes admissions to certain public institutions. These plans could illustrate other means of achieving what race-conscious plans try to achieve. There would be no reason to instruct federal courts as a matter of federal law that they

[4] Parents Involved v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 783 (plurality opinion) (citations to other cases omitted).

cannot consider race-conscious programs in the military. These plans could show that race-conscious plans do or do not achieve the ends they are trying to achieve.

Likewise, there would be no reason to instruct federal courts as a matter of federal law that they cannot consider foreign law that might answer the questions before these courts. It is not because foreign law is *foreign* law that makes it relevant in these cases; it is because foreign law is directly relevant to the questions everyone agrees courts must answer to decide these cases.

As Justice Scalia has noted, foreign law can be relevant in this way,[5] even though this does not mean that foreign law defines the ultimate *meaning* of the Constitution.[6] Our cherished protections are still the same cherished protections as they always have been and hopefully will always be. Free speech remains First Amendment American free speech, and freedom from unreasonable searches and seizures remains Fourth Amendment American freedom from unreasonable searches and seizures. Foreign law plays a role not in telling us to protect speech or in protecting us from searches or seizures, but instead in answering the discrete questions posed by applying those freedoms in specific situations.

Indeed, rather than ignoring or merely implementing the commands of the Constitution, sometimes the commands of the Constitution seem to call for foreign law. The Eighth Amendment, for instance, prohibits "cruel and unusual punishments." It has long been understood that part of determining what is "unusual" involves examining not

[5] Justice Antonin Scalia, *Foreign Legal Authority in the Federal Courts, Keynote Address to the American Society of International Law* (Apr. 2, 2004) in 98 AM. SOC. INT'L L. PROC. 304, 305, 307 (2004) ("It is impossible to say that such materials are never relevant . . . What about modern foreign legal materials? Do I ever consider them relevant to constitutional adjudication? . . . . the argument is sometimes made that a particular holding will be disastrous . . . I think it entirely proper to point out that other countries have long applied the same rule without disastrous consequences.")

[6] *See id.* ("It is my view that modern foreign legal materials can never be relevant to an interpretation of—to the meaning of—the U.S. Constitution.") (italics omitted).

just American punishment practices, but foreign punishment practices.[7] Just as we would not want to prevent courts from considering the practices of the fifty states or the practices over American history, so too we would not want to prevent courts from assessing practices around the world to see whether a punishment is truly "unusual."

III. There Is Broad Support for Using Foreign Law Across the Ideological Spectrum and Across History

Given this role that foreign law can play in helping federal courts decide constitutional issues, it should not be surprising that there has been broad support for using foreign law in constitutional interpretation. This broad support transcends ideological lines among Justices and others, and is also reflected in the range of cases the Supreme Court has decided over its history using foreign law. The issues raised by this practice are important, but we should be cautious about disregarding the wide and long-standing support for this practice.

The current debate about the role of foreign law in constitutional interpretation on the Supreme Court seems to assume that only some of the current and recent Justices engage with foreign law—perhaps Justices Breyer, Ginsburg, Kagan, Kennedy, and Sotomayor on the current Court, and before they retired Justices O'Connor and Stevens.[8]

[7] The Supreme Court case that appeared to influence many of the modern Supreme Court cases using foreign law in the Eighth Amendment context was *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (discussing practices of "the civilized nations").

[8] Both sides seem to assume that the use of foreign law is more limited on the Court than is actually the case. At the time of the July 19, 2005 hearing before this Subcommittee about a previous, related resolution, all sitting Justices had at one point or another cited foreign law in their opinions. Sarah Cleveland testified against the resolution, but noted that "[a]t least seven members of the current Supreme Court have embraced the use of foreign authorities." *Appropriate Role of Foreign Judgments in the Interpretation of the Constitution of the United States: Hearing On H.Res. 97, Before the Subcommittee on*

Justice Scalia is often cited for his speeches and opinions expressing doubts about using foreign law.[9]

But Justice Scalia has written off the bench and in his opinions that foreign law can be useful. In a speech in 2004, as mentioned above, he argued that foreign law could be relevant in deciding constitutional cases. As he wrote in *Thompson v. Oklahoma*,[10] "The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather . . . occupies a place not merely in our mores but, text permitting, in our Constitution as well."[11] Justice Scalia referenced foreign law in *Lawrence v. Texas*[12] to argue about the potential consequences of that decision based on a similar Canadian experience,[13] and has referenced foreign law in many of his other decisions, including some since the controversy about the use of foreign law first erupted.[14]

Justice Thomas has also cited foreign law.[15] Among past Justices, the late Chief Justice William Rehnquist[16] and the late Chief Justice Warren Burger[17] wrote notable opinions citing foreign law. And this is just a partial list of Justices who have used

---

the Constitution, House Judiciary Committee, 109th Cong. 39 (2005), *available at* http://commdocs.house.gov/committees/judiciary/hju22494.000/hju22494_0.HTM. Professor Cleveland was appropriately cautious by using the word "embraced" and "at least." Whether or not they had "embraced" foreign law, though, all nine Justices in the Court at that time had employed it. Representative Feeney stated at those same hearings that there were "three Justices that are remaining fixed on the Constitution without reference foreign law." *See id.* at 62. *See also id.* at 13 ("Six Supreme Court U.S. justices have approvingly been described by Professor—actually Yale Law Dean Harold Koh—as transnationalists.").

[9] *See, e.g.*, Scalia, *supra* note 5, at 307 (stating that "modern foreign legal materials" are "hardly ever" relevant) (italics omitted).

[10] 487 U.S. 815 (1988).

[11] Id. at 868 n.4 (Scalia, J., dissenting).

[12] 539 U.S. 558 (2003).

[13] *See id.* at 604 (Scalia, J., dissenting).

[14] *See* McCreary County v. ACLU of Kentucky, 545 U.S. 844, 886 (2005) (Scalia, J., dissenting); Schiro v. Summerlin, 542 U.S. 348, 356 (2004).

[15] *See* Holder v. Hall, 512 U.S. 874, 906 n.14 (1994) (Thomas, J., concurring in the judgment).

[16] *See* Washington v. Glucksberg, 521 U.S. 702, 718 n. 16, 730, 734 (1997).

[17] *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (Burger, J., concurring).

foreign law in their opinions. Indeed, over the history of the Supreme Court, these references to foreign law have been frequent. As Steven Calabresi, one of the founders of the Federalist Society, wrote in a recent article:

> The Supreme Court's practice of citing and relying on foreign law goes back two centuries . . . . If precedent and caselaw count for anything in constitutional law, then the legitimacy of Supreme Court citation of foreign law is a long settled issue.[18]

The Federalist Papers are replete with references to the constitutional practices of several dozen different countries. Indeed, *Federalist* 63 states that "[a]n attention to the judgment of other nations is important to every government."[19] Chief Justice John Marshall cited foreign law in some of his important early constitutional law opinions. In *Marbury v. Madison*[20]—the 1803 Supreme Court case taught to so many of us as announcing the cherished institution of judicial review—Chief Justice Marshall looked to foreign law as part of his decision about whether judicial review was necessary for constitutionalism.[21]

And at a time when attention has been focused on Court decisions using foreign law to reach "liberal" outcomes, it is important to note that foreign law has been used to reach outcomes not favored by liberals. For instance, foreign law was used in *Bowers v. Hardwick*[22] to deny a claim that an anti-sodomy law was constitutionally problematic, for instance. Chief Justice Rehnquist cited to foreign law in *Planned Parenthood v. Casey*[23] in arguing for the constitutionality of restrictions on abortion.[24] As Justice Scalia has

---

[18] Steven G. Calabresi, *"A Shining City On A Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1341 (2006).
[19] THE FEDERALIST No. 63, at 423 (James Madison) (Jacob E. Cooke ed., 1961).
[20] 5 U.S. (1 Cranch) 137 (1803)
[21] *See id.* at 163, 177-78.
[22] 478 U.S. 186, 196 (1986).
[23] 505 U.S. 833 (1992).
[24] *See id.* at 945 n.1 (Rehnquist, C.J., concurring in part and dissenting in part).

written, there are many ways in which foreign law can lead to more conservative as well as more liberal outcomes.[25]

The range of those who believe that foreign law can sometimes be helpful was reflected in a previous hearing this Subcommittee held on this issue in 2004. Several witnesses called by *sponsors* of a resolution similar to the current proposed legislation supported the occasional use of foreign law. One witness testified that "foreign law could be relevant to prove a fact about the world which is relevant to the law . . . . I would thus modify the resolution to make clear that these uses of foreign or international law are legitimate."[26] Another witness made a similar point.[27]

To be sure, there are those Justices on the court now and before—and those commentators writing about the use of foreign law now and before—who might be more or less inclined to use foreign law more or less often. But there are very few Justices or other experts who believe that foreign law is always completely irrelevant, as the legislation seems to mandate.

In other words, because this legislation can be read to prohibit any use of foreign law, this legislation would be telling the large majority of those working on these issues now and over history that they are wrong. This legislation would be telling John Marshall, Antonin Scalia and Stephen Breyer that their opinions are deciding issues in a way that has been prohibited as a matter of federal law. I would be hesitant to take such steps given the widespread and long-standing agreement on this issue.

---

[25] *See* Roper v. Simmons, 543 U.S. 551, 624-26 (2005) (Scalia, J., dissenting).
[26] *See* Statement of John O. McGinnis, 2004 Hearing, *supra* note 1, at 31.
[27] *See* Statement of Michael D. Ramsey, 2004 Hearing, *supra* note 1, at 22 ("A . . . category of references to foreign materials is more controversial, but, in my view, usually appropriate if done cautiously. These references arise when the constitutionality of a U.S. law can be informed by facts existing in a foreign country.").

IV. A Brief Response to Concerns about Foreign Law

I will leave it to the excellent panelists and to the questions that members of the Subcommittee might have to address in greater detail the concerns with looking to foreign law. I take the major concerns to be that looking to foreign law is undemocratic and unprincipled. Let me take each point in turn.

One criticism of using foreign law is that it is undemocratic—after all, citizens of the United States did not vote for foreign judges, so why should their decisions affect our American law? Simply put, courts do not decide constitutional cases based solely on materials that the American people have voted for or ratified. The language of the Constitution, the original understanding of that language, and information how about those understandings work in practice (are they "narrowly tailored," for instance) are all relevant in deciding cases—and none of these have been democratically authorized by the American people.

Considering foreign law also poses no democratic concerns because considering foreign law does not mean *adopting* foreign law. Sources can be used negatively, as role models of precisely what a court wants to avoid. This is true of domestic legal sources and foreign legal sources. Just as we do not want another *Dred Scott*, and courts might disavow that decision to help them reach a current decision, so too foreign law has been used to highlight a foreign practice that our courts especially want to avoid.[28]

If Americans are troubled by judges considering foreign law, they have the same options they have if Americans are troubled by anything else federal judges might do.

[28] For a good example, see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650-52 (1952) (Jackson, J., concurring).

Federal judges deciding any constitutional case are accountable to us because federal judges are appointed by the President, confirmed by the Senate, and subject to impeachment based on their conduct. If a judge puts forward a strained interpretation of the First Amendment, for instance, the President might decide not to nominate that judge for another position, the Senate might refuse to confirm that judge, and/or that judge might be impeached and removed from office if his or her conduct is deemed sufficiently problematic. The same is true here: if a judge uses foreign law when it is not needed or unwise, he or she can be denied further appointment or confirmation, and/or impeached and removed from office if his or her conduct is deemed sufficiently problematic.

Another concern is that judges applying foreign law have been and inevitably will be unprincipled—how do they know in what cases foreign law is relevant, and in those cases what foreign law to examine? These are difficult questions, but judges should evaluate the relevance of foreign law in the same fashion as they evaluate the relevance of other law. Judges define the constitutional questions they must answer and look for the most relevant law to help them answer those questions. If a federal court has to decide a free speech case, it knows to look for free speech cases. Likewise, if a federal court has to decide an affirmative action case, it can look for foreign jurisdictions that have decided cases about affirmative action. As Justice Breyer has written, our courts have "long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances."[29]

Sometimes the task is even less complicated. In Eighth Amendment cases, to determine if a practice is "unusual," the Court looks to materials from all countries to see

[29] Knight v. Florida, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting from denial of certiorari).

if they permit a particular practice. Rather than having to select more or less relevant foreign jurisdictions, all foreign jurisdictions are relevant.[30]

I must freely admit that in practice our federal courts have been too selective in considering foreign law, and that this does concern me. There is no reason why the Supreme Court should look at foreign law in some Eighth Amendment cases and not others, as has been the case recently. There is no reason why the Supreme Court should look to foreign law in gay rights cases and not in abortion cases, as has been the case recently. I do not think the proper response is to prevent the federal courts from looking to foreign law entirely, but instead to find ways to have them look to foreign law more consistently and more fairly. Developing a set of best practices will help courts use foreign law better, and will help them understand foreign law better. This is how our courts have thrived over several hundred years, and how they have mastered complicated issues as these issues have come through the courthouse doors. Foreign law is no different.

Thank you again for the opportunity to address this Subcommittee, and I look forward to answering any questions you might have.

[30] *See* Roper v. Simmons, 543 U.S. 551, 578 (2005) ("It is proper that we acknowledge the overwhelming weight of international opinion.").

Mr. FRANKS. We thank the gentleman.

And, Professor Rabkin, you are recognized for 5 minutes, sir?

TESTIMONY OF JEREMY RABKIN, PROFESSOR OF LAW, GEORGE MASON UNIVERSITY SCHOOL OF LAW

Mr. RABKIN. Thank you. Let me try to summarize my testimony and also respond to some things that have been said.

The first general point I want to make is, I associate myself with my fellow witnesses and with Mr. Nadler and others in saying that I think there are a lot of legitimate uses of foreign law in some contexts. Mr. Nadler mentioned, I think rightly, that you can go back to the Marshall court, and they cite, as in the Charming Betsy case, foreign decisions. Absolutely right. That case was about the law of nations, even in the quote that you mentioned. If we are talking about the law of nations, we want to know what other nations are doing, the law of nations, meaning international law. Yes, of course. I think Professor Fontana cited the cases where there is a contract with some overseas partner, and there is some stipulation about applying foreign law. Yes, that is fine.

So, I want to emphasize this. I think the point that really should concern people is not that somewhere in some context there is some reference to foreign law. The proble, is interpreting the United States Constitution with reference to foreign practice. That is the first point I want to clarify.

The related second point, the reason why people are upset about this, these are not just casual references. It is not just, "Oh, well, maybe, possibly that is illuminating." There is a campaign to organize the world this way. When you have human rights treaties, either those treaties take precedence over national law, or it is really hard to understand what is it you are talking about. If it is merely just one of a 100 different commitments which you can override at will, then international human treaties begin to look pointless.

So, of course, there are a lot of academics, and now there are a lot of political figures, and now finally you have, you know, courts and authorities in Europe saying, "Well, actually there should be something like a global constitution, the core of which would be human rights protections which apply everywhere." It is that context that makes people worry about appeals to what is being done in foreign countries in the area of human rights, because the implication is we all should be doing more or less the same thing under the heading of human rights.

So, now I would like to make two responses to that before I end this initial statement. The first is—this is going to make people crazy, and it is already making people crazy. It is really shocking to me when you go on to the Internet just how much hysteria there is about this. And I think a lot of it, it is certainly ugly. A lot of it is really worrisome. But people are reacting to what they see as a kind of threat, which is that somehow our Constitution is being taken away.

There is an easy way of calming a lot of this, which is to just say firmly and clearly, "Well, we are not going to do that. Our Constitution will remain our Constitution. We will not give authority to what is being done in foreign countries or even in UN or international forums of other kinds when it comes to interpreting our

Constitution." I think it would calm people, and calm is good in itself. It is particularly valuable for things which are actually important. You do not want people getting crazy about what the Constitution means.

The last point I want to make is, you could say if you want to, well, there are always hysterical people and the Internet. It gives them more openings. Talk radio does, too. We can just live with that. Okay, fine. But we should focus on a couple of issues, and I mentioned one in my testimony, and I'll mention it again, which is, we have applied international standards in interpreting the Eighth Amendment ban on cruel and unusual punishment. Why only the Eighth Amendment? Why not other amendments? Why not the First Amendment? The United States is an outlier in the world when it comes to protection of free speech. Most of our closest international partners, that includes Canada, that includes every country in Western Europe, I think a lot of countries in Latin America, think that actually free speech should be more constrained. There is now an international campaign at the UN. Every year the United Nations General Assembly passes a resolution saying there need to be bans on Islamaphobic speech and other kinds of speech that criticize other religions. A lot of countries think, well, yes, we can accommodate you on that. We need to restrain anti-Islamic speech and other kinds of anti-religious speech or hate speech against particular groups. This is an accepted practice in a lot of other countries. Yes, I know, but do we want to do that here? I think that is a real serious question, and it is becoming a somewhat urgent question.

It is not helpful in answering that question to say, "Oh, well, we have the First Amendment," when people are telling us provisions of our Constitution have to be interpreted in the light of what foreign countries think parallel guarantees mean in their countries. In Europe and Canada, they have guarantees of free speech. They think free speech means free—unless you offend some particular religious or ethnic group. I do not think we want to go down that road, but I think it would be very helpful in calming people and also in stabilizing our law to say what foreigners think about free speech is not a guide to what our First Amendment means.

And it would be helpful, I think—I will wrap up with this—I am not actually in favor of Representative Adams' measure, as I understand it, to say there should be no references to foreign law anywhere. But I think it would be very worthwhile to have the House say we do not think the Constitution should be interpreted in the light of foreign precedents or international human rights law. Thank you.

[The prepared statement of Mr. Rabkin follows:]

Subcommittee on the Constitution
Committee on the Judiciary
U.S. House of Representatives

"Judicial Reliance on Foreign Law"
Hearing of December 14, 2011

TESTIMONY

By Jeremy Rabkin
Professor of Law
George Mason University
Arlington, Virginia

I want to begin by thanking the Subcommittee on the Constitution for holding this hearing on "Judicial Reliance on Foreign Law." There has been extensive debate on this topic for almost a decade now, starting with the Supreme Court's appeal to foreign law in *Atkins v. Virginia* in 2002. Scholars have offered extensive commentary. Supreme Court justices have offered contrasting views – on and off the bench. There have been a number of previous congressional hearings on the subject. It would be easy to treat the whole debate as another of those interminable American debates on which we must all just agree to disagree.

But I congratulate this committee for continuing to engage with this debate. I think the underlying issues remain of enduring importance. Many objections have already been developed in legal literature and in testimony before this committee in earlier hearings. I believe subsequent developments have reinforced these concerns. Rather than repeat general arguments already offered, however, I will concentrate on a few developments of recent years that underscore the seriousness of these concerns.

The first point to notice is that, despite a great deal of controversy, the Supreme Court has persisted in this practice. There was already considerable debate – starting with dissenters on the Court, itself – when the Supreme Court invoked foreign practice in *Atkins v. Virginia* in 2002 and *Lawrence v. Texas* in 2003. Still, the Court repeated the practice in *Roper v. Simmons* in 2005 and then more recently in *Graham v. Florida* (2010). No one can now claim the practice is merely a passing fad. It is becoming – at least for the current majority – a settled practice.

And this deserves attention. Defenders of these decisions have emphasized that none actually turned on particular foreign references or on claims about emerging global trends. Certainly the Court laid more stress on other arguments in all of these cases. But if foreign citations were not necessary to decide these cases, why persist in them? The justices do not normally embrace controversial arguments when they can avoid them and still reach the same result. If these references were not necessary to decide particular cases, the justices who continue to invoke them must think they serve some other important purpose – important enough to risk continuing, ongoing controversy.

The next thing to notice is that the controversy has gone way beyond academic dispute about doctrine or method in constitutional adjudication. Critics warned from the outset that interpreting the Constitution in the light of foreign practice ran the risk of undermining public confidence in our own constitutional law. In fact, there has been a groundswell of public concern about the infiltration of foreign doctrine into our own courts.

So in recent years, some twenty states have passed (or attempted to pass) legislation (or constitutional amendments) to prohibit state courts from basing their decisions on foreign law.[i] A number of these measures include specific prohibitions on appeals to Islamic law (Sharia). There has been quite a lot of alarmist talk about internationalization or "Islamization" of American law – as if these were somehow equivalent – fanned by specialized advocacy organizations and specialized websites.[ii] The American Bar Association takes the movement seriously enough that its House of Delegates adopted a resolution in August of this year, opposing

"federal or state laws that impose blanket prohibitions on consideration or use by courts ... of foreign or international law" and a companion resolution against "blanket prohibitions on consideration or use by courts ... of the entire body of law or doctrine of a particular religion."[iii]

I agree with the ABA that "blanket prohibitions" are a bad idea. In fact, it is absurd to say that when an American court must interpret a treaty – a treaty duly ratified by the U.S. Senate and recognized as having the force of law in the United States -- the judges must avoid looking at what our treaty partners have said they will do under that treaty. I also agree with the ABA that we should not have "blanket prohibitions" against "consideration" of the "law or doctrine of a particular religion." There are many cases, going back many decades, in which courts have seen fit to take some notice of relevant religious doctrine – as in trying to determine the disposition of church property (requiring attention to religious doctrines on ecclesiastical organization) or in judging qualification for religion-based exemptions to civil law (as for "conscientious objector" status when military service was otherwise compulsory). There is room for debate about how far courts may go without seeming to give state endorsement to particular religious doctrines. But we won't settle these thorny constitutional debates with "blanket prohibitions," particularly if they single out the doctrines of one and only one religion for exclusion.

Still, we wouldn't have so many people so alarmed about foreign law and doctrine taking over our court system if people had confidence that our courts would always uphold our own Constitution. The ABA's House of Delegates seems to

have been persuaded by a report making this very point: "Proponents of the Bills and Amendments [prohibiting consideration of foreign law or sharia] argue that they are necessary to protect constitutional rights ... That is not so .... Our courts (both state and federal) have more than sufficient legal tools to permit them to reject foreign or religious law ... that do not meet our fundamental standards of fairness and justice. Constitutional rights (such as those contained in the Bill of Rights) protect everyone in the United States and all courts throughout the country are bound to respect them."[iv] That should be reassuring – except that Americans have heard so often now that our own courts are interpreting our own Constitution in the light of what foreigners think our fundamental guarantees should mean.

That brings me to the third general point. Yes, a lot of people now warning about foreign influence on our law seem to be getting quite fevered, worrying over international conspiracies of UN bureaucrats or jihadi jurists. But as the old saying goes, even paranoiacs may have real enemies. There is, in fact, an international movement to establish what has been called "global constitutionalism." At the core of this vision is a set of international guarantees of human rights, which all nations – or at least, all respectable nations – will integrate into their own national legal systems, so they will be enforced by their own courts. A considerable body of scholarly literature now argues that international human rights treaties must have constitutional or quasi-constitutional status, taking precedence over national or local law.[v]

This vision has been embraced more widely in Europe than in the United States. Europeans have much more experience with supranational authorities

overruling their own governments. The 27 nations of the European Union allow the European Court of Justice to overrule national laws. Many more -- 47 nations in all -- have committed to the European Convention on Human Rights, enforced by the European Court of Human Rights. In both of these systems, it is the national courts which do most of the application and enforcement of European standards.

Something of the sort – with perhaps less centralized guidance – has been suggested for American courts. Harold Koh, when dean of the Yale Law School, argued that courts would "download" international standards by "integrating" them into our own Constitution.[vi] Anne Marie Slaughter, when dean of the Woodrow Wilson School at Princeton University, explained that "global governance" would be achieved by "coordination" among national courts in such areas as human rights.[vii] These are not scholars at the far fringe of legal scholarship. Koh is currently Legal Adviser to the State Department. Anne-Marie Slaughter served, between 2009 and 2011, as Director of Policy Planning at the State Department.

Perhaps when we started debating appeals to foreign precedents – almost a decade ago, during the first term of the Bush administration – it was a remote, visionary prospect that the United States would integrate international human rights norms into our own constitutional structure. The project no longer seems quite so remote. The Obama administration has brought advocates of this project into its own inner councils. It has insisted that the United States must rejoin the UN Human Rights Council and must embrace a policy of "engagement" with the International Criminal Court. When we argue about the internationalist gestures of the Supreme Court, we are no longer speculating about remote implications.

I think the most reasonable explanation for current Supreme Court practice in this area is that it is meant to lay the foundations for American participation in a larger scheme of global governance for human rights protection. Perhaps the justices who invoke foreign precedent intend to keep the resulting commitments under their own control. But clearly they mean to expand the reach of the Constitution beyond the control of the American political system.

It is otherwise hard to understand what point there could be in citing conventions to which the United States is not a party, such as the Convention on the Rights of the Child, which the Court cited in *Roper v. Simmons*. It is otherwise hard to understand why the Court has cited rulings from the European Court of Human Rights, as the Court did in *Lawrence v. Texas* – appealing to the judgment of an international authority to which the United States not only does not now adhere, but very clearly would not join. The United States has declined to commit itself to the cognate body, the Inter-American Court of Human Rights. One way or another, justices of the current Supreme Court seem to think it is helpful to weave the views of these international human rights instruments and authorities into our own constitutional process. I think Americans are right to be worried about where this practice will lead us.

Let me, in closing, suggest three dangers in this trend. First, it may make it harder for the United States to maintain a different stance than other nations or at least other western nations. One example is the American commitment to free speech. The International Covenant on Civil and Political Rights provides that the right to free speech must be qualified by laws against hate speech ("advocacy of

national, racial or religious hatred that constitutes incitement to ... hostility") and "propaganda for war." (Art 20) The Organization of Islamic Cooperation has repeatedly urged that nations of the world must take more vigorous action to suppress "Islamophobic speech" and has repeatedly persuaded the UN General Assembly to pass resolutions calling for such measures. The Council of Europe (embracing the nations that subscribe to the European Convention on Human Rights) has established its own Commission Against Racism and Intolerance, which lobbies for stricter enforcement of laws penalizing "hate speech" against particular ethnic or religious communities.[viii]

I don't know whether the Supreme Court has any inclination to accommodate this international trend. That would require the Court to reinterpret the First Amendment guarantee of "freedom of speech." But the Court has reinterpreted other parts of the Constitution to accommodate what it sees as an emerging international consensus, based on UN admonitions and European practices. Whatever the current justices now intend, we may experience much more pressure in coming years to accommodate the international trend toward imposing penalties on those guilty of "Islamophobic expression." We certainly will find it harder to deflect such pressure by invoking our own constitutional obligations – so long as a persistent majority of Supreme Court justices holds that we ought to be interpreting our own Constitution to accommodate international human rights norms in general.

A second and related danger concerns American defense policy. The Supreme Court has held that detainees at Guantanamo must have access to review of their detention (and their military trials) in domestic courts. Our Court has not

yet said that the same constitutional reasoning must apply to foreign combatants detained on foreign battlefields. But the European Court of Human Rights has made exactly that ruling for alleged enemy combatants held by the British in Iraq.[ix] That practice invites an obvious follow-on: if human rights law protects enemy combatants in overseas detention, why not combatants still fighting? That may now sound absurd to Americans. But the European Court of Human Rights has already done that, too – holding that Britain must answer for claims that it used excessive force in trying to pacify its area of occupation in the aftermath of the invasion of Iraq in 2003.[x]

There is a great deal of literature arguing that the law of armed conflict – often called "international humanitarian law" – should now be seen as a specialized branch of international human rights law.[xi] In its own terms, it is quite logical: if we are to have something like a global constitution for human rights, then all acts of force might seem to be bound by it, just as domestic police measures are bound by constitutional norms, enforced by our domestic courts. Again, I do not know how far the current justices might be prepared to pursue this logic. But it is not easy to see a principled line between invoking international human rights norms for capital punishment at home (as in *Atkins* and *Lawrence*) and for extending protective norms to international conflict. The whole appeal of international human rights norms is that they apply everywhere – or at least, that they apply internationally. Why not, then, apply international human rights norms (as many advocates already urge) to situations of armed conflict?

Finally, I would reaffirm the concern that many critics expressed years ago, in response to *Atkins* and *Lawrence*. As we go further down this road, we risk provoking more and more public uneasiness about the status of our own Constitution. We risk undermining the public faith that our Constitution is a heritage from our own Founders, secured in our own Civil War and other great struggles in our history, reflecting the unique contours of our own national experience. We invite people instead to see the Constitution as no more than a set of local adjustments to international obligations, worked out by our judges in consultation with foreign judges, who have no special concern about American well-being and over whom we have no control. We can't go far down that road without endangering public support for the Constitution. Didn't we start this nation with a revolution against outside control? Why not replace the Constitution with a truly American charter, if the existing Constitution must be shared with so many foreigners who have so many different aims and priorities? At the least, as we go down this road, we risk provoking much more suspicion about the ultimate loyalties of our own judges. How does that serve the rule of law?

I do not advocate that Congress enact a "blanket prohibition" on references to international or foreign practice, not even for decisions interpreting our own Constitution. I do not think it likely that Congress has the constitutional authority to tell Article III courts what they can or cannot consider when interpreting the Constitution. But I think it would be appropriate for the House to vote a non-binding resolution, expressing concern about this trend. The justices who are so determined to consider foreign opinion should at least be exhorted to give special

weight to American opinion when they interpret the American Constitution. I believe the House would be speaking for most Americans if it affirmed that we do not need foreign assistance in interpreting our own Constitution.

---

[i] For a survey of such measures, see "The Law of the Land," ABA JOURNAL, April 2011, p. 14. An Oklahoma measure, adopted by public referendum, was suspended by a federal district court in *Awad v. Ziriax*, 754 F.Supp.2d 1298 (W.D. Ok 2010).

[ii] For what seems a representative example, "Conservative Action Alerts" posted an appeal called "Shariah law takes courts by surprise," urging readers to "**Fax every member of our U.S. Congress**" to support a bill purporting to "prevent the misuse of foreign law in United States federal courts, **including Shariah Law!** [original emphases] Don't let our Justice System be infiltrated by radical, foreign religious laws!" A Google search on "Islamization of America," on December 12, 2011, turned up more than 1.5 million items.

[iii] Resolution 113A, adopted at the 2011 Annual Meeting of the ABA House of Delegates, meeting in Toronto, Ontario.

[iv] Report in support of Resolution 13A, distributed at ABA Annual Meeting, submitted by Salli A. Swartz, chair of the ABA Section of International Law

[v] Some recent examples: Garrett Wallace Brown, *Grounding Cosmpolitanism: From Kant to the Idea of a Cosmopolitan Constitution (*Edinburgh University Press, 2009); Jeffrey Dunoff and Joel Trachtman, eds., Ruling the World? *Constitutionalism, International Law and Global Governance* (Cambridge University Press, 2009); Stephen Gardbaum, "Human Rights as International Constitutional Rights," *European Journal of International Law*, Vol. 19 (2008), pp. 749-68.

[vi] Harold Koh, "International Law as Part of Our Law," *Am.J.Int'l L.,* Vol. 98 (2004), 43, lauding "the emergence of a transnational law, particularly in the area of human rights, that merges the national and the international" in which "domestic courts must play a key role in coordinating U.S. domestic constitutional rules with rules of foreign and international law, not simply to promote American aims, but to advance broader development of a well-functioning international judicial system." (52-54)

[vii] Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004)

[viii] So, for example, in its Fourth Report on the United Kingdom (dated March 2, 2010), the European Commission Against Racism and Intolerance urged that UK authorities "keep the effectiveness of existing [UK] legislation against racist expression under review," (par. 33) emphasizing the relevance of the Commission's General Policy Recommendation No. 7 which advocates that "the acts criminalized under domestic law include the public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a grouping of persons on the grounds of their race, colour, language, religion, nationality or national or ethnic origin." Simultaneously, the commission urged British authorities "to keep under review the existing [UK] legislation against incitement to religious hatred in England and Wales to ensure that the existence of higher thresholds for prosecution does not deprive individuals of necessary protection against incitemnte on religious grounds." (Par. 39)

[ix] *Al-Jedda v. United Kingdom*, ECHR 100 (2011), Judgment of July 7, 2011

[x] *Al Skeini v. United Kingdom*, ECHR 095 (2011), Judgment of July 7, 2011

[xi] Mark Osiel, *The End of Reciprocity* (Cambridge University Press, 2009), Ch. 3 ("Humanitarian vs. Human Rights Law: The Coming Clash") offers a useful overview of more recent contenders in this debate. For an earlier (and more sympathetic view) of the convergence, see Rene Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press, 2002).

Mr. FRANKS. Thank you, Professor Rabkin, and I thank all of you for your testimony. And I will now begin the questioning by recognizing myself for 5 minutes.

Professor Rabkin, I will begin with you. Your testimony was very compelling. And it has been noted today that even conservative justices, like Mr. Scalia and Mr. Thomas, have cited foreign laws in the course of their careers. And, of course, I would like for you to address that. It seems to me that there is some phraseology here, and I think you addressed it very well that it is one thing to cite some indication of foreign law as a part of your narrative, another thing to authorize your decision and your interpretation of the Constitution and gain its authority from that foreign law. And I think it is a key issue here to try to separate those things.

So, what is the difference between an appropriate citation in a foreign law and an inappropriate reliance on it? Again, I think Ms. Adams has a good angle here. She talks about "authorized" rather than "based on," and I think that is, at least, a good distinction. Can you tell me what you think the difference an appropriate citation of foreign law and an inappropriate reliance on it would be?

Mr. RABKIN. Well, let me start with the easy distinction. If a case is about international law, we call it international for a reason. It involves other countries. Particularly if it is a case about a treaty, yes, then it is very worthwhile to know what our treaty partners think they have committed to when we try and figure out what we are obligated to do. That is the easy one.

I think it is quite appropriate when you look at provisions in the United States Constitution to look at what English law was at that period when the framers were using expressions which they were borrowing from English law. That is another easy one.

I want to repeat what I said. I think in a different context, no one would pay attention to this. It is not that being foreign is a taint. That is not it at all. I mean, of course you could learn something from a lot of different sources, from the Bible, from Shakespeare, from all kinds of sources. But when people are saying, "Yes, we are building up a body of transnational human rights law," then I say, no, I do not want to be tangled up in a transnational project which involves basically rewriting our Bill of Rights.

And if I cannot say, this is exactly the line, then I would say, people are worried about this, then let us back off and let us actually restrain ourselves more than we might otherwise feel was necessary so that we avoid even coming up to this line, when we are having trouble deciding exactly where that line should be.

I would say when it comes to guarantees in the Bill of Rights, I think that is the simplest way of putting my position. When it comes to guarantees in the Bill of Rights, we should not be distracting ourselves with what foreigners think these things mean in their very different legal contexts.

Mr. FRANKS. Well, thank you, sir. And, Mr. Grossman, I will ask you, what does it mean for our Federal structure when the Supreme Court puts greater emphasis on what a majority of foreign countries think about a practice than it puts on the laws that a majority of the U.S. States have already enacted?

Mr. GROSSMAN. Well, two quick thoughts with respect to that. When the Court's jurisprudence, particularly under the Eighth

Amendment concerning evolving standards of decency, cites to foreign law and tries to discern a consensus among foreign states that somehow governs U.S. practices, it is directly contrary to both the mechanism for constitutional change that is within the Constitution itself, as well as the division of power specified by the Constitution, and sort of reified by the 10th Amendment.

The second point would be, it is not apparent to me that it is actually appropriate either that the Court should be citing or trying to discern a trend among the States in determining evolving standards of decency. I am not sure that evolving standards of decency properly reflects the original understanding of the Eighth Amendment. If a State is doing something, I think, that was understood to be permissible at the time of the ratification of the Eighth Amendment, then that is something that, it may or may not be good policy, but it is something that is within the State's rights to do.

Mr. FRANKS. Thank you. Let me go then to Professor Fontana for a moment. I just wanted to make sure I understand, and, again, that is a leading question, and I will give you the head's up on it. Based on your testimony today, is it your opinion that courts should decide even in the policy arena?

Mr. FONTANA. I am sorry, I missed the question.

Mr. FRANKS. You mentioned some of the latitude the courts had. Based on your testimony today, is it your opinion that courts should also decide in some areas of policy?

Mr. FONTANA. I do not feel that in deciding cases, the Federal courts need to look to policy considerations. However, as a matter of constitutional doctrine, it is fairly settled law that in deciding constitutional issues, justices and judges on the lower courts will look to how policies have played out in practice as a way of seeing what sorts of constitutional implications there are to how these policies have played out.

So, they are not looking at them to decide whether this is a good policy or a bad policy. They are looking at them to see whether or not there might be other policies which infringe less on constitutional rights, and which promote the goals of Congress better. And this is a practice that, I think, is established for a long time and agreed to by Justice Thomas, all the way to Justice Ginsberg.

Mr. FRANKS. Well, thank you. And I now recognize the Ranking Member for his questioning?

Mr. NADLER. Professor Rabkin, you just said that you did not support the language in the bill, H.R. 973. Professor Fontana, do you? What do you think of that?

Mr. FONTANA. I agree that I think the language is potentially over broad. The previous times that this Subcommittee has met to consider this issue, the language was typically limited to just interpreting the Constitution, which, I believe, Professor Rabkin and Mr. Grossman indicated are their concerns.

Now, while I disagree with their concerns on this legislation, I think that there would be even broader agreement that banning foreign law to decide any issues in all Federal courts would be overly broad.

Mr. NADLER. Thank you. Now, Professor Fontana and Rabkin, forgetting about the questions of interpreting treaties, and laws,

and things like that, if this is about the use of foreign law only as an informative resource, that is a binding question on a treaty or something. If the problem is only that courts look to foreign law as a potentially informative resource, should we also ban reference to other non-binding resources, like law reviews, or perhaps only those in foreign law journals, to social science research? Do really believe that these sources are less harmful and more informative than what might be gained from review of how judges of other nations have treated similar issues? Professor Rabkin, and then Professor Fontana?

Mr. RABKIN. No.

Mr. NADLER. Microphone.

Mr. RABKIN. The judicial committee of the House of Lords used to have this rule that they would not cite legal scholarship by a scholar who was still alive, which I thought was a very salutary rule, which I——

Mr. NADLER. That might lead to murder cases. [Laughter.]

Mr. RABKIN. Well, for one reason or another, I do not know if that was the reason, they abandoned that restraint. I would say the difference is there are a lot of different law professors, and no one really takes very seriously the idea that all of them are working together to establish the positions of the United Law Professors.

Mr. NADLER. And all foreign courts are working together?

Mr. RABKIN. Well, in fact, people do talk about this, and even the judges sometimes talk about this. You want to show respect for the work of judges——

Mr. NADLER. Okay.

Mr. RABKIN [continuing]. Who are in the same area, right? And people do talk about building up a common body of law.

Mr. NADLER. Okay, thank you.

Mr. RABKIN. If that is the project, then I do not want to——

Mr. NADLER. Thank you. Professor Fontana?

Mr. FONTANA. Yes, thank you for the question. I mean, as a law professor, I should say that I think that writings of law professors are incredibly important. But I think that there is even more relevance, I think, to the decisions of foreign courts on relevant issues, because, as I said, part of the issues that courts are deciding in constitutional cases is, are there alternative ways of pursuing these goals? How will these things worked in practice?

It is the factual evidence, the evidentiary kind of import of this foreign law evidence that makes it relevant in courts. It is not because it is foreign law; it is because it is evidence in cases that courts need to decide the issues before them.

Mr. NADLER. Thank you. Again, Professors Rabkin and Fontana, what do you think the penalty for a judge who fails to follow this prohibition ought to be? For example, how do you enforce this bill?

Mr. RABKIN. Excellent question.

Mr. NADLER. Thank you.

Mr. RABKIN. I do not think it could constitutionally be enforced, and I think you have quoted Justice Scalia. I often agree with Justice Scalia. I think that I agree with the position that he took on this issue.

Mr. NADLER. That Congress should not legislate this.

Mr. RABKIN. That Congress cannot tell judges, you may not decide on this basis, when it comes to interpreting the Constitution. I think that is a fair point.

Mr. NADLER. Thank you. Professor Fontana?

Mr. FONTANA. Yes, thank you for the question. I think what is significant about this legislation is that it is, in fact, legislation. The earlier hearings were about resolutions, and even those Justice Scalia thought raised significant constitutional problems. So, I think it might be unconstitutional on its face, and part of the reason is that it would be very difficult, if not impossible, for the Court.

Mr. NADLER. Thank you. Professor Rabkin, you stated that the Supreme Court is "persistent in its practice of citing foreign law." And you cite two death penalty decisions, *Roper v. Simmons*, 2005, and *Graham v. Florida*. Testifying at the hearing on this issue convened in this Committee in 2004, you acknowledged that the Supreme Court had not treated foreign sources as binding authority——

Mr. RABKIN. Yes.

Mr. NADLER [continuing]. In *Atkins* or in *Lawrence*. Are you claiming that they treated foreign law as a binding rather than an informative resource in *Roper* or in *Graham*? And do you have any other examples of the supposedly persistent practice that has occurred since the 2004 hearing?

Mr. RABKIN. So, just to be clear, I do not believe a single one of those cases turned on——

Mr. NADLER. Okay.

Mr. RABKIN [continuing]. A citation to foreign law.

Mr. NADLER. Thank you. And this persistent practice, can you cite any other examples of the supposedly persistent practice since our 2004 hearing, besides those two cases?

Mr. RABKIN. Not in a majority opinion.

Mr. NADLER. So, in other words, this persistent developing pattern that we have to be aware of was in two cases since 2004.

Mr. RABKIN. Yeah.

Mr. NADLER. Okay. This is my last question. Courts considering this issue sometimes cited the Bible in their decisions. The Arizona Supreme Court did so in a decision upholding its sodomy laws, *State v. Bateman*, 1976. Should we believe that they decided that case based on Leviticus and Deuteronomy? If they consider the Bible binding on them, was that unconstitutional in itself? Should we be equally outraged by these historical references you suggest we should be by references to foreign law in other cases? After all, Leviticus is not a domestic legal document duly passed by Congress. Professor?

Mr. RABKIN. Yes. So, my colleague here, Professor Fontana, is always thanking you for the question. I really want to thank you for this question.

This is a very good analogy if you think we are citing foreign practice the way they sometimes cite something from the Bible as a sort of passing reference. If there were an organized campaign to say we need to Christianize American law or we need to coordinate law with the higher law of the Bible, then I think people would be a lot more upset about these passing references to the Bible.

Mr. NADLER. So, basically you are saying the problem is that there is an organized campaign. But you also said there have been no instances of this since 2004, other than those two decisions. So, where is the organized campaign?

Mr. RABKIN. Look—this, is again a very helpful question and I thank you for it. I think what Chairman Franks was suggesting, was some sharp line between when you rely on it as the basis of the decision, and when you just mention it. It does not work like that in practice. What you do if you are trying to develop a doctrine is you sort of insinuate it. You refer to it without quite basing your decision on that. Chief Justice Marshall did this in a lot of famous cases. You put something on the table, you give it prominence, but you find some other way of deciding this particular case. And over time, this builds up a structure and people forget that that was not actually the basis of the decision, and they get used to the idea of it. Oh, yes, we do, for example, have the dormant commerce clause doctrine, which Marshall did not rely on in *Gibbons v. Ogden*, but put on the table.

That is how courts develop controversial law. And I am concerned about their developing controversial law in the future in this area.

Mr. FRANKS. I thank the gentleman, and I now recognize the gentleman from Iowa, Mr. King.

Mr. KING. Thank you, Mr. Chairman, and I thank the witnesses for your testimony. A few things I am curious about, and I think one of them, if I can direct my first question to Professor Fontana, would be a little bit on the side, a parallel topic, not directly the subject of the testimony here.

But if the United States enters into a treaty or an agreement with a foreign country or an entity broader than the United States, are the constitutional protections that are in the Bill of Rights, as Professor Rabkin referenced, are they paramount over the decision of that treaty? Can the Senate ratify a treaty that diminishes the rights of Americans?

Mr. FONTANA. I believe there is a Supreme Court case from several decades ago called *Reid v. Covert*, which says that there are Bill of Rights limitations on treaties duly entered into under the supremacy clause, yeah.

Mr. KING. Bill of Rights limitations on that, meaning that the Bill of Rights restrains, protects American citizens regardless of the decision? Did I hear that right?

Mr. FONTANA. So, if there is a treaty validly entered into, it cannot violate the First Amendment. It cannot violate the Fourth Amendment, and so on.

Mr. KING. Okay. And if it did, then how would that treaty be regarded?

Mr. FONTANA. I would imagine that a court would strike down whatever was being done pursuant to the treaty.

Mr. KING. So, that is good news to me. If my constitutional rights, particularly those Bill of Rights constitutional rights, happen to be violated by a treaty that perhaps this Administration could be entering into, then there would be an opportunity to, if one had standing, to litigate that all the way to the Supreme

Court, for example, and to be able to see a treaty such as that invalidated by the Court.

Mr. FONTANA. I do not know that necessarily the entire treaty would be invalidated, but just the parts of the treaty that implicate Bill of Rights concerns.

Mr. KING. Thank you very much. Professor Rabkin?

Mr. RABKIN. I agree that that is what ought to happen. I do not think we can be totally confident that that is what would happen. Take the case that Professor Fontana mentions, *Reid v. Covert*. The opinion that he is referencing did not get five votes on the Supreme Court; it got only four. And a lot of people at the time were saying, "Well, I do not know, not exactly, what it means."

This doctrine should be the law, and there are a lot of law review articles saying, "Oh, yes, the Bill of Rights must trump a contrary treaty." It is not absolutely clear from the case law that that is what the Supreme Court thinks.

And if I can just add one other thing, I think the real concern here is not that the Supreme Court would say, "Oh, too bad, the Bill of Rights has been superseded by a treaty." The concern is rather that the Court would say, "We have to reinterpret the Bill of Rights so that it can be compatible with international commitments, particularly international commitments in the area of human rights, which, after all, concern human rights," so they are good, and they should take priority, right?

And sincere, serious people who are not involved in a conspiracy have conflicting views about what is the right human rights position on, for example, hate speech. And the UN position, and this goes back decades, is you not only have the right to free speech, but you also have the right to be protected from hate speech. Both of those are rights, and that means actually the international human rights position is you should have less free speech protection than Americans have.

I do not think we can say with confidence, particularly if the Supreme Court is going around reinterpreting the Constitution to make it consistent with international trends——

Mr. KING. Where is my protection from hate speech in the Constitution? Where is my protection from hate speech in the Constitution?

Mr. RABKIN. We do not have protection from hate speech.

Mr. KING. And so, I ask the question for this point then, that it is possible in the explanation that you have delivered here, that as we would see those clearly defined rights that are primarily defined in the bill of rights, could potentially be compromised and eroded by a reinterpretation of them by making accommodations to international norms. And those international norms might impose a prohibition on hate speech that limits our freedom of speech, or a prohibition on gun rights that limits our gun rights.

Mr. RABKIN. This is what people worry about. And whoever says, "Oh, you have nothing to worry about," I think is not paying attention.

Mr. KING. And so, I will maybe turn to Mr. Grossman and ask you about this. We have this Constitution that I think was clearly defined, and yet it gets redefined over the centuries. And the idea that we are dealing with a—I will phrase it this way. If there is

a case before the Court, do the opinions of the American people matter in the evaluation of that? Does public opinion matter? Does a consensus matter? Do the American people really get to weigh in on that if the Supreme Court is sitting up there listening to a case?

Mr. GROSSMAN. Well, gosh, I hope not. You know, the idea that the Supreme Court should interpret the Constitution or its statutory law on the basis of poll results or something like that is troubling, but that might actually even be a better basis and a more legitimate basis for decision than citing the opinions of foreign elites, whose views do not even accord with the views of their own people.

Mr. KING. You actually borrowed my last question. But I would ask consent to ask one concluding question.

Mr. FRANKS. Without objection.

Mr. KING. I thank the Chairman for that, indulging me, because I really wanted to turn this then to Professor Fontana and ask if you agree with the response of Mr. Grossman, but follow that with this: at least in theory, public opinion in America does not matter when it comes to a legal opinion of a panel of justices. And so then, how can a global consensus have impact on a court's decision if public opinion in America does not?

Mr. FONTANA. I believe in the Eighth Amendment context, the Supreme Court has long held that because the Eighth Amendment bans cruel and unusual punishment, that surveying the practices of the States is considered relevant. And looking to foreign laws is relevant to determine if it is unusual because there is a lot of reason to believe, going back to when the Eighth Amendment was adopted, that the founding fathers wanted the Eighth Amendment to be interpreted going forward by looking to whether or not a particular punishment was actually unusual.

Mr. KING. We have 37 States that supported a policy that was overturned by the Court because of an international consensus. How can a perceived international consensus trump the will of the people?

Mr. FONTANA. I do not believe that it should.

Mr. KING. But it did.

Mr. FONTANA. Justice Kennedy in *Roper* said that the foreign law can provide "respected and significant confirmation." Now, there are questions about whether or not he got the domestic law part right, but the analysis in *Roper* says that you only turn to see whether or not a practice is unusual around the world after you first determine that it is unusual domestically.

Mr. KING. Thank you very much. Thank you, Mr. Chairman. I yield back.

Mr. FRANKS. And I thank the gentleman. I now recognize the gentleman from Illinois, Mr. Quigley.

Mr. QUIGLEY. Thank you, Mr. Chairman.

Mr. Grossman, I do not want you to feel neglected here. And I do not want to paraphrase it and get it wrong, Professor, but I think what he was getting to is it is difficult to find the bright line when this is okay. I think, Professor, there is some legitimate uses of foreign thought, judicial thought. Do you see a bright line out there that you can delineate where it is okay, when it is not, or just nothing at all?

Mr. GROSSMAN. Well, let me assume, first, that we are talking about constitutional interpretation as opposed to other applications——

Mr. QUIGLEY. Well, is that one of your bright lines, if it is only applying to constitutional interpretations, or is it just as the bill is proposed here, just anything?

Mr. GROSSMAN. Well, as I explained in further detail in my written testimony, I identify with the remarks of other witnesses here with respect to the use of foreign law to interpret, say, contracts or international treaties. That may be relevant in those instances, although it may be a difficult undertaking. I think that is something that is often overlooked.

So, I focus on constitutional interpretation because I think that is the area where the controversy lies, and ought properly to lie. With respect to that, is there a bright dividing line? To my mind, the important and legitimate foreign sources and international sources of law in constitutional interpretation are those that elucidate the background principles of the law that the framers in effect legislated against when they——

Mr. QUIGLEY. But who decides that point? I mean, can you legislate that at all where you decide at this point it is appropriate, and at this point it is not?

Mr. GROSSMAN. Well, I think that is a wonderful question. In other words, what is it that Congress can do in this area? I think it is perfectly legitimate as a co-equal branch that Congress should state its belief of the proper means of interpretation of the Constitution, the proper means of interpretation of its own statutes. I think that is perfectly legitimate.

And the Court, although it may not bow to the wishes of Congress in that sense, in other words, it will not be bound by them necessarily, I think should give them some degree of deference and should take them into account.

Mr. QUIGLEY. So, help me here. You know, as an attorney, my concern here is that you are limiting. I feel like I am in a scene from Inherit the Wind, begin to limit thought, right? It is not an isolated country in any other respect. Our scientists, doctors, teachers, lawmakers, artists, business leaders, technology, architects—it is a world of thought out there. And to say, we are not going to listen, as this proposed bill says, to any other authority. I mean, we listen to Locke and Rousseau.

Mr. RABKIN. Not Rousseau.

Mr. QUIGLEY. Sorry?

Mr. RABKIN. Not Rousseau.

Mr. QUIGLEY. Well, I mean, I am sorry. If you read the Federalist Papers, they were considered, correct? Yes, thank you.

Mr. GROSSMAN. The challenge with the citation of foreign law in particular is that law is generally cited in court opinions for its binding legal effect. In other words, it is relied on as a source of law. When a court cites in passing, a turn of phrase from a novel, or a scene from a movie or dialogue, or a phrase even from the Bible, it is not cited in a way as having binding legal effect. So, maybe foreign law could perhaps set a mood or an atmosphere.

But when it is cited in a way such that it is taken to govern or speak to the meaning of, say, the Constitution of the United States,

that is a very different type of usage of law. A law review article is not itself binding law; it describes what the law is. But a foreign court opinion does not describe what the United States Constitution says or means. It says something else entirely.

Mr. QUIGLEY. But you certainly do not want to tell judges at the local level or the Federal level how they are coming at their decisions, what authorities, what aspects of what they are learning. I mean, we are all a bundle of everything we have learned in our experiences. At what point are those foreign? It becomes very limiting, and the law should be the opposite of that. The law should be open to all kinds of thought.

You know, brilliant writers are not just in the United States. The great jurists are not just in the United States as well.

Mr. GROSSMAN. Well, sir, I am afraid I do not subscribe to that view. If I were before a court, I would like to be judged on the basis of the law and not on the basis of a novel or a movie or Shakespeare.

Mr. QUIGLEY. One of the best decisions I ever read was Lights in Wrigley Field. They quoted "Take Me Out to the Ballgame," one of the best, upheld by the Supreme Court. Whatever it takes to be just and fair. But as soon as you start limiting thought, you might as well have robots up there.

Mr. GROSSMAN. Well, to the extent that they are merely thinking such things, but not relying on them for any legal, binding effect, to the extent that they are not decisional materials, fine, so be it. But I do not think that that is actually the focus of the controversy unfortunately.

Mr. QUIGLEY. It is the focus of this bill. Thank you.

Mr. FRANKS. I would like now to recognize Mr. Scott from Virginia.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Rabkin, the language in the bill says that any court created by or under Article III of the Constitution of the United States, "No justice, judge, or other judicial official shall decide any issue in any case before that court, in whole or in part, on the authority of foreign law, except where a constitution of Congress provides it." What does authority mean?

Mr. RABKIN. I think that is a fair question.

Mr. SCOTT. Well, let me ask you——

Mr. RABKIN. Probably a difficulty with the language in the bill.

Mr. SCOTT. Let me ask it another way. What authority does foreign law now have in Article III, United States Federal courts? Authority.

Mr. RABKIN. Putting aside a case involving a foreign contract where you are trying to decide it under foreign law because it was negotiated in a foreign country——

Mr. SCOTT. Well——

Mr. RABKIN [continuing]. Putting all that aside and just speaking about constitutional decisions, I think it is very hard. This is why law professors sometimes get paid a sizable salary to sort out what is the actual basis of the decision because there is often a lot of doubt.

Mr. SCOTT. If you have a U.S. circuit court, and you are talking about district court, and they have a case on point, that would be authority, is that right?

Mr. RABKIN. Yes.

Mr. SCOTT. What about, as the gentleman from New York has pointed out, the social service research, and State court decisions, law review articles? If they are cited, is that authority? It's not authority; it's just reason, help in reasoning.

Mr. RABKIN. Honestly, I think there is not such a clear line here. Mr. Quigley used the word "bright line." I do not think there is a bright line between——

Mr. SCOTT. Well, if——

Mr. RABKIN. The things that determine the outcome and the things that go into the argument.

Mr. SCOTT. If you have a case of first impression for which there is no authority——

Mr. RABKIN. Yes.

Mr. SCOTT [continuing]. What is wrong with noticing State court decisions or law review articles to help you decide?

Mr. RABKIN. This is a very, very good example because what it shows is when you do not have another authority, you fall back on things that are not quite authoritative that are being used in place of the authority that you do not have, which means that you are treating them as a little bit authoritative.

Mr. SCOTT. Well then, if a foreign court has dealt with the issue and produced a well-reasoned opinion, what's wrong with citing that?

Mr. RABKIN. I do not think 30 years ago we would be having this debate, and 30 years ago we would not have regarded that as controversial. I think in the current context where people are saying there should be transnational, quasi constitutional international human rights norms, then it makes people worry.

Mr. SCOTT. Well, if you have a case of first impression, and we are trying to decide the case, what is wrong with noticing that every other court in the world has come up with a particular——

Mr. RABKIN. Because the implication is that we ought to be——

Mr. SCOTT. It might make some common sense to conform the United States to what everybody in the world is doing.

Mr. RABKIN. This is why——

Mr. SCOTT. It might. It might not, if it makes sense.

Mr. RABKIN. I think you have put this very well. A lot of us are concerned that the implication of this reasoning is that the United States needs to conform to the rest of the world. And we started out by saying let the rest of the world conform to us, that we hold these truths to be self-evident to ourselves.

Mr. SCOTT. Since there is no authority based on what makes sense, Professor Fontana, what about based on the reasoning and not the authority of foreign law? If we pass this bill that says you cannot base it on the authority of foreign law, but you based on reasoning of foreign law, would that violate this legislative language?

Mr. FONTANA. I also admit that I am a little unclear about the use of the word "authority" in the legislation. I believe there are two different types of authority that courts to look to, binding au-

thority, like the decision of a higher court, and persuasive authority, which, as your question suggests, could be things like law review articles, social science evidence. And I am not sure what exactly the legislation covers.

But I take it to cover looking to foreign courts or foreign law for either their reasoning or for whatever their actual state of law, forever the outcome as well. I take it to ban all foreign law.

Mr. SCOTT. Thank you, Mr. Chairman. I yield back.

Mr. FRANKS. Well, the gentleman yields back with extra time. So, I guess he yielded to me here. So, Professor Rabkin, take one last shot at it here, and tell me what would be the purpose of placing something in the argument if it is not part of the binding legal authority. And that is a question, not a leading point.

Mr. RABKIN. Yeah. So, I would like to mention two things, and one is that, you know, lawyers try out a lot of different arguments, and they hope that if you are not persuaded by this, maybe you will be persuaded by that. And since you are aiming at maybe different people there, different judges, for example, or different members of the jury, it is not helpful to you to say, "This is the central argument, the real argument." You may want to be a little vague about which one is crucial, which one is decisive, which one is just background. So, that is one way in which this gets fuzzed over.

And I think another way it gets fuzzed over is every important case, particularly before the Supreme Court, is not just deciding that particular dispute. It is building precedent for the future. So, one of the things that you could be doing is laying the groundwork for later cases to say, "Ah, yes, here is something which they mentioned in that earlier case." That happens all the time. And it, again, means that you have to worry about something which maybe Mr. Nadler would say in this particular case is not really crucial to this particular case, but the Court is still, in a way, offering it for the future as something which can be drawn upon. And if you do not like this development, then you do not want to be piling up things that future courts can draw upon.

Mr. FRANKS. Well, it has been a very interesting hearing, and I want to thank all the Members here, and certainly thank the panelists. It seems like we have been arguing this point for a long time, the rule of law versus the rule of men. It is certainly an interesting subject.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward and ask the witnesses to respond as promptly as they can so that their answers may be made part of the record.

Without objection, all Members will have 5 legislative days with which to submit any additional materials for inclusion in the record.

And with that, again, I thank the witnesses, and I thank the Members and observers. And this hearing is now adjourned.

[Whereupon, at 11:14 a.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

legalaffairs THE MAGAZINE AT THE INTERSECTION OF LAW AND LIFE

Features

YES PLEASE, I'D LOVE TO TALK WITH YOU

The court has learned from the rest of the world before. It should continue to do so.

By Vicki Jackson

CHIEF JUSTICE WILLIAM REHNQUIST INTRODUCED A CONFERENCE on comparative constitutional law in 1999 by telling the story of how, a decade before, the justices of Canada's Supreme Court said to him, "We cite your Constitution; why don't you cite ours?" The chief justice explained that at the time of that question, the Canadian Charter of Rights and Freedoms was only seven years old. But time had passed, he said, and by 1999 it was "less defensible to say that we're not familiar with it."

"It's time," he wrote, that "the U.S. courts began looking to the decisions of other constitutional courts to aid in their own deliberative process."

In recent years, a number of United States Supreme Court justices have referred, in limited ways, to foreign or international legal sources while resolving constitutional questions. Of the current nine justices, at least six—Chief Justice Rehnquist, and Justices John Paul Stevens, Antonin Scalia, Anthony Kennedy, Ruth Bader Ginsburg, and Stephen Breyer—have done so since 1992. Critics argue that such references to foreign law are an illegitimate, antidemocratic judicial usurpation of authority, or an effort to obscure the absence of solid grounding in U.S. law for a result based on "foreign fads" rather than "American conceptions" of law.

These critiques are off the mark and often counterproductive. Understanding references to foreign law in their legal and historic context should defuse unwarranted criticisms, highlight the benefits of well-informed uses of foreign and international legal sources, and focus attention on some genuinely difficult questions. While care must be taken in making legal comparisons, consideration of foreign legal decisions can contribute to our understanding of our own distinctiveness as a nation, illuminate common concepts, and challenge us to think more clearly about our own legal questions. Understanding foreign legal practice can also shed light on the justifications for government action—on which U.S. constitutional law will often turn—and on the possible consequences of different choices for the interpretation of our fundamental law.

It's important to note that the court's recent references to foreign decisions and practice do not treat them as binding. International law may be binding, as when Congress ratifies and implements a treaty. But that's a separate question from whether the Supreme Court should cite foreign or international sources merely as sources that are relevant and only if they have persuasive value, positive or negative. In this sense, foreign legal authority (or nonbinding international norms) shares characteristics of other forms of persuasive authority used in Supreme Court decisions. These include the rulings of lower federal courts and of state courts (even when interpreting their own state constitutions), law review articles, and even works of fiction by Shakespeare, Mark Twain, or George Orwell.

But critics could argue that state courts, even when interpreting distinct provisions of distinct state constitutions, do so within the tradition of U.S. constitutionalism in a way that is not true of foreign or international tribunals. And no one thinks that a work of fiction is a binding legal precedent, even when the

court quotes from *Othello* on the importance of preserving the reputation of one's name. Does the Supreme Court's citation of a decision by a foreign court, not bound by United States law, imply that greater weight is being given to the decision than is warranted because it was made by a court? If that court is interpreting different provisions in a different legal tradition, why is its decision relevant at all? And what relevance could international covenants, not ratified by or binding in the U.S., have to U.S. constitutional questions?

LET US GO BACK TO THE BEGINNING. Far from being generally hostile to foreign countries' views or laws, the founding generation had what the signers of the Declaration of Independence described as a "decent Respect to the Opinions of Mankind." Federalist No. 63 explained:

> An attention to the judgment of other nations is important to every government. . . . [I]ndependently of the merits of any particular . . . measure, it is desirable . . . that it should appear to other nations as the offspring of a wise and honorable policy . . . [and] in doubtful cases, particularly where the national councils may be warped by . . . passion or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can be followed.

While this passage was not directed to legal judgments of courts, the founding generation showed concern for how adjudication in our courts would affect other countries' regard for the United States. As the early Supreme Court noted, the judicial power of the United States was intended to include cases "in the correct adjudication of which foreign nations are deeply interested . . . [and in] which the principles of the law and comity of nations often form an essential inquiry."

In many early cases, the court referred to the "law of nations" (today called "international law") or other countries' practices. In 1804, Chief Justice John Marshall wrote in *Murray v. Schooner Charming Betsy* that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction" exists. In 1812, in *The Schooner Exchange v. McFaddon*, the court relied on "the usages and received obligations of the civilized world" to hold that a foreign sovereign's vessel in a U.S. port was immune from judicial jurisdiction. And in determining three years later what the law of nations was in *Thirty Hogsheads of Sugar v. Boyle*, a case governed by that law, the court commented that "[t]he decisions of the Courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect."

In addition to its cases grounded in the law of nations, the early court also referred on occasion to foreign or international practices in interpreting the U.S. Constitution. In *Worcester v. Georgia* (1832), the court considered the law of nations in defining the status of Indian tribes and state authority under the U.S. Constitution. In some early constitutional cases, the law of nations was referred to by way of contrast to account for constitutional text. In *Prigg v. Pennsylvania* (1842) the court explained that the "fugitive slave clause," which mandated the return of escaped slaves who crossed into other states, was necessary because otherwise the law of nations would not have required a free state to return an escaped slave.

In other cases, the practices of other nations were invoked both to support and to oppose particular interpretations of the Constitution. In the notorious 1857 *Dred Scott* decision, the majority cited discriminatory practices of European nations at the time of America's founding to support the view that the Constitution precluded national citizenship for African-Americans, while a dissent argued in favor of Scott's free status in part by relying on contemporary European practice and international law. In *Fong Yue Ting v. United States* (1893), the majority relied on foreign practice, the law of nations, and the inherent rights of sovereignty to support a broad national power to deport Chinese laborers. The dissent vigorously countered that the United States "takes nothing" from the practices of other countries that expelled people due to their religion or ethnicity.

In *Fong Yue Ting* and elsewhere, justices have demonstrated that they can draw on foreign practice as "negative" authority, just as they may find other foreign authority to be a positive support. In the *Youngstown Steel* case in 1952, the court held that President Harry Truman lacked constitutional power to

take over the steel companies in anticipation of a strike. Justices Felix Frankfurter and Robert Jackson, in separate opinions, alluded to the dangers of dictatorship that other countries had recently experienced, with Jackson explaining features of the Weimar Constitution in Germany that allowed Adolf Hitler to assume dictatorial powers. He contrasted Germany's legal practice to that of France and Great Britain, where legislative authorization was required for the exercise of emergency powers, to support the conclusion that without more specific Congressional authorization the president could not take private property.

Foreign or international examples, both negative and positive, can also inform the court's determination of appropriate measures to protect U.S. constitutional rights. In *Miranda v. Arizona* (1966), canvassing examples of other countries' protections against abusive interrogation of suspects held in custody, the court urged that we should provide "at least as much" protection as countries such as England, Scotland, or India provided, because the United States has "a specific requirement of the Fifth Amendment of the Constitution, whereas other jurisdictions arrived at their conclusions on the basis of principles of justice not so specifically defined." On another issue, affirmative action, Justice Ginsburg, concurring in *Grutter v. Bollinger* (2003), noted the provisions for "temporary special measures" to combat race or gender discrimination in two widely adopted international covenants. She did this in connection with the court's conclusion that individualized consideration of race in law school admissions was permissible under established U.S. law, but only for a limited period of time.

Foreign practice and decisions can also be helpful in evaluating the justifications for government action. In *Washington v. Glucksberg* (1997), the court had to decide whether a state's prohibition on physician-assisted euthanasia was "reasonably related" to "legitimate" state interests. In concluding that the statute in question was constitutional, Chief Justice Rehnquist's opinion noted the debate in other countries, including the Netherlands' experience with physician-assisted suicides and the rejection of euthanasia in Canada and Britain. Foreign law can also help illustrate the possible consequences of different interpretive choices. In *McIntyre v. Ohio Elections Commission* (1995), Justice Scalia's dissent, arguing in favor of the constitutionality of a ban on anonymous pamphleteering, relied in part on practices of "foreign democracies" to conclude that such a ban "is effective in protecting and enhancing democratic elections." Caution is important before reasoning from foreign legal practices to draw any conclusions about U.S. law, since each foreign system differs in important ways. But caution need not mean wholesale avoidance.

ONE OF THE MOST DEBATED RECENT REFERENCES to foreign law was made in *Lawrence v. Texas* (2003). In 1986, in *Bowers v. Hardwick*, a narrowly divided 5-4 court rejected a challenge to a Georgia law making sodomy a crime as applied to homosexual conduct. Chief Justice Warren Burger was part of the majority and wrote separately to argue, among other things, that "throughout the history of Western civilization" homosexual sodomy was subject to prohibition. In *Lawrence*, the court overruled *Bowers*, concluding that *Bowers* failed to appreciate the nature of the liberty interest at stake.

As part of its ruling, the court made two distinct uses of foreign legal sources. First, it relied on them to clarify and correct misimpressions on which the earlier opinion had been based: "The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction." As Burger's opinion illustrates, jurists may believe they know something of the laws of other countries, something that is incomplete, or erroneous, but that nonetheless influences their understanding of U.S. law; candid references have the advantage of allowing for correction of such partial or incorrect understandings.

Lawrence's second use of foreign materials was more positive, suggesting that European conceptions of "human freedom" could inform understandings of liberty in the United States. This use was the more controversial, provoking a dissenting justice to argue that the court " 'should not impose foreign moods . . . on Americans.' " Similar concerns have arisen in connection with challenges to the death penalty. To the extent that constitutional rights rest upon the people's consent to the specific intent of constitutional framers and ratifiers, and are embedded in a broader institutional framework of U.S. law, the reasoning and decisions of foreign tribunals about foreign law may be of quite limited value.

But international human rights are so named because they are considered rights that attach to all persons

by virtue of being human. Legal instruments that protect these rights have drawn inspiration from the U.S. ConstitutionÃ¯Â¿Â½ drafted, after all, to provide governance for a people who, in declaring their independence, invoked universal understandings of "unalienable rights." Many of our constitutional rights and values—liberty, equal protection of the law, due process, freedom of expression—reflect not only specific decisions made in the United States, but also widely shared commitments of many Western democracies.

Where courts in other nations, in decisions meant to bind their own governments, have reflected on similar practices affecting human rights, well-informed American jurists, knowledgeable of these decisions, can decide whether they help in evaluating the best understanding of similar concepts in U.S. law. Decisions concerning "constitutional relatives—international or foreign texts inspired or influenced by the United States—may be of particular interest. As Judge Guido Calabresi of the Second Circuit has said, in referring to U.S. courts learning from constitutional court decisions in Europe: "Wise parents do not hesitate to learn from their children."

It is of course important for U.S. decisions to be rooted in American understandings and traditions, and it is likewise important for courts to be open to understanding the Constitution differently from how it was understood in the past. Reasoned consideration of matters of principle is an important part of our constitutional tradition, one without which the road from *Plessy v. Ferguson* (1896) to *Brown v. Board of Education* (1954) would have been a more difficult one to travel. Particularly with emotionally charged issues of social controversy such as abortion, gay rights, and the death penalty, looking at our own system from an outside perspective can facilitate examination of whether existing constitutional doctrine is consistent with our deepest values.

NOTWITHSTANDING THE LONG HISTORY of the Supreme Court's referring to foreign legal practices and its willingness to note the views of other courts, Justices Antonin Scalia and Clarence Thomas have both asserted that nonbinding contemporary foreign or international legal sources are usually not relevant to constitutional decisions: It is "American conceptions of decency" that are controlling in deciding whether a punishment is "cruel and unusual," for example. European conceptions are, in Scalia's words, "thankfully" not ours, and foreign authorities may be relevant to "making" but not to "interpreting" a constitution once made. Thomas has suggested that citation of foreign authorities is a sign of weakness, an admission that the position for which the foreign authority is cited lacks support in U.S. legal sources. And Chief Justice Rehnquist has raised federalism concerns about using foreign law to interpret constitutional provisions that would limit the states.

To some extent, these objections rest on the proposition that foreign law should be cited only if it bears on the original meaning or specific intentions of the framers of constitutional text—a view that treats originalism as the sole legitimate method of interpreting the Constitution. But accepting that approach might exclude essential constitutional developments, as sociolegal understandings of traditional distinctions and practices shift. The law of gender equality, for example, has been developed from the Fourteenth Amendment's equal protection clause, even though other words in that amendment favored male over female voters, and its framers were not seeking to advance gender equality. A narrowly originalist view is inconsistent with the court's tradition of relying on a variety of sources to interpret the Constitution—including the original intentions of the framers, the text and structure of the Constitution, the court's own precedents, constitutional practice in other branches, and the consequences of different interpretations.

Some of the objections to the citation of non-U.S. sources can be understood as part of a more general challenge to the authority of U.S. courts to invalidate actions taken by current majorities at the state or federal level in the name of the Constitution. These objections are entwined with a concern about increasing judicial "discretion" in constitutional interpretation. Any limitations on democratic decision-making are acceptable, one argument goes, only if they are expressly stated in America's fundamental law. Yet many constitutional rules must be interpreted through legal analysis, not read mechanically off the page. And the notion that U.S. judges would reach results inconsistent with U.S. traditions because of their knowledge of, or citation to, nonbinding international or foreign law seems far-fetched.

Perhaps some objections also reflect concern that using foreign law to help identify the best reading of U.S. law will divert attention away from U.S. sources and morph into treating foreign law as binding. But the Supreme Court has been able to view state court authority as sometimes helpful in formulating a federal rule, and sometimes not. There is little reason to doubt its capacity to do the same with respect to nonbinding international or foreign law.

A more difficult challenge, however, is to be knowledgeable about what to compare. Some issues may be more amenable to comparison than others; some lines of U.S. precedent are well established and quite distinct from the rulings of other nations. Legal education is just beginning to recognize the importance of offering training in understanding foreign and international law.

Although there are limitations in making comparisons, legal reasoning in the United States is often based on analogies, providing jurists and lawyers with training in how to examine conflicting approaches and sort out what is most relevant and persuasive. Cautious but explicit consideration is perhaps the best response to our increased awareness of the practices of foreign governments, since what we think we know—as with Chief Justice Burger's opinion in *Bowers*—may already inform, or misinform, our understanding of U.S. constitutionalism.

Decisions of U.S. constitutional law are always about our law. But no justice should cut off knowledge and analysis of foreign law if it can help the court reach a better understanding of our own. .

Vicki Jackson *is a professor of law at Georgetown University and the co-author with Mark Tushnet of* Comparative Constitutional Law.

HARVARD International LAW JOURNAL

HARVARD ILJ ONLINE
VOLUME 52 – AUGUST 27, 2010

The Controversial Status of International and Comparative Law in the United States*

Martha Minow†

INTRODUCTION

In recent years, I have watched the swirling debate over whether the United States courts should consult international or comparative law. As a law professor, the debate has puzzled me, for international and comparative legal materials have always appeared in the sources consulted by American lawyers and judges. So this article is really a search for the roots of the contemporary controversy. Why is there a controversy? And what can we learn from it?

I will suggest three conjectures to explain the fact of the contemporary debate over the proper role of international law within the United States:

(1) a basic concern emphasizes that we risk being taken over, or losing what we are by engaging with others;

(2) a second worry stresses that the United States is exceptional and thus faces politically motivated attacks as the last superpower;

(3) a third very specific trepidation arises from the unusual nature of "customary international law."

My hope is that by locating the sources of the controversy over the place of international law within the United States, we can dismiss artificial issues and focus on genuine and significant developments—broader changes that offer a window onto the prospects for more effective human governance. The debate diverts attention from

* This article is based on a speech given at the Chicago Council on Global Affairs on May 10, 2010, and the closing discussion draws from the author's recently published book, IN *BROWN*'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK (2010).

† Dean and Jeremiah Smith, Jr. Professor, Harvard Law School. Thanks to Jackie Martinez for research assistance.

developments that might be instructive to us not just in what US courts do but, more importantly, in how we design legislation and legal institutions and how we understand our place in the world.

First, we need to see the puzzle: what is the contemporary debate and how does it relate to judicial practice in the United States?

I. THE CONTEMPORARY DEBATE AND THE PUZZLE

Here is the puzzle: no one disagrees that United States judges have long consulted and referred to materials from other countries as well as international sources; yet for the past nine or so years, citing foreign and international sources has provoked intense controversy.

The evidence of the longstanding practice is undisputed and well-forecast by one of the Federalist Papers, which asserted, "attention to the judgment of other nations is important to every government" as a matter of foreign policy and also as a check on "strong passion or momentary interest" within the nation.[1] The U.S. Constitution itself accords to Congress the authority to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."[2] Citations to foreign law appear in Supreme Court opinions from 1823 (dealing with Native Americans),[3] 1832 (defining the status of Indian tribes)[4], 1877 (concerning personal jurisdiction),[5] and 1879 (rejecting polygamy)[6]. In 1900, the Supreme Court ruled that "international law is part of our law."[7] Justices on the Supreme Court have consulted and referred to the laws of other nations in addressing slavery,[8] mandatory vaccinations,[9] regulation of wheat markets,[10] emergency governmental powers,[11] the meaning of cruel and unusual punishment,[12] rights upon arrest,[13] abortion,[14]

---

[1] THE FEDERALIST NO. 63 (James Madison). *See also* 4 WILLIAM BLACKSTONE, COMMENTARIES *67 (stating that the common law adopts the law of nations).
[2] U.S. CONST. art. I, § 8.
[3] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574–85, 592–96 (1823).
[4] Worcester v. Georgia, 31 U.S. 515, 551–552 (1832).
[5] Pennoyer v. Neff, 95 U.S. 714, 729–30 (1877).
[6] Reynolds v. United States, 98 U.S. 145, 164–65 (1879).
[7] The Paquete Habana, 175 U.S. 677, 700 (1900). *See also* Murray v. Schooner Charming Betsy, 6 U.S. 64, 80 (1804) (Chief Justice Marshall agreed with the complainant that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains").
[8] Dred Scott v. Sanford, 60 U.S. 393, 407–08, 451 (1857).
[9] Jacobson v. Massachusetts, 197 U.S. 11, 31–32 (1905).
[10] Wickard v. Filburn, 317 U.S. 111, 125–26 (1942).
[11] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 651–52 (1952) (Jackson, J., concurring).
[12] Trop v. Dulles, 356 U.S. 86, 103 (1958).
[13] Miranda v. Arizona, 384 U.S. 436, 486–87 (1966)
[14] Roe v. Wade, 410 U.S. 113, 136–38 (1973).

sodomy,[15] and end-of-life treatment.[16] Judge Frank Easterbrook reviewed the use of foreign sources by U.S. courts and concluded that the practice "has been stable for a long time; any suggestion that the practice has skyrocketed recently is unfounded."[17]

Others have noted that consideration by U.S. judges of decisions or practices from other countries and international bodies is fundamentally no different than references to law review articles, materials from state courts, or Shakespeare, in that each is "filtered through the analytical machinery of a U.S. court" and treated not as binding but merely as potentially instructive.[18]

Whether identified as foreign law, international law, or comparative law, what if any role should legal materials originating from outside domestic U.S. practice play inside the legal system of this country? It is worth noting at the outset that the discussion tends to merge these categories—international and comparative law—although all that they share is "not U.S. in origin." Let me flag for later emphasis: where international law *does* have endorsement by the United States, then it too is U.S. law. Although this point gets obscured, let us acknowledge that the debate sweeps in consultation of constitutions, statutes, and judicial decisions from other countries, as well as international treaties we have not signed, international treaties we have signed, and other sources of international law.

Current members of the U.S. Supreme Court advance the most visible edge of the contemporary debate over this issue. When Justices of the United States Supreme Court give public speeches, they seldom replay fights internal to the Court on the results of particular cases, but more commonly explore disagreements about methods of interpretation and the roles of judges and the judiciary.

During his Senate confirmation hearing, Chief Justice John Roberts objected to reference to international law by U.S. courts because international law "doesn't limit [judges'] discretion the way relying on domestic precedent does," and consulting how other countries treat particular legal questions pending in the United States is like "looking out over a crowd and picking our your friends."[19] During his own confirmation hearing, Justice Samuel Alito emphasized that "The Framers [of the United States Constitution] did not want Americans to have the rights of people in France or the rights of people in Russia, or any of the other countries on the

---

[15] Lawrence v. Texas, 539 U.S. 558, 573 (2003).

[16] Washington v. Glucksberg, 521 U.S. 702, 718 n.16 (1997). *See generally* Steven G. Calebresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005).

[17] Frank H. Easterbrook, *Foreign Sources and the American Constitution*, 30 HARV. J.L. & PUB. POL'Y 223, 223 (2006).

[18] Chimène I. Keitner, *International and Foreign Law Sources: Siren Song for U.S. Judges?*, 3 ADVANCE J. ACS ISSUE GROUPS 215 (2009). *See also* Easterbrook, *supra* note 17 (cautioning against citation of any sources to support judicially-announced changes in the Constitution or national law).

[19] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 201 (2005) (statement of Judge John G. Roberts, Jr.).

continent of Europe at the time. They wanted them to have the rights of Americans, and . . . I don't think it's appropriate to look to foreign law."[20]

Justice Thomas wrote concurring in a denial of certiorari, "While Congress, as a *legislature*, may wish to consider the actions of other nations on any issue it likes, this Court's Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans."[21] In a 2004 opinion, Justice Antonin Scalia chided fellow Justices for inviting implying that the "law of nations," which he described as "redefined to mean the consensus of states on *any* subject," could ever bind citizens in our territory because, he wrote, this idea is "a 20th-century invention of internationalist law professors and human rights advocates"[22] and is inconsistent with both the understanding of our Constitution's framers and democracy. Scalia viewed international human rights law to be "a fantasy."[23] In another recent opinion, Justice Scalia objected to the citation of the laws of other nations as irrelevant and inconsistent, and also noted that that "'[a]cknowledgment' of foreign approval has no place in the legal opinion of this Court *unless it is part of the basis for the Court's judgment*—which is surely what it parades as today."[24]

Some members of Congress decided to join the fray and even suggested censure or impeachment of a judge who cites non-U.S. sources.[25] Members of Congress have repeatedly introduced resolutions such as this one: "judicial interpretations regarding the meaning of the Constitution of the United States should not be based in whole or in part 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."[26] Senator John Cornyn introduced this resolution into the Senate by warning that a trend of citing foreign decisions, if real, would mean that "the American people may be losing control over the meaning of our laws and of our Constitution. If this trend continues, foreign governments may even begin to dictate what our laws and our Constitution mean, and what our policies in America should be."[27] During the Senate confirmation hearings for Justice Elena Kagan, Senator Jon Kyl said he was troubled by the suggestion "you can turn to foreign law to get good ideas."[28] Former Attorney General Alberto Gonzales

---

[20] *Confirmation Hearing on the Nomination of Samuel A. Alito to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 471 (2006) (statement of Judge Samuel A. Alito).

[21] Foster v. Florida, 537 U.S. 990, 990 n.1 (Thomas, J., concurring in the denial of certiorari).

[22] Sosa v. Alvarez-Machain, 542 U.S. 692, 749–50 (2004) (Scalia, J., concurring in part and concurring in the judgment).

[23] Harlan Grant Cohen, *Supremacy and Diplomacy: The International Law of the U.S. Supreme Court*, 24 BERKELEY J. INT'L L. 273, 310 (2006).

[24] Roper v. Simmons, 543 U.S. 551, 628 (2005) (Scalia, J., dissenting).

[25] *See* Judicial Conduct Act of 2007, H.R. 2898, 110th Cong. (2007); Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, WASH. POST, Apr. 9, 2005, at A3.

[26] H.R. Res. 372, 110th Cong. (2007); S. Res. 92, 109th Cong. (2005).

[27] 151 CONG. REC. S3109 (daily ed. March 20, 2005) (statement of Sen. John Cornyn).

[28] *Confirmation Hearing on the Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (June 30, 2010).

objected that foreign legal sources should not be used in U.S. courts because their authors "are not accountable to the American people."[29] In sum, critics charge that references to non-U.S. sources by American judges can be selective, faddish, and cover for the judges' own unaccountable views, or a departure from American democracy and authority.

When it comes to keeping Congress out of their business, perhaps all the Justices could agree. Hence, Justice Scalia in a speech in 2006 declared, "As much as I think that it is improper to use foreign law to determine the meaning of the Constitution, I don't think it's any of [Congress's] business."[30]

But on the place of foreign and international law within U.S. law, Justices Breyer, Ginsburg, and Kennedy have diverged from the views already described. Justice Breyer does not only refer to foreign and international legal sources,[31] he also emphatically defends this practice, noting:

> [W]hen I do read things, I can read what I want. If I see something written by a man or a woman who has a job like mine in another country, and who is interpreting a document somewhat like mine and who in fact has a problem in front of the court somewhat like mine, why can't I read it, see what they've done? I might learn something.[32]

Justice Breyer has asserted that international law importantly reflects a globalization of human rights and "near-universal desire for judicial institutions that, through guarantees of fair treatment, help to provide the security necessary for investment and, in turn, economic prosperity."[33] Foreign governmental responses, in his view, may "cast an empirical light on the consequences of different solutions to a common legal problem."[34] Justice Breyer has also commented: "I know it's not binding," when the authority comes from outside the United States, and, in his words, "so what's the problem?"[35]

Justice Ruth Bader Ginsburg similarly has commented that "Judges in the United States are free to consult all manner of commentary—Restatements, Treatises, what law professors or even law students write copiously in law reviews . . . why not the

---

[29] Alberto Gonzales, U.S. Att'y Gen., Remarks at George Mason University (Oct. 18, 2005) (transcript available at http://www.justice.gov/archive/ag/speeches/2005/ag_speech_051018.html).

[30] *Scalia Criticizes Use of Foreign Law in Interpreting U.S. Constitution*, FOX NEWS, May 18, 2006, *available at* http://www.foxnews/com/story/0,2933,196114,00.html.

[31] *See, e.g.*, Knight v. Florida, 120 S.Ct. 459, 462–463 (1999) (Breyer, J., dissenting) (mem.) (citing decisions from Jamaica, India, Zimbabwe, and the European Court of Human Rights).

[32] Jesse J. Holland, *Justice Breyer Says Debate Over Foreign Law is Irrelevant*, ASSOCIATED PRESS, Apr. 2, 2010, *available at* http://www.law.com/jsp/scm/PrintFriendly.jsp?id=1202447364424.

[33] Associate Justice Stephen Breyer, *Keynote Address: The Supreme Court And The New International Law*, 97 AM. SOC'Y INT'L L. PROC. 265, 267 (2003).

[34] *Id.* at 266.

[35] Holland, *supra* note 32.

analysis of a question similar to one we confront contained in an opinion of the Supreme Court of Canada, the Constitutional Court of South Africa, the German Constitutional Court, or the European Court of Human Rights?"[36] More controversially, she has stated, "We are losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups."[37] Indeed, she stresses that lack of engagement with foreign decisions has reduced the influence of the Supreme Court.[38] Following the Senate confirmation hearings for Justice Kagan, Justice Ginsburg speech stressed, "The U.S. judicial system will be the poorer, I have urged, if we do not both share our experience with, and learn from, legal systems with values and a commitment to democracy similar to our own."[39] Citing reference to foreign opinion or law by the authors of the Declaration of Independence, the authors of the Federalist Papers, and by Supreme Court opinions, Justice Ginburg predicted that the U.S. Supreme Court will continue to accord "a 'decent Respect to the Opinions of [Human]kind' as a matter of comity and in a spirit of humility."[40]

Justice Anthony Kennedy previously objected to the idea that judgments from foreign constitutional courts could contribute to the development of American constitutional law, but in recent years he has cited foreign sources in key opinions. In *Lawrence v. Texas*, invalidating Texas' sodomy statute, Justice Kennedy pointed to the decriminalization of sodomy by the British Parliament in 1967, the European Convention on Human rights, and a 1981 European Court of Human Rights decision.[41] In *Roper v. Simmons*, explaining the Court's rejection of the death penalty applied to a crime committed by a minor, Justice Kennedy's analysis of the Eighth Amendment Cruel and Unusual Punishment Clause included consideration of "the world community" as providing "respected and significant confirmation for our own

---

[36] Ruth Bader Ginsburg, Associate Justice, Supreme Court of the United States, Speech at the Constitutional Court of South Africa: "A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication (Feb. 7, 2006) (transcript available at http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_02-07b-06.html).

[37] Breyer, *supra* note 33 (quoting Ginsburg, J.).

[38] Adam Liptak, *Ginsburg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa*, N.Y. TIMES, Apr. 12, 2009, at A14.

[39] Ruth Bader Ginsburg, Associate Justice, Supreme Court of the United States, Speech at the International Academy of Comparative Law, American University: "A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication (July 30, 2010) (transcript available at http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_08-02-10.html). Noting how the framers set the "high importance" of observing the "laws of nations," Justice Ginsburg reiterated Elena Kagan's position that foreign opinions "set no binding precedent for the U.S. judge. But they can add to the store of knowledge relevant to the solution of trying questions." *Id.*

[40] *Id.*

[41] 539 U.S. at 572–73.

conclusions."[42] Justice Kennedy added, "It does not lessen fidelity to the Constitution . . . to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples underscores the centrality of those same rights within our own heritage of freedom."[43]

Justice Sonia Sotomayor has also supported "broader consideration of foreign and international law in U.S. judicial opinions,"[44] and in 2009 in a speech stated, "to the extent that we have freedom of ideas, international law and foreign law will be very important in the discussion of how to think about the unsettled issues in our legal system,"[45] though she has also maintained that such sources have "very limited formal force" and she joins Justices Scalia and Thomas in warning of selection bias in the use of international legal sources.[46] While on the Court, Chief Justice Rehnquist and Justice Sandra Day O'Connor at times supported judicial consultation of decisions of other constitutional courts outside the United States.[47]

Yet since 2003, a serious political as well as theoretical fight over judicial reference by U.S. judges to non-U.S. sources has broken out in the opinions of Supreme Court Justices, on the lecture circuit, in law reviews, and in Congress. Intensity of feeling around these debates should not be underestimated. Justice Ginsburg reported a death threat was posted on a website in 2005 against both her and Justice O'Connor in reference to their discussions of international law in the

---

[42] 543 U.S. at 578.

[43] *Id.*

[44] Collin Levy, Op-Ed., *Sotomayor and International Law*, WALL. ST. J., July 14, 2009, at A13.

[45] Steven Groves, *Questions for Justice Sotomayor on the Use of Foreign and International Law*, THE HERITAGE FOUNDATION, July 6, 2009, *available at* http://www.heritage.org/Research/Reports/2009/07/Questions-for-Judge-Sotomayor-on-the-Use-of-Foreign-and-International-Law at note 12 and accompanying text (quoting speech by Sotomayor, J. to the ACLU in Puerto Rico).

[46] *Id.*

[47] *See* William Rehnquist, *Constitutional Courts – Comparative Remarks*, *in* 14 GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE –TURERERMAN-AMERICAN SYMPOSIUM 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993) ("now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative processes"); SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE 234 (2003) ("As the American model of judicial review of legislation spreads further around the globe, I think that we Supreme Court Justices will find ourselves looking more frequently to the decisions of other constitutional courts, especially other common-law courts that have struggled with the same basic constitutional questions that we have: equal protection, due process, the Rule of Law in constitutional democracies. . . . All of these courts have something to teach us about the civilizing function of constitutional law."). On the bench, however, in interpreting the Eighth Amendment, Chief Justice Rehnquist wrote, "if it is evidence of a *national* consensus for which we are looking, then the viewpoints of other countries simply are not relevant." Atkins v. Virginia, 536 U.S. 304, 325 (Rehnquist, C.J., dissenting).

context of judicial decision-making.[48] Justice Ginsburg cautioned that the congressional debates seemed to "fuel the irrational fringe."[49]

II. WHY THE BIG FIGHT?

A. FEAR OF BEING TAKEN OVER AND LOSING CONTROL

Senator Cornyn offered a cogent explanation of the first source of the fight over turning to foreign law: a basic concern about identity and autonomy—that we risk being taken over and losing what we are by engaging with others. This concern squarely hits the use of comparative law, the law of Germany, Canada, South Africa, Israel, or other countries, rather than consultation of international law, though that, too, could raise similar worries. There is an obvious intersection between this set of concerns and debates over judicial interpretation and constitutional construction. Justice Scalia, for example, is explicit in his advocacy of "originalism," directing judges to construe the United States Constitution to discern the meaning of its drafters. Justice Scalia connects this method to his resistance to foreign sources in noting, "the men who founded our republic did not aspire to emulate Europeans, much less the rest of the world . . . and nothing has changed."[50] Justice Breyer emphasizes, in contrast, that the Declaration of Independence itself points to a "decent respect to the opinions of mankind,"[51] and Justice Breyer has articulated a philosophy of judicial interpretation that pursues the underlying values of fostering democracy and the well-being of citizens.[52]

For Senator Cornyn and others, U.S. judges risk losing tight adherence to strictly U.S. text and values if they consult the laws or decisions of other nations to construe terms within the U.S. Constitution. Attacks against consideration of foreign sources can reflect not only concerns about confining judges to the views held by the Constitution's framers but also disagreements over the results in cases like *Lawrence v. Texas*—striking down a statute criminalizing sodomy—and *Roper v. Simmons*—rejecting the death penalty applied to a crime committed by a minor. An author posting on the National Review website comments that this consultation of foreign and international law to assist interpretation of the U.S. Constitution could allow a judge to "reach the result he wants to reach" with no restrictions, and with the effect

---

[48] *See* Bill Mears, *Justice Ginsburg Details Death Threat*, CNN, Mar. 15, 2006, http://www.cnn.com/2006/LAW/03/15/scotus.threat.

[49] *Id.*

[50] Antonin Scalia, Associate Justice, Supreme Court of the United States, Remarks at the American Enterprise Institute on the Role that International and Foreign Law Should Play in American Judicial Decision-Making (Feb. 21, 2006) (transcript available from CQ Transcriptions).

[51] Tom Curry, *A Flap over Foreign Matter at the Supreme Court*, MSNBC, Mar. 11, 2004, http://www.msnbc.msn.com/id/4506232.

[52] STEPHEN BREYER, ACTIVE LIBERTY (2005).

of "depriving American citizens of their powers of representative government by selectively imposing on them favored policies of Europe's leftist elites."[53] As no one argues that foreign sources are in any way binding on the United States, the objection merely to consulting them is thus often simply part of the critique of the outcomes.

Yet there is another worry about the consultation of foreign sources that seems to operate at a psychological or sociological level of concern. The sheer act of looking at decisions or opinions from non-U.S. sources is the apparent problem—so why? There seems to be a fear of temptation or loss of control. If merely looking at what others are doing causes the worry, the concern seems to be about caving to peer pressure or being an outlier—some kind of contagion effect. Justice Breyer must sense this objection for he responds, "comparative use of foreign constitutional decisions will not lead us blindly to follow the foreign court," and "of course, we are interpreting our own Constitution . . . and there may be relevant political and structural differences between their systems and our own."[54]

This recognition of differences offers a response to the fear that our judges will be contaminated, unable to resist, or taken over if they consult constitutional materials from other countries. The assumption that looking at what others do leads to following them neglects the genuine possibility that looking at others will lead to greater conviction about remaining different or to increased clarity about the reasons for going a different way. As Professor Vicki Jackson at Georgetown University Law Center emphasizes, the process of engagement with comparative materials is as likely to help American judges clarify what is *not* consistent with the text and traditions of the United States as it is to be instructive in interpreting American commitments.[55] For example, in viewing the treatment of hate speech in Canada and Germany, where courts have upheld and applied restrictions, analysis of the American constitutional tradition rejects the path pursued elsewhere as disconnected from our text and commitments, as well as reflective of different contexts and concerns.[56] Looking at what others do may sharpen our sense of our differences rather than produce a sense of pressure to conform.

This reminds me of the critical lesson my mother taught my sisters and me. As my sister Nell explained recently:

---

[53] Ed Whelan, *Obama Supreme Court Candidate Harold Koh—Part 1*, BENCH MEMOS, NATIONAL REVIEW ONLINE, Sept. 24, 2008, http://www.nationalreview.com/bench-memos/50710/obama-supreme-court-candidate-harold-koh-mdash-part-1/ed-whelan (criticizing judicial transnationalism as interpreted in Harold H. Koh, *Why Transnational Law Matters*, 24 PENN. ST. INT'L L. REV. 745, 749–50 (2006)).

[54] Breyer, *supra* note 33, at 266 (internal quotation marks omitted).

[55] VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 115 (2009); *see also* Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005).

[56] RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE 51–52, 137–38 (2006); Frederick Schauer, *The Exceptional First Amendment*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29, 32–38 (Michael Ignatieff ed., 2005). *See also* Doe v. Michigan, 721 F. Supp. 852, 860–67 (E.D. Mich 1989) (discussing the various restrictions on free speech allowed by U.S. Courts under the First Amendment).

> One of the greatest gifts my mother ever gave me was when I was in kindergarten and I told her that everyone else was allowed to go to a friend's house after school without getting permission first except me. She said, "Now is a good time for you to learn that that reason will never work in our family. If there's a reason that something is right for us, I want to hear about it. But what everyone else is doing is never a reason for us to do it."[57]

My sister reflected:

> What an utterly liberating idea. I never thought about trying to be like everyone else again. Now that backfired a little on my mother when she tried to tell me that everyone else wears shoes at their wedding, but other than that, we've both been very happy with it.[58]

I do not mean to minimize concerns about peer pressure or influence but instead to emphasize that confidence in who we are, what our values and traditions are, and how we interpret them over time stems from a source deeper than a refusal to look at what others do.

B. DEFENSE OF AMERICAN EXCEPTIONALISM

Announcement of American difference, however, is a further reason for the resistance to judicial consideration of foreign or international sources. The view of American uniqueness has roots in ideas from the Puritans, ideals of the Revolution, comments by observers like Alexis de Tocqueville,[59] and visions of leaders like Abraham Lincoln, whose Gettysburg Address locates America as a nation "conceived in liberty, and dedicated to the proposition that all men are created equal."[60] After the fall of the Soviet Union, American exceptionalism also became associated with recognition of the nation as the last superpower, and some have argued that as the United States has been expected to play—and is often playing—the leading role in many international affairs, this country should be understood as an "exception" to the

---

[57] Nell Minow, Sermon delivered at Beth El Hebrew Congregation, Alexandra, Virginia 4 (Apr. 30, 2010) (transcript on file with the Harvard International Law Journal).
[58] *Id.*
[59] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf 1987) (1831).
[60] Abraham Lincoln, President of the United States, Gettysburg Address (Nov. 19, 1863) *in* THE COLLECTED WORKS OF ABRAHAM LINCOLN (Ray P. Basler ed., 1953). *See also* SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD 31 (1997) ("G. K. Chesterton put it: 'America is the only nation in the world that is founded on a creed. That creed is set forth with dogmatic and even theological lucidity in the Declaration of Independence. . . .'") (citations omitted).

law of nations. Some make this claim affirmatively and others do so critically.[61] In this context, reference to international law in decisions by American judges can be fraught with political charge, especially if it seems to signal adherence to international documents outside the official process of treaty agreement involving the Congress and the President.

For some, reference to foreign sources in Justice Kennedy's opinion for the five-Justice majority striking down the death penalty for crimes committed by juveniles in *Roper v. Simmons* is especially controversial because even the majority acknowledged that "when the Senate ratified the International Covenant on Civil and Political Rights . . . it did so subject to the President's proposed reservation regarding Article 6(5) of that treaty, which prohibits capital punishment for juveniles."[62] Justice Kennedy's consideration of practices by other nations thus, to some, looked like an end run around that treaty process. It is worth noting, however, that Justice Kennedy's opinion expressly interprets United States law, namely, the "cruel and unusual punishment" language in the Eighth Amendment of our Constitution, and considers foreign practice only alongside practices within our states and expert opinions within the United States as data to assess, as our Eighth Amendment directs, whether punishment is "cruel and unusual."[63] The relevance of the law of other nations is only as provided by United States law that itself directs judges to consider what is or has become "cruel and unusual."

The issue of American exceptionalism arises additionally with regard to international legal sources, and the clear rule is that the United States is bound by international law when that law has been duly incorporated into U.S. law, pursuant to our own procedures for doing so. One of the treaties we have not signed establishes the International Criminal Court (technically: President Bill Clinton signed the governing Rome Statute, President George Bush "unsigned" it, and Congress has never ratified it).[64] U.S. critics assail this court—empowered to investigate and prosecute crimes against humanity, war crimes, and genocide—as an infringement of national sovereignty, as operating with vague and unaccountable power, and as subject to politically motivated prosecutions.[65] It does pose the unusual feature that even nations that have not signed onto the court could face prosecutions if the situation involving an alleged international crime within the court's jurisdiction is referred to the ICC prosecutor by the United Nations Security Council under Chapter

---

[61] *See, e.g.*, Discussion among Neal K. Katyal, Michael S. Paulsen, David B. Rivkin, Jr., Nadine Strossen, and Steven G. Calabresi, The Federalist Society, American Exceptionalism, the War on Terror and the Rule of Law in the Islamic World (Nov. 17, 2007), *available at* http://www.fed-soc.org/publications/pubID.460/pub_detail.asp; AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS (Michael Ignatieff ed., 2005).

[62] *Roper*, 543 U.S. at 567.

[63] *Id.* at 276–78.

[64] *See Braced for the Aftershock*, ECONOMIST, Mar. 5, 2009, at 66.

[65] John Bolton, *Speech Two: Reject and Oppose the International Criminal Court*, *in* TOWARD AN INTERNATIONAL CRIMINAL COURT? 37, 43–45, 47 (Alton Frye ed. 1999).

VII of the Charter of the United Nations.[66] The United States has itself embraced the Charter of the United Nations, so this provision is itself consistent with the law of the United States. That the United States holds a veto at the United Nations Security Council should be some reassurance that checks exist to protect the United States.[67] But with calls for war crimes prosecutions against various officials in the United States for incidents ranging from the conflicts in Vietnam to the conflict in Iraq, these concerns could contribute to the heat over reference to international sources by the United States judiciary.

The proper resolution of this matter, once more, is to be found in the directives of U.S. law itself. In a series of recent decisions, the U.S. Supreme Court addressed the place of international law as a limit to the conduct of the executive branch and clearly reinforced this ground rule: where the United States has made international law part of our domestic legal system, it is binding and enforceable law inside the country, even against the executive during a time of armed conflict. Hence, in *Hamdan v. Rumsfeld*, the Court found fatal defects in the military commissions established during the administration of George W. Bush to hold trials for detainees at Guantanamo Bay because their structures and procedures violated two sources of U.S. law: the Uniform Code of Military Justice and Common Article 3 of the Geneva Conventions, signed in 1949 and codified in U.S. law and ensuring detainees a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[68] In his concurring opinion, producing the fifth vote for this view, Justice Kennedy reasoned:

> The terms of this general standard are yet to be elaborated and further defined, but Congress has required compliance with it by referring to the "law of war" in §821. The Court correctly concludes that the military commission here does not comply with this provision.
>
> Common Article 3's standard of a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples," . . . supports, at the least, a uniformity principle. . . .

---

[66] Rome Statute of the International Criminal Court art. 13(b), July 12, 1998, 2187 U.N.T.S. 900 [hereinafter Rome Statute]. A nonstate party may also consent to ICC jurisdiction over crimes committed within its territory or over its nationals. *Id.* at art. 12.

[67] In addition, under the "complementarity" provision, should any case arise from the conduct of a United States national, the case is inadmissible before the ICC if the case "is being investigated or prosecuted" within the United States or if it "has been investigated" here and the State "has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute." *Id.*, arts. 17(1)(a), 17(1)(b).

[68] Hamdan v. Rumsfeld, 548 U.S. 557, 642 (2006) (Kennedy, J. concurring) (quoting Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. at 3318).

> Absent more concrete statutory guidance, this historical and statutory background—which suggests that some practical need must justify deviations from the court-martial model—informs the understanding of which military courts are "regularly constituted" under United States law.[69]

Explicit Congressional authority would be necessary before the executive could bypass these otherwise existing U.S. norms. No claim of American exceptionalism can give the President of the United States unilateral authority to suspend the Geneva Conventions;[70] for those who care about the capacity of the United States to operate apart from developments in international law, the internal domestic structures of the United States Constitution—notably, congressional action, subject to presidential veto and judicial review—provide the proper avenues.

C. CUSTOMARY INTERNATIONAL LAW

Heated concerns over bypassing domestic legal structures lie behind the specific objection to judicial application of what is known as "customary international law." Understanding those concerns can help explain some of the anxieties about judicial application of international law. "Customary international law" can be defined as "rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act in that way."[71] Analogous in some ways to the common law in the Anglo-American tradition, customary international law—which has, according to observers such as the authors of the 1987 Restatement (Third) of Foreign Relations Law of the United States, long included the international crimes of slavery, genocide, and war crimes, as well as the principles of immunity for visiting heads of state and the right to humanitarian intervention—thought by some to be

---

[69] *Id.* at 644.

[70] President Bush had so claimed. *See* Memorandum from George W. Bush, President of the United States to The Vice President, the Sec'y of State, the Sec'y of Def., the Attorney Gen., Chief of Staff to the President, Dir. Of Cent. Intelligence, Assistant to the President for Nat'l Sec. Affairs & Chairman of the Joint Chiefs of Staff (Feb. 7, 2002), *reprinted in* MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR 105 (2004). *See also* Memorandum from Alberto R. Gonzales, Attorney Gen., to George W. Bush, President of the United States (Jan. 25, 2002), *reprinted in* DANNER, *supra* note 70, at 83. By their terms, common art. III of the Geneva Conventions cannot be repudiated by a signatory during an ongoing conflict. GENEVA CONVENTION [NO III] RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[71] SHABTAI ROSENNE, PRACTICE AND METHODS OF INTERNATIONAL LAW 55 (1984). Shabtai Rosenne is the former Ambassador of Israel to the United Nations and a leading expert on international courts. *See also* JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW xxxi–xlii (2005) (exploring customary international law which is not written and which is reflected in state practice and conviction in the international community that such practice is required as a matter of law).

binding, not merely advisory.[72] The Restatement itself, written by American law professors Louis Henkin, Andreas Lowenfeld, Louis Sohn, and Detlev Vagts, was the first effort to assert inclusion of customary international law within the U.S. federal law; the prior edition has indicated that its status was an open question.[73] In a powerful law review article published in 1997, law professors Curtis Bradley and Jack Goldsmith argued against treating customary international law as part of U.S. law, in part by showing the absence of any actual judicial opinion or federal statute clearly making customary international law part of U.S. law.[74]

Two sources of U.S. law make customary international law pertinent. The first is the United Nations Charter—over which the United States played a key role and to which our nation subscribes. The United Nations Charter includes a provision directing the International Court of Justice to apply "international custom, as evidence of a general practice accepted as law."[75] Discerned in assessments of general, consistent, and widespread practice, this source of norms has governed relations among diplomats and rules of war. The second instance is the Alien Tort Statute, enacted as a clause of the Judiciary Act of 1789, directing that federal district courts "shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."[76] Ignored or neglected for centuries, this provision has recently been deployed as a vehicle for international human rights litigation in U.S. federal courts. In 1980, the Federal Court of Appeals for the Second Circuit found jurisdiction and held that deliberate torture perpetrated under color of official authority "violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties"—and under that holding, the court ruled that U.S. federal courts could hear cases alleging violations of public international law or treaties brought by non-U.S. citizens even for conduct occurring outside the United States.[77] Ultimately in this case, a federal court announced civil damages liability against the former police inspector general of Paraguay following the kidnapping and torturing of a 17-year-old son of the plaintiff in reaction to his father's political activities.[78]

With this case and its progeny, as well as assertions by some human rights advocates that customary international law constrains the executive branch of the United States, customary international law has generated controversy. Why should the federal courts address extra-territorial matters? They impose burdens of work;

---

[72] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987).

[73] Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 834–36 (1997).

[74] *Id.* at 849–70.

[75] The Statute of the International Court of Justice, annex to the U.N. Charter, art. 38(1)(b).

[76] Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (current version at 28 U.S.C. § 1350) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

[77] Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

[78] *Id.*

they strain the courts' expertise; and they may unmoor the courts from U.S. law, some may object. These objections may grow in the face of assertions that customary international law is evolving to include economic and social rights, to prohibit the death penalty, and to regulate discrimination on the basis of sexual orientation.[79] Professors Bradley and Goldsmith note that customary international law is now articulated not only by actual practices of states but by treaties, resolutions, and views of academics.[80] They also note how customary international law is growing rapidly and addressing topics—such as labor organizing, primary education, and hate speech—historically treated only by domestic law.[81] Other examples claimed to be customary international law include the protection of refugees from being sent back to places where their lives or liberties are in jeopardy; immunities for visiting foreign heads of state, a right of humanitarian intervention, and prohibitions of slavery, genocide, and crimes against humanity, although no one claims that these were consistent practices among civilized nations at the time of the founding of the United States. Very fair questions arise, thus, over what counts as consistent practice, who decides, and why practices never explicitly endorsed or embraced within the United States come to trump rules adopted pursuant to the legislative, judicial, and executive practices of U.S. states and the nation.[82]

Among the powerful critiques developed by Professors Bradley and Goldsmith is one telling argument that portrays dramatic shifts in prevailing understandings of law itself within the United States. They note how for a time customary international law was viewed by judges, scholars, and lawyers in this country as part of "general common law," inherited from England or simply the "law of the land" with no attention to its source in particular judicial or legislative authority.[83] This fit a dominant pattern before 1938, when even federal courts could claim to be simply finding the general common law of torts or contracts even if that meant contradicting what a state law said. Oliver Wendell Holmes, Jr., with disparagement called this conception of general common law that of "a transcendental body of law outside of any particular State"[84] and he instead argued that the common law evolves and reflects the interests and times of those articulating it.[85] So rather than one universal body of law, the common law reflected rules and decisions created by particular decision-makers. In its 1938 decision in *Erie Railroad Co. v. Tompkins*, the Supreme Court embraced this view and rejected assertions by federal courts of a power to announce general common law; "law in the sense in which courts speak of it today does not exist without some definite authority behind it" and hence "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be

---

[79] *See* Bradley & Goldsmith, *supra* note 73, at 818.
[80] *Id.* at 839.
[81] *Id.* at 840–42.
[82] *See* Bradley & Goldsmith, *supra* note 73, at 838, 857–59, 870–76.
[83] *Id.* at 822–23.
[84] Black & White Taxicab Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, Jr., J. dissenting).
[85] OLIVER WENDELL HOLMES, JR., THE COMMON LAW (1881), *available at* http://pds.lib.harvard.edu/pds/view/10253629?.

applied in any case is the law of the State."[86] Scholars gradually recognized that this knocked the legs out from under federal court articulations of customary international law as well, and that is the argument that Bradley and Goldsmith emphasized.[87] Hence, a federal court cannot apply customary international law "in the absence of some domestic authorization to do so."[88]

The U.S. Supreme Court actually had a chance to weigh in on this question—and the status of customary international law in federal courts—in a case in which a Mexican citizen brought a claim under the Alien Tort Statute asserting false arrest by U.S. Drug Enforcement Agency and a Mexican national hired to help the U.S. government. A district court and the Court of Appeals for the Ninth Circuit ruled that the Alien Tort Statute created a private cause of action for the Mexican citizen to claim a violation of international law due to the arbitrary arrest and detention against Jose Francisco Sosa, the Mexican citizen hired to help the U.S. agency. Defendant Sosa argued that U.S. courts have no authority to announce or apply customary international law; the plaintiff argued that not only do the federal courts have that power but it extended to the instance of false arrest he claimed. The Supreme Court struck a middle course. Using a close study of evidence about how the framers of the Constitution approached international law, the Supreme Court unanimously ruled that the international common law claims authorized for enforcement in the federal courts do not include the claim in this case, and federal courts should not recognize as claims violations of international law norms "with less definite content and acceptance among civilized nations than the 18th-century paradigms familiar" when the Alien Tort Statute was enacted in 1789—such as those against piracy, prohibiting offenses against ambassadors, and ensuring safe conduct into or out of a country, whether during war, truce, or peacetime.[89]

Justice Scalia concurred in the result in the case and concurred in the assessment of the historical understanding. But, in a separate opinion, Justice Scalia asserted that recent developments—including the post-*Erie* treatment of common law—preclude the federal courts from recognizing any further developments in international common law. He objected that "the law of nations, redefined to mean the consensus of states on *any* subject" is merely "a 20th-century invention of internationalist law professors and human rights advocates" inconsistent with the intent of the Constitution's framers and the democratic project."[90] Nonetheless, even Justice Scalia did not dispute that Congress in 1789 authorized federal courts to enforce a small number of international norms even without further specific authorization by

---

[86] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–79 (1938).

[87] Bradley & Goldsmith, *supra* note 73, at 827–28, 846–47, 852.

[88] *Id.* at 853.

[89] *Sosa*, 542 U.S. at 732. The Court noted that the United States announced their reception of the "law of nations" at the time of the Declaration of Independence, and that included, as summarized ultimately by Blackstone, violation of safe conducts, infringement of the rights of ambassadors, and piracy. *Id.* at 713–14. One historical inquiry suggests that the framers had in mind only safe conducts, not piracy or ambassadorial infringements. Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830 (2006).

[90] *Sosa*, 542 U.S. at 749–50 (Scalia, J., concurring in part and concurring in the judgment).

Congress.[91] A six-Justice majority kept the door open to new statements of federal common law by federal courts, given two centuries of acknowledgment of international law by the United States and the supplemental authority given by Congress to permit judicial consideration of torture victim cases.[92] But even this group of Justices emphasized, as I already mentioned, that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar" when the Judiciary Act of 1789 was enacted.[93] And in addition, cautioned the Court, practical consequences of making a claim available to litigants should be considered.[94]

Because the subject of customary international law remains one where federal courts might exercise some limited and restrained discretion, the topic could generate anxieties about federal court consideration of international law. The historical shifts in prevailing understandings of the nature of law's development and authority—and the increasing recognition that judges do not merely discover pre-existing law, they help create it—may increase concerns over the sources judges can consult. The Supreme Court has tethered consultation of customary international law to traditions and understandings in this country in 1789. This seems a sound precaution given growing evidence that first actors in announcing developments in customary international law may themselves retreat or alter their positions over time.[95] Where there are disagreements across nations about the content of customary international law, it seems almost definitional that the topic in question does not yield a norm of such general practice and acceptance as to rise to the level of customary international law.

In exploring the sources of concern over judicial consultation of foreign and international law, I have suggested worries about customary international law, risks to America given politically motivated uses of law, and fears of being taken over or losing control. To be frank, those who raise these concerns are likely more worried about what others will do than about themselves. But I hope that the recent history I have recounted gives assurance that the Supreme Court has affirmed rigorous adherence to American law and traditions when the Justices turn to foreign or international law and has emphasized restraint even then.

---

[91] *Id.* at 728–30 (discussing Scalia, J. concurring opinion and referring back to sections I and II, endorsed by Justice Scalia).
[92] *Id.* at 724-25.
[93] *Id.* at 732.
[94] *Id.* at 732-33.
[95] *See, e.g.*, Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Regulating Role of the Political Branches in the Transnational Prosecution of International Crimes*, 47-52 (Harvard Law School Faculty Workshop, Working Paper, 2010) (discussing developments in universal jurisdiction) (on file with Harvard International Law Journal).

III. RECLAIMING THE CHANCE TO LEARN

Those who object to references to foreign or international law even when U.S. law directs attention to these sources run risks of inciting anxieties and fears, as the death threats to Justices Ginsburg and O'Connor indicate. There are other costs that spread beyond judges and courts.

Neglecting developments in international and comparative law could vitiate the vitality, nimbleness, and effectiveness of American law or simply leave us without the best tools and insights as we design and run institutions, pass legislation, and work to govern ourselves.

Consider two examples of extra-domestic—and extra-judicial—learning that would be helpful; the absence of which would be a loss.

First, regulators, citizens, and indeed anyone interested in governance could learn about emerging forms of what is called "soft law" in the context of the European Union. Unlike government-issued rules that carry sanctions, enforceable by courts or agencies, soft law includes voluntary standards that depend on consensual action, and which are embraced by private actors and also informal institutions.[96] Soft law can proceed through private and voluntary codes, certification and labeling systems, or transparency obligations placed on government where the disclosure of information deters misconduct and empowers observers to monitor government action.[97] And, as summarized by John Kirton and Michael Trebilcock, soft law offers the advantages of "timely action when governments are stalemated; bottom-up initiatives that bring additional legitimacy, expertise, and other resources for making and enforcing new norms and standards; and an effective means for direct civil society participation in global governance."[98] In trade, labor relations, environmental protection, and other fields, these techniques can elicit changes in behavior, attract cooperation, and also at times work as a precursor to or substitute for "hard law" with sanctions. These kinds of devices pervade international law and also identify tools that are often useful within a country, state, or town.[99]

Of course, we use some of these devices already, both domestically and in our international ties. But learning about developments elsewhere could offer new tools and refinements even while helping us clarify how law works. It is easy to emphasize that foreign and international legal materials—analogous to soft law--represent no

---

[96] *See* John J. Kirton & Michael J. Trebilcock, *Introduction: Hard Choices and Soft Law in Sustainable Global Governance*, *in* HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE 3, 9 (John J. Kirton & Michael J. Trebilcock eds., 2004); MARY ELLEN O'CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT 12 (2008).

[97] *See* Kirton & Trebilcock, *supra* note 96, at 10.

[98] *Id.* at 5.

[99] *See* Gerda Falkner, et al., Complying with Europe: EU Harmonisation and Soft Law in the Member States 179–80 (2005); Dinah Shelton, *Soft Law*, *in* Routledge Handbook of International Law 68 (David Armstrong ed., 2009); David M. Trubek, Patrick Cottrell & Mark Nance, *'Soft Law', 'Hard Law' and EU Integration*, *in* Law and New Governance in the EU and US 65, 69 (Gráinne De Búrca & Joanne Scott eds., 2006).

binding force within the United States, except where American law itself endorses, incorporates, or calls for consultation of international or foreign law. Nonbinding authorities, including law reviews, scholarly treatises, and judgments of sister circuit courts are often and widely consulted. Especially in issues of first impression or evolving legal norms, consultation of nonbinding sources can be instructive and clarifying though never binding.

A second topic offering potentially useful learning to lawyers, judges, and citizens in the United States is the International Criminal Court. It is the institutional design that offers instruction here. Any worries about prosecutions of United States citizens are not only unwarranted but they also risk obscuring fascinating features of that experiment that might offer intriguing ideas for domestic work here. Chief among them is the idea of complementarity, built into the Court: the Court defers to actions within nations and in fact loses the ability to proceed with a case if the case "is being investigated or prosecuted" within a country having jurisdiction over it or even if it "has been investigated" here and the State "has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute."[100] This device has several consequences. It puts power in the hands of individual nations to avoid ICC action—if only the individual nation takes up the investigation of the matter otherwise headed to the ICC. It thereby creates a device for limiting the ICC's business and power. It also creates an incentive for increasing capacity and political will in individual nations for enforcing the norms against genocide and crimes against humanity. It preserves decentralization and national sovereignty in ways that might offer models on some matters for the relationships between the national and state governments within the United States, between Indian Tribes and the United States, between government and nongovernmental entities, or in other instances where multiple agents may have an interest in a given matter. A dean might try this with students, or a parent might even try this with a child—I'll check into your conduct unless you do so and do so credibly.

The complementarity device of the ICC is simply one example of international legal materials offering potential instruction to people in the United States—not because it is our law but because it offers an approach to issues of institutional design that we often face. Moreover, we as Americans who contributed so much to modern international law remain involved in it. Even Americans who report skepticism about the efficiency of the UN respond very positively to the recommendations of the UN.[101]

One last thought: we might actually learn something from an instance about which I think there is considerable pride in this country. Our Supreme Court's landmark decision, *Brown v. Board of Education*, is a legal moment about which our nation is justifiably proud. However partial and limited is the fulfillment of its ultimate vision of racial integration, *Brown's* rejection of "separate but equal" schools spurred the end of segregation in retail stores, theaters, swimming pools, and

---

[100] Rome Statute art. 17(1)(a), 17(1)(b).

[101] Katerina Linos, *How International Norms Shape Voter Choices*, 103 AM. SOC'Y INT'L L. PROC. 10, 11 (forthcoming 2010).

employment, though often only after a struggle and legislative or litigated reforms.[102] The steps from Jim Crow segregation to the election of President Barack Obama were many and nonlinear, but *Brown* played a role in mobilizing changes in ideas as well as in practices and opportunities. *Brown's* influence inside schools but outside of the context of race has profoundly altered the discussions and treatment of gender, disability, language, ethnicity, and national origin, with further changes in the way educational and life opportunities of students are affected by their sexual orientation, religion, economic class, or status as Native Hawai'ians or Native Americans.[103] Well beyond schooling, *Brown* and the efforts surrounding it have created the model for social and legal reforms in the United States on behalf of girls and women, persons with disabilities, members of religious minorities, and advocates for economic justice, environmental protection, and other issues.[104]

As I researched my new book on *Brown's* influence,[105] I was struck by how much our landmark case and the struggle behind it have served as an evocative reference point for advocates pursuing equal opportunity and social change around the world. Advocates in Northern Ireland, South Africa, India, and Eastern Europe have pointed to *Brown* in their own efforts to use law to overcome social division within educational systems and even in initiatives addressing social hierarchy and exclusion without connection to race or education.[13] Although this international perspective echoes *Brown's* mixed legacy in actually realizing equal opportunity in practice, looking across the world, it is undeniable that Chief Justice Warren's opinion for a unanimous Supreme Court has become a powerful resource for change agents everywhere.

Brown v. Board of Education has played a prominent role in efforts both to combat this segregated education system and to transition away from the apartheid regime more generally. In 1958, Britain's Prime Minister Harold Macmillian cited *Brown* while critiquing apartheid in an address to South Africa's Parliament.[106] During the 1980s, two lawyers who worked closely with Thurgood Marshall on *Brown v. Board of Education* assisted lawyers in South Africa to develop judicial strategies to terminate

---

[102] *See, e.g.*, JEFF WILTSE, CONTESTED WATERS: A SOCIAL HISTORY OF SWIMMING POOLS IN AMERICA (2007); RICHARD C. CORTNER, CIVIL RIGHTS AND PUBLIC ACCOMMODATIONS: THE *HEART OF ATLANTA MOTEL* AND *MCCLUNG* CASES (2001). *See generally* GARY GERSTLE, AMERICAN CRUCIBLE: RACE AND NATION IN THE TWENTIETH CENTURY (2001); MICHAEL J. KLARMAN, UNFINISHED BUSINESS: RACIAL EQUALITY IN AMERICAN HISTORY 160–203 (2007); RICHARD WORMSER, THE RISE AND FALL OF JIM CROW (2003).

[103] *See* MARTHA MINOW, IN *BROWN*'S WAKE: LEGACIES OF AMERICA'S CONSTITUTIONAL LANDMARK 33–83, 96–108 (2010).

[104] *See, e.g.*, Beverly Wright, *The Deep South Center for Environmental Justice: Education and Empowerment for an Engaged Citizenry*, 8 DIVERSITY DIGEST 11 (2004), www.diversityweb.org/Digest/vol8no2/wright.cfm; David S. Meyer & Steven A. Boutcher, *Signals and Spillover: Brown v. Board of Education and other Social Movements*, 5 PERSP. ON POL. 81 (2007).

[105] MINOW, *supra* note 103.

[106] *See* Anthony Lester, Brown v. Board of Education *Overseas*, 148 PROC. AM. PHIL. SOC'Y 455, 459 (2004).

apartheid.[107] After the fall of apartheid and the creation of a new constitutional regime, the South African Constitutional Court has repeatedly cited *Brown v. Board of Education* in cases. For the case of *In re The School Education Bill of 1995*, the Court relied on *Brown* in discussing the important role of education in developing and maintaining a democratic society, but reflected the history of South Africa and the global human rights movement in rejecting the claim that the government had a constitutional duty to establish or fund Afrikaans schools while recognizing the right of private groups to maintain such schools.[108] One author argues that the tensions over school desegregation and affirmative action in the United States influenced drafters of the South African Constitution in their decision to shield remedial uses of racial categories from constitutional challenge.[109]

And last October, the South African Constitutional Court worked to accommodate language rights while tackling ongoing exclusion of black South Africans from educational opportunities. An Afrikaans-language school had extra spaces and black South Africans wanted access, but the school asserted a right to instruct only in Afrikaans. The Constitutional Court acknowledged the constitutional right to be taught in an official language of one's choice but directed the school's own governing body to reassess its language policy and provide sufficient spaces for English learners for the coming school year.[110] Affirming equality as respect for the language of one's own choice in this case involved protecting a minority language of the historically privileged group;[111] the Court then expressly pointed to the

---

[107] *See* Richard J. Goldstone & Brian Ray, *The International Legacy of* Brown v. Board of Education, 35 MCGEORGE L. REV. 105, 114 (2004) (discussing efforts by Constance Baker Motley and Jack Greenberg).

[108] *In re Dispute Concerning the Constitutionality of Certain Provisions of the School Education Bill of 1995*, 1996 (3) SA 165 (CC) at ¶¶ 47–52 (S. Afr.); *see also* Penelope Andrews, *Perspectives on* Brown: *The South African Experience*, 49 N.Y.L. SCH. L. REV. 1155, 1165–67 (2005); Rassie Malherbe, *A Fresh Start I: Education Rights in South Africa*, 4 EUR. J. FOR EDUC. L. & POL'Y 49, 50–51 (2000). Courts in other countries have also referenced *Brown* for the general proposition that education is pivotal in a democratic society. *See, e.g.*, R. v. Jones, [1986] 2 S.C.R. 284, ¶ 22 (Can.); *see also* Goldstone & Ray, *supra* note 107, at 117–18 (discussing case in Trinidad and Tobago).

[109] Andrews, *supra* note 108, at 1158–65. *See generally* MARK S. KENDE, CONSTITUTIONAL RIGHTS IN TWO WORLDS: SOUTH AFRICA AND THE UNITED STATES (2009).

[110] Head of Dep't: Mpumalanga Dep't of Educ. v. Ermelo, (CCT 40/09) [2009] ZACC 32 (Oct. 14, 2009) (Saflii), *available at* http://www.saflii.org/za/cases/ZACC/2009/32.pdf (unpublished).

[111] The case thus offers a striking contrast to *Lau v. Nichols*, 414 U.S. 563 (1974), in which a minority immigrant group of Chinese-speaking students successfully argued that instruction solely in English failed to provide equal educational opportunity. *See* MINOW, *supra* note 103, at 37–40. The historic power and resources held in the Afrikanner community complicate protection for its autonomy; but for that, the case has some similarities with issues confronted by indigenous groups at risk of forced assimilation unless they can maintain their own culture. *See* MINOW, *supra* note 103, at 96–108.

Constitutional design to transform public education and South African society by addressing unequal access to educational resources.[112]

In Eastern Europe, the European Roma Rights Center in Budapest joined with others, including Czech attorney David Strupek, in 2000 to challenge student placement practices in the Czech Republic, where a disproportionately large number of Roma children were being placed in schools for students with mental or learning disabilities rather than mainstream schools.[113] Lawyers and others working on behalf of the Roma students explicitly discussed *Brown* and the movement surrounding it.[114] They initiated a case known as *D.H.* as the centerpiece of the Roma rights movement's litigation strategy,[115] which was designed to pursue cases that could change existing practices "through liberal and far-reaching judicial interpretation, as well as to trigger comprehensive reform of legislation."[116] *D.H.*—like the cases combined into *Brown*—focused on systematic discrimination and mindsets perpetuating second-class status for an entire group of people. Lawyers from the United States, Great Britain, and many European nations contributed to the advocacy strategy and commentary about it.[117]

And the European Court of Human Rights ruled in favor of the Roma applicants by a vote of thirteen to four.[118] Finding the special schools offered an often inferior curriculum as well as diminished educational and employment prospects,[119] and

---

[112] Head of Dep't: Mpumalanga Dep't of Educ. v. Ermelo, (CCT 40/09) [2009] ZACC 32 at ¶¶ 45–47.

[113] European Roma Rights Centre, Strasbourg Application by Roma Challenges Racial Segregation in Czech Schools (Apr. 29, 2000), *available at* http://www.errc.org/cikk.php?cikk=219.

[114] William New, Remarks at the Annual Meeting of The Law and Society Association: *D.H. & Others v. C.Z.*: A Narrative Analysis of Romani Education Policymaking (July 6, 2006) (transcript on file with the Harvard International Law Journal).

[115] Morag Goodwin, Developments, *D.H. and Others v. Czech Republic: A Major Set-back for the Development of Non-discrimination Norms in Europe*, 7 GERMAN L.J. 421 (2006).

[116] European Roma Rights Centre Legal Activities, www.errc.org/Litigation_index.php (last visited Nov. 6, 2009), *cited in* Jennifer Devroye, *The Case of D.H. and Others v. the Czech Republic*, 7 NW. U. J. INT'L HUM. RTS. 81 (2009).

[117] *See* Bob Hepple, *The European Legacy of Brown v. Board of Education*, 2006 U. ILL. L. REV. 605 (2006). Sir Bob Hepple, a distinguished English law professor, was born in South Africa and is a frequent lecturer there.

[118] Grand Chamber Judgment, Case of D.H. & Others v. Czech Republic, App. No. 57325/00, 47 Eur. H.R. Rep. 3 (2008), *available at* http://www.echr.coe.int/echr/en/hudoc/ [hereinafter D.H. Grand Chamber Judgment]. The decision is notable in clarifying that, at least in the context of education, the European Convention on Human Rights applies not only to cases of individual discrimination but also to systemic discrimination; that a prima facie case of discrimination can be shown through evidence of disproportionately negative effects on one racial group in the application of an apparently neutral rule; that statistical evidence can show such a prima facie case, and upon the showing of a prima facie case, the burden of proof shifts to the responding party to try to demonstrate that the rule or practice was objectively and reasonably justified. *Id.*

[119] *Id.* at ¶ 207.

finding that the placement in special schools likely increased stigma for Roma children, the Grand Chamber quoted, with approval, the European Commissioner for Human Rights, who said that "segregated education denies both the Roma and non-Roma children the chance to know each other and to learn to live as equal citizens."[120] The Grand Chamber cited research from the United States about racial inequity in special education,[121] noting the negative effects of early tracking.[122] It located its judgment in the context of sources from the Council of Europe,[123] including European Community law and practice concerning indirect discrimination and disparate impact of tests on minority populations;[124] United Nations materials;[125] and a set of "other sources," including the U.S. Supreme Court's interpretation of the 1964 Civil Rights Act, allowing evidence of the disparate racial impact of a test as evidence of racial discrimination.[126] The European Court ultimately ruled that demonstration of invidious intention was not necessary to show a pattern of separation and disadvantage for children from one background and in this dimension, struck out on a path quite different from the constitutional interpretation of the U.S. Supreme Court, which demands proof of intentional discrimination to establish a violation of the U.S. Constitution.

One more echo of *Brown* can be heard in Northern Ireland which has long been divided between "controlled" schools—which are government run, have Protestant roots, and serve about 50 percent of the students—and "managed" schools, which are maintained by Catholic organizations and educate about 45 percent of the children. Historically, these separate school systems have taught contrasting versions of regional history and as a result have not reduced but have contributed to the tensions and violence of "the Troubles," which begin in the 1960s and have continued even after the Belfast agreement of 1998. In the 1980s, a group of parents started the Northern Ireland Council for Integrated Education as a voluntary organization to develop schools that would bring together students from the two communities. With government aid, the Council allows parents to launch new, integrated schools; the Council also developed a procedure by which parents could vote to convert an existing school into an integrated school.[127] These schools give general instruction in Christianity rather than strict instruction in Protestantism or Catholicism.[128] The

---

[120] *Id.* at ¶ 50 (quoting the commissioner for human rights).
[121] *Id.* at ¶ 44 (citing Daniel J. Losen & Gary Orfield, *Introduction*, *in* RACIAL INEQUITY IN SPECIAL EDUCATION xv (Daniel J. Losen & Gary Orfield eds., 2002)).
[122] *Id.* at ¶¶ 52–53.
[123] *Id.* at ¶¶ 54–80 (citing recommendations adopted by the Committee of Ministers of Council of Europe, the Parliamentary Assembly of the Council of Europe, the Framework Convention for the Protection of National Minorities, and the Commissioner for Human Rights).
[124] *Id.* at ¶¶ 81–91.
[125] *Id.* at ¶¶ 92–102.
[126] *Id.* at ¶ 107 (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971)).
[127] FAITH SCHOOLS: CONSENSUS OR CONFLICT? 159 (Roy Gardner, Jo Cairns & Dennis Lawton eds., 2005).
[128] *See* Northern Ireland Council for Integrated Education, What Is Integrated Education? http://www.nicie.org/aboutus/default.asp?id=30 (last visited Aug. 6, 2010).

Department of Education incorporates such schools only after they show sufficient enrollment and a waiting list for preschool.[129]

By 2009, the Council had produced, with aid from English charitable trusts, nineteen integrated nursery schools, forty-one integrated primary schools, and twenty integrated second-level colleges—showing impressive growth, but reaching barely five percent of the population.[130] Across the country, integrated schools have generated considerable parental demand, with long waiting lists. Perhaps by having a strategy of integrating schools only with supportive parents and starting such schools on a small scale, the project ensured from the start a base of support rather than conflict—even before the larger community conflict quieted down.

After a decade of relative peace following a process producing political power-sharing, Northern Ireland experienced a spike in intergroup violence in March 2009. The murder of a Northern Irish police officer in Ulster occurred two days after the murders of two British soldiers, and a resurgence of acts of terror committed by dissident groups wracked the region.[131] Johann Hari, a British journalist, suggested "Northern Ireland needs its own version of *Brown v. Board of Education*."[132] Citing a six-year study by researchers at Queen's University, Hari noted that individuals who attended the integrated schools were "significantly more likely" to oppose sectarianism, had more friends across the divide, and identified as "Northern Irish" rather than as "British" or "Irish."[133] Stressing that "[i]t's difficult to caricature people you've known since you were a child: great sweeping hatreds are dissolved by the grey complexity of individual human beings," Hari marveled that "82 percent reported that they personally support the idea of integrated schooling, and 55 percent of parents say the only reason their kids don't go to an integrated school is because" they cannot get into one.[134] And taking one more page from U.S. history, this British journalist

---

[129] COLIN KNOX & PÁDRAIC QUIRK, PEACE BUILDING IN NORTHERN IRELAND, ISRAEL AND SOUTH AFRICA: TRANSITION, TRANSFORMATION AND RECONCILIATION 63–64 (2000).

[130] Northern Ireland Council for Integrated Education, *supra* note 128.

[131] *New Wave of Violence Grips Northern Ireland*, VOANEWS (Mar. 10, 2009), http://www1.voanews.com/english/news/a-13-2009-03-10-voa30-68813047.html; Henry McDonald & Owen Bowcott, *Ulster Violence Escalates as Policeman Is Shot Dead*, GUARDIAN, Mar. 10, 2009, at 1.

[132] Johann Hari, *Northern Ireland Needs Its Own Version of "Brown vs. The Board of Education"—and Fast*, HUFFINGTON POST (Mar. 14, 2009), www.huffingtonpost.com/johann-hari/northern-ireland-needs-it_b_174939.html. Hari is a Scottish-born journalist, based in London, with the *Independent*; in 2008 he became the youngest person ever to be awarded the George Orwell Prize for political journalism.

[133] *Id.* The piece explains that among those who attended integrated schools, "politics were far more amenable to peace: Some 80 percent of Protestants favour the union with Britain, but only 65 percent of those at integrated schools do. Some 51 percent of Catholics who went to a segregated school want unification with Ireland, but only 35 percent of those from integrated schools do. The middle ground—for a devolved Northern Ireland with links to both countries, within the EU—was fatter and happier." *Id.*

[134] *Id.*

concluded: "Who knows—a hefty push for school integration could yield, in a few decades, a Northern Irish Obama, carrying both sides in his veins."[135]

There might even be lessons to take back to the United States about the potential influence of a parent-based movement for integration. But *Brown* itself, as it turns out, even before the U.S. Supreme Court, reflected important influence from comparative and international concerns. The Swedish scholar Gunner Myrdal's *American Dilemma*, with its searing indictment of America's treatment of the "Negro," became a key citation in the Court's famous footnote 11.[136] Initially, President Eisenhower showed no sympathy for the school integration project and expressed suspicion that the United Nations and international economic and social rights activists were betraying socialist or even communist leanings in supporting the brief.[137] But as the United States tried to position itself as a leader in human rights and supporter of the United Nations, the Cold War orientation of Eisenhower's Republican administration gave rise to interest in ending official segregation, lynchings, and cross burnings in order to elevate the American image internationally. The Department of Justice collaborated with the State Department on an amicus brief that argued that ending racially segregated schools could terminate the Soviet critique of the tolerance of racial abuses by the U.S. system of government and thereby help combat global communism.[138] Ending segregation emerged as part of a strategy to secure more influence than the Soviet Union over the "Third World." African-American civil rights leader and journalist Roger Wilkins later recalled that ending official segregation became urgent as black ambassadors started to visit Washington, D.C. and the United Nations in New York City.[139]

At our best, we have learned from a global perspective; my small and I hope not too controversial thought is: judges and lawyers, citizens and residents of this country can and should continue to learn from global perspectives in order to advance the best version of ourselves.

---

[135] *Id.*

[136] Brown v. Board of Education, 347 U.S. 483, 494 n.11 (1954); *see* GUNNAR MYRDAL, AN AMERICAN DILEMMA (1944); WALTER A. JACKSON, GUNNAR MYRDAL AND AMERICA'S CONSCIENCE: SOCIAL ENGINEERING AND RACIAL LIBERALISM, 1938–1987 (1990).

[137] *See* CAROL ANDERSON, EYES OFF THE PRIZE: UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955 (2003). Anderson argues that anticommunism contributed to the narrowing of the civil rights agenda.

[138] *See* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 99–102 (2000). *See also* Lester, *supra* note 106, at 457–59 (noting Department of Justice brief in pre-*Brown* civil rights cases indicating how the nation's foreign relations were embarrassed by its domestic acts of discrimination).

[139] *Black/White and Brown: Brown versus the Board of Education of Topeka* (KTWU/Channel 11 broadcast May 3, 2004) (transcript available at http://brownvboard.org/video/blackwhitebrown) (statement of Roger Wilkins).

International and Foreign Law Sources: Siren Song for U.S. Judges?

By Chimène I. Keitner

October 2007

International and Foreign Law Sources: Siren Song for U.S. Judges?

Chimène I. Keitner*

In recent years, foreign and international law sources have come under attack as a particularly insidious form of temptation to U.S. judges engaged in constitutional adjudication. For some, this might seem a strange choice of target. After all, continued judicial reference to our English common law inheritance remains beyond reproach, even though this inheritance comes from a country whose institutions we fought a Revolution to reject. For others, this jurisprudential xenophobia might be unsurprising. As the only country to have "un-signed" the Rome Statute creating the International Criminal Court, and as a non-party to the almost universally ratified Convention on the Rights of the Child, the United States has earned notoriety for its skepticism towards international institutions and influences.

Some of this skepticism might be born of ignorance. A National Geographic survey conducted in 2006 found that only 37% of Americans between the ages of 18 and 24 can find Iraq on a map; 6 in 10 young Americans cannot speak a foreign language fluently; and 20% of young Americans think Sudan is in Asia.[1] *Un*familiarity can breed contempt. Anti-internationalist arguments can capture the public imagination in a way that, for example, arguments about strict constructionism might not. To the extent that members of the public have opinions about what judges do and how they do it, anti-internationalist arguments have found a receptive audience in the United States.

In this issue brief, I first recap recent debates among judges about the appropriate use of foreign and international law sources (primarily, though not exclusively, the decisions of foreign courts and international tribunals), and the echoes of these debates in the court of public opinion. I then identify three principled objections to the use of foreign and international law sources in constitutional adjudication and suggest responses to each of them. I conclude that, although there are doubtless many grounds for criticizing opinions by U.S. Supreme Court justices on questions of constitutional interpretation, the citation of foreign and international law sources as non-binding authority should not be one of them.

I. The Judicial Debate

Attitudes towards the use of foreign and international law sources in U.S. constitutional interpretation can be grouped under three broad headings, although the views of individual justices do not fall neatly or consistently into discrete categories. For convenience, I label these attitudes "road to perdition," "tempest in a teapot," and "ignore at our peril." Although the "road to perdition" view is generally associated with the political right, and the "ignore at our peril" view is associated with the political left, this is not an impenetrable division, nor are individual justices always rooted in one camp to

* Associate Professor of Law, University of California, Hastings College of the Law

[1] NATIONAL GEOGRAPHIC-ROPER PUBLIC AFFAIRS 2006 GEOGRAPHIC LITERACY STUDY (2006), *at* www.nationalgeographic.com/roper2006/pdf/FINALReport2006GeogLitsurvey.pdf.

the exclusion of the others. For example, many commentators have cited Chief Justice William Rehnquist's recommendation that U.S. judges look beyond U.S. borders for persuasive reasoning about constitutional questions, even though he has elsewhere criticized this practice. The Chief Justice wrote:

> When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.[2]

Similarly, Justice Sandra Day O'Connor, who has more consistently been supportive of transnational judicial dialogue, has observed:

> As the American model of judicial review of legislation spreads further around the globe, I think that we Supreme Court Justices will find ourselves looking more frequently to the decisions of other constitutional courts, especially other common-law courts that have struggled with the same basic constitutional questions that we have: equal protection, due process, the Rule of Law in constitutional democracies. . . . All of these courts have something to teach us about the civilizing function of constitutional law.[3]

In terms of the three categories, Justice O'Connor has generally taken the "tempest in a teapot" approach, dismissing criticisms of the use of foreign and international law as "much ado about nothing," since "it doesn't hurt to know what other countries are doing."[4]

Other justices have articulated rationales for looking beyond U.S. borders that reflect the "ignore at our peril" position. For example, Justice Ruth Bader Ginsburg has warned that an entirely self-referential jurisprudence impoverishes the judicial system: "The U.S. judicial system will be the poorer, I believe, if we do not both share our experience with, and learn from, legal systems with values and a commitment to democracy similar to our own."[5] Justice Stephen Breyer has advocated the empirical utility of looking to the experiences of other jurisdictions: "Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and

---

[2] William H. Rehnquist, *Constitutional Courts—Comparative Remarks* (1989), *reprinted in* GERMANY AND ITS BASIC LAW: PAST, PRESENT, AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993).

[3] SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE 234 (2003).

[4] Hope Yen, *O'Connor Dismisses International Law Controversy as "Much Ado About Nothing,"* U.S. SUP. CT. MONITOR, Apr. 4, 2005.

[5] Ruth Bader Ginsburg, *"A decent respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication*, 99 ASIL PROC. 351, 351 (2005).

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 . . . ."[6] And Justice Anthony Kennedy's belief that foreign sources can be relevant for U.S. judges formed the subject of a lengthy article in *The New Yorker*, which quoted him as follows:

> "Let me ask you this . . . . Why should world opinion care that the American Administration wants to bring freedom to oppressed peoples? Is that not because there's some underlying common mutual interest, some underlying common shared idea, some underlying common shared aspiration, underlying unified concept of what human dignity means? I think that's what we're trying to tell the rest of the world, anyway." . . . He went on, "If we are asking the rest of the world to adopt our idea of freedom, it does seem to me that there may be some mutuality there, that other nations and other peoples can define and interpret freedom in a way that's at least instructive to us."[7]

Notwithstanding these remarks, recent U.S. Supreme Court justices have not uniformly endorsed the view that looking beyond U.S. borders is benign or even desirable in adjudicating constitutional questions. In particular, Justice Antonin Scalia has been a vocal opponent of this practice (even though he has also engaged in it). In *Thompson v. Oklahoma*, for example, the plurality opinion surveyed the practice of other U.S. states, as well as that of other countries, in determining that "it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense."[8] Justice Scalia, joined by Chief Justice Rehnquist and Justice Byron White, wrote in dissent:

> That 40% of our States do not rule out capital punishment for 15-year-old felons is determinative of the question before us here, even if that position contradicts the uniform view of the rest of the world. We must never forget that it is a Constitution for the United States of America that we are expounding. The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so "implicit in the concept of ordered liberty" that it occupies a place not merely in our mores but, text permitting, in our Constitution as well. *See Palko v. Connecticut,* 302 U.S. 319, 325 (1937) (Cardozo, J.). But where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution. In the present case, therefore, the fact that a majority of foreign nations

---

[6] *Printz v. United States*, 521 U.S. 898, 977 (Breyer, J., dissenting).
[7] Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, THE NEW YORKER, Sept. 12, 2005, *available at* http://www.newyorker.com/archive/2005/09/12/050912fa_fact.
[8] 487 U.S. 815, 826–30 (1988).

> would not impose capital punishment upon persons under 16 at the time of the crime is of no more relevance than the fact that a majority of them would not impose capital punishment at all, or have standards of due process quite different from our own.[9]

Justice Scalia would allow legislators to look beyond U.S. borders for insight and inspiration but, according to the approach he advocated in *Thompson*, this source of information should be foreclosed to judges interpreting the Constitution. In 1996, Justice Scalia included a statement to this effect in a footnote of his majority opinion in *Printz v. United States*: "We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one."[10] This aside has become talismanic among those who seek to prohibit judicial reference to non-U.S. sources.

The debate about the appropriateness of looking to non-U.S. sources has been particularly virulent in the context of death penalty cases. In *Atkins v. Virginia*, a majority of the justices found that the execution of mentally retarded defendants violates the Eighth Amendment. Chief Justice Rehnquist, joined by Justice Scalia and Justice Clarence Thomas, wrote in dissent:

> In my view, these two sources—the work product of legislatures and sentencing jury determinations—ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment. They are the only objective indicia of contemporary values firmly supported by our precedents. More importantly, however, they can be reconciled with the undeniable precepts that the democratic branches of government and individual sentencing juries are, by design, better suited than courts to evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments.[11]

Chief Justice Rehnquist continued: "if it is evidence of a *national* consensus for which we are looking, then the viewpoints of other countries simply are not relevant."[12]

As these quotations indicate, and as others have observed, one's opinion about the potential relevance of foreign and international law sources to the question of what constitutes "cruel and unusual punishment" depends in no small part on one's view of the role of judges in a constitutional democracy. In my view, it also depends critically on one's view of what the *relevant community* is for determining the meaning of concepts

---

[9] *Id.* at 869 n.4 (Scalia, J., dissenting). Justice Stevens wrote the plurality opinion; Justice O'Connor concurred in the judgment; and Justice Kennedy did not participate. One year later, in *Stanford v. Kentucky*, Justice Scalia wrote an opinion for a 5–4 majority holding that the Eighth Amendment does not prohibit the execution of a person who was 16 years old at the time of his or her offense, because this practice is consistent with "*American* conceptions of decency." 492 U.S. 361, 369 n.1 (1989).

[10] *Printz v. United States*, 521 U.S. 898, 921 n.11 (1996).

[11] 536 U.S. 304, 324 (Rehnquist, C.J., dissenting).

[12] *Id.* at 325.

such as decency, cruelty, and due process: the citizenry of a particular state within the United States;[13] the United States population as a whole, either in the late eighteenth century or today; or the wider global community of those who share certain core democratic values embodied centrally, but not exclusively, in the U.S. Constitution.

II. Public Reverberations

The debates among judges about the appropriate boundaries—both geographical and institutional—of judicial review drew intense public attention with the publication of two constitutional law opinions by Justice Kennedy for the Court in 2003 and 2005. The first, in *Lawrence v. Texas,*[14] overruled the Court's prior holding in *Bowers v. Hardwick*[15] and held that criminalizing consensual homosexual intercourse violates the liberty interests protected by the due process clause. The second, in *Roper v. Simmons,*[16] abrogated the Court's prior holding in *Stanford v. Kentucky*[17] and held that executing individuals who were under age eighteen at the time of their capital crimes violates the constitutional prohibition on cruel and unusual punishment. In both of these opinions, Justice Kennedy cited foreign or international law sources as additional support for the Court's interpretations of the scope of the protected freedoms.

In *Lawrence*, Justice Kennedy began by indicating that Chief Justice Warren Burger's concurring opinion in *Bowers* had inaccurately characterized non-U.S. authority: "The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards [condemning homosexual conduct] did not take account of other [European] authorities pointing in an opposite direction,"[18] notably an earlier decision by the European Court of Human Rights, binding on all members of the Council of Europe, that struck down a statute similar to the one at issue in *Bowers*.[19] Justice Kennedy then surveyed the evolving practice of U.S. states, and intervening U.S. Supreme Court precedents on the constitutional protection of personal autonomy and privacy interests in matters of intimacy. After this discussion, he added:

> To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere . . . The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.[20]

---

[13] As Chief Justice Rehnquist put it in *Atkins*, "The question presented by this case is whether a national consensus deprives Virginia of the constitutional power to impose the death penalty on capital murder defendants like petitioner. . . ." *Id.* at 321.
[14] 539 U.S. 558 (2003).
[15] 478 U.S. 186 (1986).
[16] 543 U.S. 551 (2005).
[17] 492 U.S. 361 (1989).
[18] *Lawrence*, 539 U.S. at 572.
[19] *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981).
[20] *Lawrence*, 539 U.S. at 576-77.

Although the experiences of other countries (here, members of the Council of Europe, Australia, Canada, New Zealand, Israel, and South Africa) were by no means determinative, Justice Kennedy found that these countries' decisions to protect this aspect of personal intimacy from governmental intrusion were informative, and he said so in his written opinion.

In *Roper*, Justice Kennedy again indicated the potential relevance of non-U.S. sources to interpreting the Eighth Amendment as *part of* the U.S. constitutional tradition:

> It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. . . . The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions. . . . It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.[21]

While these non-U.S. references in *Lawrence* and *Roper* appear judicious, they have proved a lightning rod for criticism by those who object to the Court's decisions in these cases.

Certain U.S. legislators have become ardent critics of acknowledging the potential relevance of non-U.S. sources, and have repeatedly introduced congressional resolutions reflecting this criticism.[22] Recent versions of the resolution state "that judicial interpretations regarding the meaning of the Constitution of the United States should not be based in whole or in part 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."[23] To date, versions of this resolution have not advanced past committee, but they have garnered some measure of support.

Proponents of a congressional resolution have emphasized their perception that references to non-U.S. sources by U.S. judges threaten the independence of the United States. In introducing a Senate version of this resolution, Senator John Cornyn indicated:

---

[21] *Roper*, 543 U.S. at 578.

[22] At the time of writing, these resolutions have included: H.R. Res. 446, 108th Cong., 1st Sess. (Nov. 18, 2003) (introduced by Jim Ryun, R-Kan.) and H.R. Res. 468, 108th Cong., 1st Sess. (Nov. 21, 2003) (introduced by Sam Graves, R-Missouri); H.R. Res. 568, 108th Cong., 2nd Sess. (March 17, 2004) (introduced by Tom Feeney, R-Fla.); H.R. Res. 97, 109th Cong., 1st Sess. (Feb. 15, 2005) (reintroduced by Tom Feeney, R-Fla.); S. Res. 92, 109th Cong., 1st Sess. (March 20, 2005) (introduced by John Cornyn, R-Tex.); H.R. Res. 372, 110th Cong., 1st Sess. (May 3, 2007) (reintroduced by Tom Feeney, R-Fla.).

[23] S. Res. 92, 109th Cong., 1st Sess. (March 20, 2005); H.R. Res. 372, 110th Cong., 1st Sess. (May 3, 2007).

> If this trend [of citing foreign decisions] is real, then I fear that, bit by bit, case by case, the American people may be slowly losing control over the meaning of our laws and of our Constitution. If this trend continues, foreign governments may even begin to dictate what our laws and our Constitution mean, and what our policies in America should be.[24]

It is unclear from such statements whether the actual target of these congressional proposals is foreign influence or, rather, U.S. courts. Referring to the Court's decisions in *Atkins*, *Lawrence*, and *Roper*, Senator Cornyn opined that "because some foreign governments have frowned upon [prior] ruling[s], the U.S. Supreme Court has now seen fit to take th[ese] issue[s] away from the American people."[25] He continued, "I am concerned that this trend may reflect a growing distrust among legal elites—not only a distrust of our constitutional democracy, but a distrust of America itself."[26] Representative Tom Feeney, who has introduced several analogous bills in the House, has expressed a similar view:

> Six U.S. Supreme Court Justices—approvingly described as "transnationalists" by Yale Law Dean Harold Koh—have increasingly expressed disappointment in the Constitution we inherited from the Framers and disdain for certain laws enacted by democratically elected representatives. . . . Mr. [Bob] Goodlatte, I, and others on this Committee hope to start a great civics debate on the constitutionally appropriate role of judges in this Republic.[27]

Opposition to the citation of non-U.S. sources has thus become a vehicle through which certain legislators have sought to diminish the potential impact of judicial review on what they view as the "original meaning" of the Constitution.

This legislative movement also has some support from those Senator Cornyn dubbed "legal elites," although presumably these elites would not be subject to Senator Cornyn's charge of "distrust[ing] America." For example, Georgetown University law professor Nicholas Rosenkranz has testified: "Simply put, those who would cite contemporary foreign law necessarily embrace the [troubling] notion of an evolving Constitution."[28] M. Edward Whelan, III, President of the Ethics and Public Policy Center, has emphasized:

> Thus the broader long-term resolution to the problem that House Resolution 97 [the 2005 version of the Feeney resolution] usefully addresses is the confirmation to the Supreme Court of originalist Justices like Scalia and Thomas who understand that the Constitution constrains

[24] 151 CONG. REC. S3110 (daily ed. Mar. 20, 2005) (statement of Sen. Cornyn).
[25] *Id.*
[26] *Id.*
[27] *Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong., 1st sess. (July 19, 2005) at 72, *available at* http://commdocs.house.gov/committees/judiciary/hju22494.000/hju22494_0.HTM [hereinafter *Hearing*].
[28] *Id.* at 35.

> them to construe its provisions in accordance with the meaning those provisions bore at the time they were promulgated—Justices, in short, who understand that the Constitution does not give them free rein to impose their own policy preferences on the grand questions of the day.[29]

A central goal of these proposals, then, is to promote a certain method of constitutional interpretation. Although the proposed resolutions would not be binding on courts, Representative Feeney has indicated: "my friend from Virginia [Rep. Robert Scott] suggested that all we could really hope for with the resolution is to chill certain activities from the bench; and I have to admit that that is entirely what some of us intend to do with this."[30]

The American Bar Association voiced its opposition to House Resolution 97 on precisely these grounds, stating that the resolution inappropriately attempts to impose a particular disputed method of constitutional interpretation on the courts:

> The resolution indirectly propounds a doctrine of constitutional construction that is itself highly controversial. The resolution states that judicial determinations should not rely on foreign judgments, laws or pronouncements of foreign institutions unless they ". . . otherwise inform an understanding of the *original meaning* [emphasis added] of the laws of the United States." The debate over whether interpretation should always be limited to an inquiry into the original meaning of a text, or whether meanings may evolve over time to reflect a changing society, is as old as the Constitution and still unresolved. Our concern is that this incorporated jurisprudence of original intent is presented [by the resolution] as the normative mode of constitutional interpretation and therefore not a focus of discussion and debate.[31]

To the extent that the Feeney resolution is specifically intended to promote "originalist" jurisprudence, the ABA's criticism is not likely to deter the resolution's supporters.

The ABA is not alone in expressing concern about the tension between the principle of coequal branches of government and the wording of the proposed resolution. Representative Jerrold Nadler (D-New York), who has voiced a "tempest in a teapot" attitude toward the use of foreign sources, has commented:

> I continue to believe that this is a big fuss over nothing. No case has ever turned on a foreign source. No foreign source has ever been treated as binding, and this phenomenon of citing foreign sources is certainly nothing new. What is really dangerous is the threats that accompany our deliberations, and the suggestion that Congress may exercise its power to

---

[29] *Id.* at 32.
[30] *Id.* at 61.
[31] Letter from Robert D. Evans to F. James Sensenbrenner, Jr. (Sept. 30, 2005), *available at* www.abanet.org/poladv/letters/judiciary/050930letter_foreign.pdf.

> tell the courts what is or is not appropriate, what is or is not an appropriate way to consider a complex issue.[32]

Despite these words of caution, some have suggested that U.S. judges' citation of non-U.S. sources ought to be grounds not only for censure, but for impeachment.[33] A bill introduced simultaneously by Senator Richard Shelby (R-Ala.) and Representative Robert Aderholt (R-Ala.) sought to mandate a particular vision of the appropriate sources for constitutional interpretation, and provided in part as follows:

> In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional and common law up to the time of the adoption of the Constitution of the United States.[34]

Going further, a resolution seeking to amend Title 28 of the U.S. Code regarding the "standards for impeachment of justices and judges" includes the following offenses in its definition of the term "other high crimes and misdemeanors":

> (G) Entering or enforcement of orders or decisions based on judgments, laws, agreements, or pronouncements of foreign institutions, governments, or multilateral organizations, other than orders or decisions based on the common law of the United Kingdom.
>
> (H) Entering or enforcement of orders or decisions that conflict with or are inconsistent with the text of the United States Constitution.
>
> (I) Entering or enforcement of orders or decisions based on precedent from previous Federal court decisions that conflict with or are inconsistent with the text of the United States Constitution.[35]

Under proposed subsection (I), following *U.S.* precedent would become an impeachable offense!

Perhaps these lengthy quotations give these legislative proposals more attention than they are due. But the challenge of maintaining and renewing the legitimacy of constitutional provisions, interpreted through the process of judicial review, depends on the perceptions of the people these provisions and interpretations ultimately impact. Arguments for an exclusively self-referential jurisprudence based on a purported foreign

---

[32] *Hearing, supra* note 27, at 12.
[33] *See, e.g.*, Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, WASH. POST, Apr. 9, 2005, at A3, *available at* http://www.washingtonpost.com/wp-dyn/articles/A38308-2005Apr8.html.
[34] S. 520, Title II, Sec. 201, 109th Cong., 1st Sess. (March 3, 2005); H.R. 1070, Title II, Sec. 201, 109th Cong., 1st Sess. (March 3, 2005).
[35] H.R. Res. 2898, 110th Cong., 1st Sess. (June 28, 2007).

threat to U.S. sovereignty are easy for the public to understand, and can be compelling. Coupled with misunderstanding or misinformation—such as the false belief that U.S. justices and judges are treating foreign sources as binding in constitutional cases—objections to the citation of non-U.S. sources have become incendiary.[36]

III. Objections and Responses

The debate about the appropriate use of foreign and international law sources in interpreting provisions of the U.S. Constitution continues in multiple fora,[37] as do debates about the proper methods of constitutional interpretation generally. I do not engage this rich literature here. Instead, I identify three principled objections to the use of foreign and international law sources by judges interpreting the U.S. Constitution and suggest responses to each of them. Although there is a long-established tradition of looking to foreign sources in U.S. constitutional interpretation,[38] I accept that those who espouse a strictly "originalist" approach to constitutional interpretation are not likely to be receptive to the argument that the framers' original intent *included* the intent to make the United States an active and engaged member of the world community through all of its branches of government. Once we move beyond originalism, however, it is reasonable to ask whether foreign and international law sources can be appropriate reference points for interpreting provisions of the U.S. Constitution. I submit that the answer is "yes."

A Institutionalist Objections

Institutionalist objections do not take issue with the practice of drawing on foreign and international law sources *per se*. They simply argue that U.S. judges are ill-suited to this task. The most basic version of this argument focuses on many U.S. judges' lack of training in international and comparative law. In this view, although U.S. judges inevitably engage with foreign and international law when they are called upon to interpret treaties or to adjudicate transnational disputes, these forays into unfamiliar legal territory should be minimized.

---

[36] *See* Bill Mears, *Justice Ginsburg Details Death Threat* (Mar. 16, 2006), *at* http://edition.cnn.com/2006/LAW/03/15/scotus.threat/index.html (describing internet chat group posting threatening Justices Ginsburg and O'Connor for citing foreign and international law sources); *see also* Gina Holland, *Justice Ginsburg Describes "Threats" to O'Connor and Herself* (Mar. 16, 2006), *at* http://feministlawprofs.law.sc.edu/?p=238 (quoting language from posting, including the statement that Justices Ginsburg and O'Connor "have publicly stated that they use (foreign) laws and rulings to decide how to rule on American cases. This is a huge threat to our Republic and Constitutional freedom.").

[37] ACS programs on this topic include a co-sponsored symposium on *International Law and the Constitution: Terms of Engagement* at Fordham University School of Law on October 4–5, 2007; a 2006 "program-in-a-box" on *The Use of Foreign and International Law in Interpreting the U.S. Constitution*; and a 2005 national convention panel on *The Application of International and Foreign Norms to Domestic Law*. Vicki Jackson and Mark Tushnet have institutionalized the comparative study of constitutional law (which can include, but is not reducible to, using foreign and international law sources to interpret the U.S. Constitution) in their law school casebook on *Comparative Constitutional Law*, now in its second edition.

[38] *See, e.g.*, Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006) (demonstrating that "international law has always played a substantial, even dominant, role in broad segments of U.S. constitutional jurisprudence").

This objection, while perhaps accurate, does not seem particularly troubling. U.S. judges are routinely called upon to engage with unfamiliar areas of law. At most, this objection indicates the continued importance of incorporating international and comparative law into legal education and outreach programs.[39] Common-law legal reasoning is by nature designed to ferret out the strongest legal arguments. To the extent that judicial decisions from other jurisdictions contain persuasive reasoning on legal questions of common concern, they are appropriate source material for common law judges, particularly in the absence of binding authority on a given issue. The Supreme Court stated over a century ago:

> There is nothing in *Magna Charta*, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted.[40]

There are a variety of situations in which casting a wide net can enrich judicial reasoning.[41] I will focus on two of these. First, the lived experiences of other societies can provide relevant data for U.S. judges. For example, *Miranda* warnings have become a hallmark of U.S. criminal procedure. But the Supreme Court did not limit itself to U.S. precedents and experiences in establishing this standard. It canvassed the prevailing rules in England, Scotland, and India, as well as the U.S. Uniform Code of Military Justice (another form of comparative analysis) to support its conclusion that "the danger to law enforcement in curbs on interrogation is overplayed."[42] The Court explained:

> There appears to have been no marked detrimental effect on criminal law enforcement in these jurisdictions as a result of these rules. Conditions of law enforcement in our country are sufficiently similar to permit reference to this experience as assurance that lawlessness will not result from warning an individual of his rights or allowing him to exercise them. Moreover, it is consistent with our legal system that we give at least as much protection to these rights as is given in the jurisdictions described.[43]

---

[39] In this regard, I was struck in reading former California Supreme Court Chief Justice Serranus Hastings's comment upon founding the UC Hastings College of the Law in 1878 that "This College . . . was established not to make lawyers merely, as is generally supposed, but to qualify judges, statesmen, and law-makers; to educate young men [sic] who intend to engage in foreign and domestic commerce in a knowledge not only of the laws of their country, but of the laws of foreign nations and international law . . . ." *A Brief History of Hastings*, *in* HASTINGS COLLEGE OF THE LAW STUDENT GUIDEBOOK 2007–2008 at 2 (2007).

[40] *Hurtado v. California*, 110 U.S. 516, 531 (1884).

[41] For example, Harold Koh has usefully identified three such situations, which he calls "parallel rules," "empirical light," and "community standard." Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 45 (2004). David Fontana has explored how judges might usefully adopt a "refined comparativist" perspective on certain constitutional questions in *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539 (2001).

[42] *Miranda v. Arizona*, 384 US 436, 486 (1966).

[43] *Id.* at 489.

Notably, the dissent did not take issue with the majority's reference to foreign experiences, but rather suggested that the majority had not drawn the proper conclusions from the relevant data: "The law of the foreign countries described by the Court also reflects a more moderate conception of the rights of the accused as against those of society when other data are considered."[44] Certainly, judges can differ in the lessons they draw from foreign experiences. But this is no different from the existence of divergent views on the proper interpretation and application of domestic experiences and precedents. Without such differences, there would be no need for a system of appellate review, or a court of final appeal with more than one justice assigned to each case.

The second situation involves references to non-U.S. precedents as part of an attempt to elucidate broad conceptions, such as "the concept of ordered liberty"[45] that animates the requirement of due process. Unlike references for empirical purposes, this category of references lies more in the realm of political and legal theory than the realm of policy. The idea here is that the experiences and conclusions of other jurisdictions are relevant not because of the experiential lessons they teach, but because they are part of a common quest to identify and articulate the basic elements of human dignity that ought to be protected by the rule of law in a "civilized" society. Foreign and international law sources can be relevant in this context not because they are binding, or even because they evidence any sort of positive legal consensus in the world community, but because they get it (the right) right.[46]

Inevitably, reasonable minds differ on what it means to get it "right." As suggested above, objections to foreign and international law references by U.S. judges charged with interpreting the Constitution are often coupled with the accusation that these judges are simply imposing their personal conceptions of what it means to live in a just and well-ordered society. This criticism becomes especially pointed when justices reach a conclusion that differs from the conclusion reached by a particular set of elected representatives, and blends into the critique of judicial review as at odds with a strong notion of democratic accountability. To the extent that such criticisms really target the role of the judicial branch, however, they will not be assuaged by the simple deletion of foreign and international law references from U.S. judicial opinions.

In this fashion, what I have called the institutionalist critique, which focuses on the (in)competence of U.S. judges in grappling with foreign and international law sources, leads to the instrumentalist critique, which attacks the allegedly outcome-oriented reasoning that leads judges to invoke these sources in the absence of "favorable" domestic authorities. Georgetown University law professor Viet D. Dinh has testified:

---

[44] *Id.* at 521–22 (Harlan, J., dissenting).
[45] *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.).
[46] Gerald Neuman usefully characterizes this aspect of a legal right as the "suprapositive" aspect, which "reflects the claim of the right to normative recognition independent of its embodiment in positive law." Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82, 84 (2004).

> [W]e as American lawyers, and especially as American judges, are just not very good at doing foreign laws. We are not steeped in their tradition, we do not know the interpretation. We do not know the entire body of law of a particular nation or of a particular organization or of a particular convention. So what is left is that we would cherry-pick those sources of law which would tend to support our point of view, whether it be in a brief or in a particular opinion.[47]

The accusation of "cherry-picking" lies at the heart of the instrumentalist objection.

B. Instrumentalist Objections

For those who view the judiciary as Ulysses chained to the mast of "originalism," foreign and international law sources represent yet another siren song luring judges astray. In *Conroy v. Aniskoff*, Justice Scalia noted that "Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends."[48] He reprised this metaphor in *Roper v. Simmons*, stating that "all the Court has done today, to borrow from another context, is to look over the heads of the crowd and pick out its friends."[49] Chief Justice John Roberts popularized this image during his confirmation hearings.[50] In his view, "relying on foreign precedent doesn't confine judges. It doesn't limit their discretion the way relying on domestic precedent does."[51] However, contrary to the Chief Justice's assertion, the use of *any* non-binding authority involves judicial discretion, regardless of where that authority comes from.

Foreign and international law sources have never been treated as binding in the context of constitutional interpretation, nor would they be. They might involve "more" discretion in the quantitative sense that they expand the field of available sources, but given the tremendous volume of reported U.S. state and federal decisions, not to mention other non-judicial sources routinely used by U.S. judges, this expansion of available non-binding source material cannot be said materially to affect the degree of judicial constraint, or lack thereof.[52]

---

[47] *Hearing*, *supra* note 27, at 22.

[48] *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in judgment).

[49] *Roper v. Simmons*, 543 U.S. 551, 617 (2005) (Scalia, J., dissenting).

[50] Transcript: Day Two of the Roberts Confirmation Hearings (Part III: Sens. Kyl and Kohl) (Sept. 13, 2005), *at* http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091301210.html. Chief Justice Roberts also drew a distinction between foreign and U.S. judges in terms of their democratic accountability: "The president who nominates judges is obviously accountable to the people. Senators who confirm judges are accountable to people. And in that way, the role of the judge is consistent with the democratic theory." *Id.* Of course, however, U.S. judges who cite foreign and international law sources as an element of their judicial reasoning *are* "accountable to the people."

[51] *Id.*

[52] Concededly, researching foreign and international law sources might increase a judge's workload (or at least that of his or her law clerks), but this does not inevitably magnify the degree of discretion reflected in that judge's opinions. Objections to increasing the quantity of sources might come under the rubric of what David Strauss has labeled "conventionalist" arguments for relying exclusively on U.S. precedents in

In line with the instrumentalist critique, Roger Alford has argued that what's sauce for the goose is sauce for the gander.[53] If one considers any international practice, Alford argues, one must consider all of it:

> In its 2002 *World Report*, Human Rights Watch states that "in virtually every country in the world people suffered from *de jure* and *de facto* discrimination based on their actual or perceived sexual orientation." Amnesty International reports that "individuals in all continents and cultures are at risk" of discrimination based on sexual orientation and "many governments at the U.N. have vigorously contested any attempts to address the human rights of lesbian, gay, bisexual and transgender people." One definitive source not cited in any amicus brief paints a bleak picture, indicating that there is "hardly any support for gay and lesbian rights" among the population in 144 countries, that the treatment of homosexuals is far worse in the former British colonies than elsewhere, that a majority in only eleven countries favors equal rights for homosexuals, that only six countries legally protect gays and lesbians against discrimination, and that 74 of the 172 countries surveyed outlaw homosexuality. In short, while the Court is no doubt correct that *Bowers* has been rejected elsewhere in the world, these and similar reports also make clear that the reasoning and holding in *Bowers* has *not* been rejected in much of the civilized world.[54]

International law scholars habitually survey state practice and *opinio juris* (statements evidencing beliefs about the legality or illegality of particular actions) in order to determine whether a particular rule has attracted sufficient consensus to attain the status of customary international law. But the Court in *Lawrence* did not cite foreign sources in order to determine whether the Texas anti-sodomy statute was consistent with customary international law. Rather, the Court attempted to give meaning to the protection of privacy in the U.S. Constitution by examining critically a variety of sources and arguments, including the conclusions of foreign courts.

The selective invocation of non-binding authority is the essence of reasoning by analogy, which involves differentiating between "like" and "unlike." The appropriateness of this kind of selectivity is underscored by Justice Ginsburg's emphasis on learning from "legal systems with values and a commitment to democracy similar to our own."[55] Precisely because the Court is charged with interpreting the U.S. Constitution and not a global constitution, the argument that any principled invocation of foreign sources ought to involve a global show of hands should not carry much weight. Just as one can

---

constitutional interpretation. *See* David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1738 (2003).

[53] Roger Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 67–68 (2004).

[54] *Id.* at 65–66 (citations omitted).

[55] Ginsburg, *supra* note 5, at 351. This ability to differentiate is also central to the appropriate empirical use of comparative information, whether that information comes from another U.S. state or a foreign country.

distinguish domestic precedents that are incompatible with values of individual freedom and dignity, one can distinguish and choose not to follow foreign precedents that curtail rights and dignity, based on their inconsistency with the values embodied in the U.S. Constitution.

C. Inherentist Objections

The third principled objection to the use of foreign and international law sources is what I call the inherentist objection. This objection takes the position that U.S. constitutional values are simply intrinsically different from those of other countries, such that foreign and international precedents are *never* relevantly similar to the issues confronted by U.S. judges in constitutional cases. Often, those who make institutionalist and instrumentalist objections are also motivated—explicitly or not—by inherentist concerns.

The debate between "originalists" and "evolutionists" (or between a "dead" constitution and a "living" one) could be framed as a debate about which community's mores and commitments should provide the touchstone for U.S. constitutional interpretation: the community that existed in the United States at the time the Constitution was adopted, or the contemporary national community informed by, but not restricted to, eighteenth-century understandings.[56] Arguments about federalism are likewise, at bottom, arguments about which community's standards ought to govern interactions among individuals in a particular geographic area (state, federal, or, in certain instances, tribal). The inherentist view accepts the appropriateness of looking to the contemporary national community, but disputes that any non-domestic sources are relevant to this task unless they have been explicitly endorsed by the national legislature (for example, in the form of a self-executing treaty, or a non-self-executing treaty accompanied by implementing legislation). While inherentists would generally accept that Illinois state decisions, for example, might be relevantly similar for the purposes of judicial decision-making on similar state law issues in Vermont, they would not extend this reasoning to encompass jurisdictions beyond U.S. borders.

The argument that the "provenance" of foreign and international law analogies is what makes them objectionable is an inherentist objection. Kenneth Anderson articulates this objection as follows:

> The problem with comparative constitutionalism for democratic constitutional self-government, then, is the *provenance* of materials used in constitutional interpretation. Provenance matters in constitutional interpretation, at least if democracy and self-government are important, because though the content of the material may be, so to speak, intelligent or unintelligent, sensible or stupid, prudent or imprudent, it is frankly

[56] Congressman Robert Scott (D-Va.) stated during a subcommittee hearing on House Resolution 97: "I hope the sponsors of the amendment won't be offended if I don't agree with the idea that we ought to rely on the original intent of the Constitution. Insofar as if we kept the original intent, I would only have three-fifths of a vote on this Committee and not a full vote." *Hearing, supra* note 27, at 54.

> secondary to the fact that it gives, even indirectly, the consent of the governed to its use and hence to the binding conclusions derived . . . . Without fidelity to the principle of democratic, self-governing provenance over substantive content in the utilization of constitutional adjudicatory materials, a court becomes merely a purveyor of its own view of best policy. Yet this is not solely an issue of an unconstrained Court. It is, more importantly, a violation of the compact between government and governed, free people who choose to give up a measure of their liberties in return for the benefits of government—a particular pact with a particular community, in which the materials used in the countermajoritarian act of judging them nonetheless have, in some fashion, even indirectly, democratic provenance and consent. In this respect, citing a foreign court will *always* be different from citing Shakespeare, and it does not help to say, well, it is not binding precedent. It is the source that is the problem.[57]

Anderson posits a stark dividing line between sources that are internal to "the political community which enacted and sustains [the Constitution]" and those that are external to it.[58] Internal sources can readily be differentiated, since "[w]e all know . . . the difference between citing a Supreme Court case and a quotation from Bartlett's."[59] External sources are problematic at least in part because there is no commonly understood hierarchy dictating which countries' judicial decisions should be treated as more persuasive than others. Foreign judicial opinions, which express the "particularity" of other political communities, cannot properly be weighed by U.S. judges and should therefore never be considered by them in deciding constitutional questions.

One could point to abysmally low voter turnout rates, the *de jure* and *de facto* disenfranchisement of large segments of American society, and the various dysfunctions of our system of representative government to impugn the "democratic provenance" of many U.S. legal materials. However, the point remains that Americans do have a conception, however fanciful, that we have made "a particular pact with a particular community." Anderson seems to come to terms with the "countermajoritarian act of judging" within this community by reassuring himself that, at least, the "materials" used in this endeavor "have, in some fashion, even indirectly, democratic provenance and consent," as well as a commonly understood hierarchy of persuasive value. But this account of democratic legitimacy does not, in fact, differentiate among various types of non-binding sources. The only thing that appears to make Shakespeare, or state law materials in a federal case, or Illinois materials in a Vermont case, "even indirectly" legitimate is that they have been filtered through the analytical machinery of a U.S. court—an integral part of the U.S. government. The same is true of non-U.S. sources referenced by U.S. judges in reaching decisions.

---

[57] Kenneth Anderson, *Foreign Law and the U.S. Constitution: The Supreme Court's Global Aspirations*, POL'Y REV. (June-July 2005), *available at* http://www.hoover.org/publications/policyreview/2932196.html.
[58] *Id.*
[59] *Id.*

Popular rhetoric, drawing on inherentist themes, has framed the "threat" posed by citing foreign and international law decisions—as opposed to, say, Shakespeare—in terms of its implications for national sovereignty.[60] The Feeney resolution specifically articulates the premise that "inappropriate judicial reliance" on foreign judgments "threatens the sovereignty of the United States."[61] But U.S. judges who cite their foreign counterparts in reasoning about domestic constitutional questions do not "rely" on foreign judgments as binding precedent. This tendency to overestimate the role of foreign and international law sources, and its consequent threat to U.S. sovereignty (even though U.S. judges remain the gatekeepers for such sources), has been reinforced by certain legal scholars. Professor Rosenkranz has testified: "When the Supreme Court declares that the Constitution evolves, and declares further that foreign law affects its evolution, it is declaring nothing less than the power of foreign governments to change the meaning of the United States Constitution."[62] If there is one thing stronger than the language of democracy to inflame public opinion, it is the language of sovereignty.

Sovereignty-based arguments should be engaged seriously, precisely because of their popular resonance. But they should be placed in perspective. I do not take the position that borders have no meaning, and I am not aware of any U.S. judge or justice who would embrace this view. Nor would I disagree with Justice Scalia's statement in *Stanford v. Kentucky* that "it is *American* conceptions of decency that are dispositive . . . ."[63] The point is that the experiences of other relevantly similar communities (our proverbial "friends in the crowd") might help judges discern what protecting these conceptions entails in a particular case. Following the *American* tradition of transparency in judicial reasoning, it is only appropriate that judges who consider such materials cite them in their written opinions so that the American public can continue to debate and refine what our constitutional commitments are, and how "we the people" can best honor them.

IV. Conclusions

The use of foreign and international law sources as non-binding authority in constitutional adjudication has created a furor in recent years. In part, this is attributable to the highly charged issues that a divided Supreme Court has addressed in opinions that cite non-U.S. materials, including the constitutionality of criminalizing homosexual conduct and executing juvenile offenders. When judicial opinions constrain legislative action on issues deeply connected to social mores and values, they understandably attract public scrutiny. A critique of judicial methodology that blames foreign influence taps into strong, if often imprecise, feelings about the importance of democracy and national sovereignty. Sovereignty-based arguments provide a further means by which proponents of a certain constitutional vision can impugn "activist" judges.

---

[60] *See, e.g.*, Eric D. Hargan, *The Sovereignty Implications of Two Recent Supreme Court Decisions* (July 10, 2003), *available at* http://www.fed-soc.org/publications/pubID.61/pub_detail.asp.

[61] H.R. Res. 568, 108th Cong., 2nd Sess. (March 17, 2004) (introduced by Tom Feeney, R-Fla.); H.R. Res. 97, 109th Cong., 1st Sess. (Feb. 15, 2005) (reintroduced by Tom Feeney, R-Fla.).

[62] *Hearing*, *supra* note 27, at 35.

[63] *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) (emphasis in original).