

## FOREIGN SOURCES AND THE AMERICAN CONSTITUTION

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Everyone is talking about foreign law. No surprise here, because it is the topic of this symposium. But the Justices of the Supreme Court are addressing it in and out of court—Justice Scalia has debated Justice Breyer in a road-show tour and just delivered an endowed lecture on this subject at the American Enterprise Institute;<sup>1</sup> and there is a competing program on the same topic at another law school this weekend.

What's all the fuss about? Just because of citation practice in a handful of recent opinions? Come, now. Next, the Justices will start citing law reviews, which have no legal authority in *any* jurisdiction. Oh—they *do* cite law reviews! Never mind. Maybe they'll start citing articles in the *New York Times*. But since when have these citations caused a string of symposia?

Courts have been citing foreign authority since the nation's founding<sup>2</sup>—though citations are rare, and effect on the outcome rarer still.<sup>3</sup> The portion of opinions that cite foreign decisions has been stable for a long time; any suggestion that the practice has skyrocketed recently is unfounded.<sup>4</sup>

Objections to this practice date from its inception more than two centuries ago; statutes enacted during the founding era in

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1. Antonin Scalia, *Don't Impose Foreign Law on Americans*, AM. ENTERPRISE, May 2006, at 40 (excerpts). A complete version of the lecture has not been published.

2. See Steven G. Calabresi & 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). The article weighs in at 167 pages, with 836 footnotes, making it at least 25% more persuasive than the articles discussed during the previous panel.

3. See David Zaring, *The Use of Foreign Decisions by Federal Courts: An Empirical Analysis*, 3 J. EMPIRICAL LEGAL STUD. 297 (2006) (data limited to most recent 60 years).

4. For details, see Calabresi & Zimdahl, *supra* note 2; Zaring, *supra* note 3.

some states forbade such citations because citizens of a new nation wanted to sever ties to the colonial power.<sup>5</sup> Contemporary reliance on foreign law, by contrast, does not suggest that judges are paying obeisance to King George III. The problem is that Justices have taken a kingly role for themselves.

In *Atkins v. Virginia*,<sup>6</sup> which posed the question whether the Eighth Amendment permits capital punishment of retarded murderers, the majority opinion related that “the world community” (the Court’s phrase, not mine) has “overwhelmingly disapproved” of such executions.<sup>7</sup> It did not explain why a poll of United Nations members today has any bearing on the meaning of a constitutional text that James Madison drafted in 1791 or the power of each state to stake out its own position on the subject. The performance was repeated, with nearly identical language (and omissions), in *Roper v. Simmons*,<sup>8</sup> which concerned capital punishment of youthful murderers. And in *Lawrence v. Texas*,<sup>9</sup> which dealt with a challenge to the prohibition of consensual homosexual conduct, the Court cited decisions of the European Court of Human Rights and the report of a British parliamentary committee, among other sources.<sup>10</sup>

I am inclined to think that these references are just window dressing. They play no more causal a role than did Kenneth Clark’s famous research on dolls, which following its citation in *Brown v. Board of Education*<sup>11</sup> led to many conferences and articles about the use of social-science research in constitutional adjudication. Most citations are just filler, added by law clerks or by the Justices themselves when engaged in belt-and-suspenders reasoning. They do not imply that the cited sources have any legal effect. Ask yourself this: if some countries prosecute newspapers that publish caricatures of the Prophet Muhammad, or imprison historians who deny that the Holocaust occurred (as Austria has done), what is the chance that any Justice of the Supreme Court will cite these steps as prece-

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5. Judge O’Scannlain collects many of these in a talk delivered at the Federalist Society’s national convention in November 2005.

6. 536 U.S. 304 (2002).

7. *Id.* at 316–17 n.21.

8. 543 U.S. 551, 575–78 (2005).

9. 539 U.S. 558 (2003).

10. *Id.* at 573, 576–77.

11. 347 U.S. 483, 494 n.11 (1954).

dent in any case under the First Amendment of our Constitution? There is no chance.

Back to *Lawrence*. The Justices would have reached the same decision in *Lawrence* if the Wolfenden Report in the United Kingdom had come to a different conclusion. In *Lawrence*, the reference to international custom was designed to refute the contention of former Chief Justice Burger that homosexuality has always and everywhere been condemned.<sup>12</sup> It is hard to fault Justice Kennedy for giving an accurate internationalist response to an absurd internationalist ukase offered in support of criminal prohibition. What *really* swayed the Justices in *Lawrence* was John Stuart Mill's *On Liberty* (1859): Government should not interfere with acts that do not harm third parties.

That is an attractive moral principle. You will find me flocking with the libertarian wing of the Federalist Society. Still, it is no easier to turn British moral philosophy of the nineteenth century into constitutional law than to treat the World Court as a source of American constitutional law. Publications that post-date our Constitution are arguments to the living (which is to say, the legislative and executive branches); they cannot be treated as established law that the living may upset only by super-majority action.

There is no rule in the Constitution of 1787 (or the Civil War amendments) that harm to third parties is essential to constitutional legislation. That's clear enough for the national government—think of the food and drug laws<sup>13</sup>—and even clearer for

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12. *Bowers v. Hardwick*, 478 U.S. 186, 196–97 (1986) (Burger, C.J., concurring).

13. I have in mind cases such as *United States v. Rutherford*, 442 U.S. 544 (1979), which held that the FDA may prevent administration of drugs to terminal cancer patients, even on the assumption (forced by the posture of the litigation) that the given drug is the only potential cure and that no third party will be harmed by its use. The Court held that drug could be kept off the market until its benefits had been demonstrated in scientific, double-blind tests. Mill would have disapproved—though one could say in response that, once a useless drug is freely available, quacks are bound to prey on the gullible and may divert them from beneficial treatments. See JOHN DIAMOND, *SNAKE OIL AND OTHER PREOCCUPATIONS* (2001). Whether we treat this as justification for sumptuary legislation, or as permitting the government to prevent the exploitation of the gullible, does not matter; in either event the Court has approved (to widespread applause) legislation that would not pass Mill's tests. The Court did not mention *Rutherford* in *Lawrence*. I see no sign that the Justices who voted with the majority in *Lawrence*, *Roper*, and *Atkins* are prepared to reconsider the *Slaughterhouse Cases*, 83 U.S. 36 (1872), or revive *Lochner v. New York*, 198 U.S. 45 (1905), though both steps would be the logical consequence of a constitutional rule that protects pri-

the states, which are not bound by the Ninth Amendment, a provision added only because of fear that an untested and menacing national government would trample on reserved rights and powers.

To the extent we are witnessing nothing but the desire to add one more citation—and never mind the logic—it is no different from much of the rest of contemporary citation practice. The Wolfenden Report is much superior to most student notes in law reviews, which judges freely cite, and for that matter superior to many opinions of U.S. district and appellate judges that all too often are ghost written by fourth year law students. If a Justice is going to rely on secondary authority, why not pick the best? And judges who find other people's work persuasive should acknowledge their intellectual debt.

But citation practice may reveal a cast of mind, and this is the source of a genuine concern. All too many decisions, including *Lawrence*, *Roper*, and *Atkins*, start with the belief that the judiciary will flesh out vague rules. Since the Constitution itself is short and old, *if* the Justices are to produce thoughtful and wise resolutions they must have many sources to draw from, many experiments to monitor. Why not see how other nations have done things and assess whether these experiments have turned out well or poorly?

Notice the way I put this. I have assumed, as Justices often do, that (a) there is no answer to be found in the Constitution's own text and history, but (b) the judiciary must give an answer. When those conditions hold, people search far and wide.

But when *do* those conditions hold? The answer should be "never." Have the Justices forgotten that our Constitution lacks a Judicial Review Clause? The reason why judges are entitled to make constitutional decisions is that the Constitution is *real law*. That's *Marbury's* central point.<sup>14</sup> A written constitution creates a hierarchy of legal rules; and when the Constitution clashes with an ordinary law, the Constitution prevails. That's an implication not only of the Supremacy Clause but also of the Amendment Clause, which disables legislatures from changing the Constitution without a national consensus reflected in the approval of three-fourths of the states.

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vate consensual conduct harmless to third parties. Sumptuary legislation has been a feature of American law (especially state law) since the founding.

14. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

This means, however, that judges have the last word *only* when the Constitution is law. Appeals to substantive due process—the basis of *Lawrence*—are not appeals to “law” at all.

To put this slightly differently: it is never enough to have a theory of constitutional meaning. Anyone you meet in the street has one of those. The challenge is to have a theory that can explain why the judge’s word must be binding even when other people, equally learned and in good faith, disagree; and why the rest of us should accept the view of someone you can’t vote out of office. The Founders’ objection to George III was that no one elected him, and we were stuck with him till he died. They did not wage a revolution to turn the same power over to a bunch of judges! The point of the Revolution, and the Constitution, was to allow the people to exercise choice through representatives, who were held on short leashes—the longest term is six years.

*Marbury* gives a reason why judges’ views on the Constitution are conclusive: the Constitution is higher law and constrains the democratic process. But the emphasis in this phrase must be on the word “law,” not on the word “constrains.” We need to take *Marbury* seriously—and this has implications for what counts as an admissible source. Foreign law, Mill, Mr. Herbert Spencer’s *Social Statics*, law reviews, and the editorial page of the *Times* stand or fall together; none is better than another.<sup>15</sup> When the judicial claim rests on interest balancing, on empirical predictions, on views about what makes for the life worth living—well, on these issues we need to count votes, if we are to live in a democracy.

At this point someone always says that a textualist view of judges’ authority leaves us governed by a dead hand. Professor Neuman, for example, doesn’t want to be “frozen in the eighteenth century,”<sup>16</sup> summoning up the image of law as a woolly mammoth in the Siberian steppes. Yes and no. It is when the past *has* created a genuine rule that the judge can claim power.

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15. The oldest of these is *Social Statics*, published in 1851 and therefore having at least a potential to have influenced those who wrote and approved the Fourteenth Amendment. But not since *Lochner* was interred has there been a serious claim in Spencer’s name—despite the fact that his book anticipates the arguments in *On Liberty* by eight years and was at the time of the Civil War amendments better known in the United States.

16. Gerald L. Neuman, *International Law as a Resource in Constitutional Interpretation*, 30 HARV. J.L. & PUB. POL’Y 177, 183 (2006).

The old super-majority trumps today's simple majority. The First Amendment protects the freedom of speech even when a living majority prefers censorship. *That's* the dead hand for you. *That's* the constitutional structure.

But on contemporary issues, there just is no old decision hiding under a rock and waiting to be found. Then there is no dead hand. What the Constitution gives us is democracy.<sup>17</sup> The living are entitled to decide; the majority are entitled to prevail.

When things are up for contemporary debate, they must be open to vote as well. It is weird to have decisions taken by foreign legislatures, which people can vote out of office, used by tenured officials in the United States as a reason why *our* citizens are forbidden to decide the same subject the same way.

The Wolfenden Report was not a document to be used by a judge to constrain what Parliament could do. It was part of an ongoing democratic debate about how living actors in the United Kingdom should deal with private homosexual conduct. When other nations abolish the death penalty for people under 18, or for everyone, they do this by voting and can reverse the result by voting. How, then, can these deliberations and results possibly eliminate the role of the people of the United States in making decisions? When past generations have not faced and resolved a subject by super-majority vote, then we the living may resolve it today. And we the living act through elected representatives, who the next wave of voters can throw out of office.

Judges who deny that fundamental nature of our political system may be inclined to cite foreign authorities, but that is the least of their sins. The disease lies in the claim of power; foreign citations are just a symptom. Foreign law post-dating the Constitution's adoption is relevant only to those who suppose that judges can change the Constitution or make new political decisions in its name, which I think just knocks out the basis of judicial review. My objection is not to the sources the judge chooses to cite but to the legal perspective that makes them pertinent. It is a rhetorical mistake, as well as a legal one, to focus on citations to foreign law as if they were any different

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17. See generally Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119 (1998); Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349 (1992).

in kind from a pragmatic jurisprudence based exclusively on recent domestic sources.

I do not for one second deny both the propriety and utility of understanding and relying on foreign sources of law. The Constitution itself creates the power to do so.

There are two ways to commit the United States to international norms. The first is the Treaty Clause: the President plus two-thirds of the Senate may bind courts and citizens of the United States to a proposition on which they agree with other nations. The second is the Law of Nations Clause, which says that Congress may “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”. This requires a majority in each chamber plus the President, or two-thirds in each chamber to override a veto.

There is no corresponding power in the judiciary to make any norm of international law binding within the United States. The Supreme Court recognized this point early in its history, holding in *Hodgson v. Bowerbank*<sup>18</sup> that courts could not adjudicate claims between or among aliens. To do this would require federal common law (else there would be no federal question), and the courts could not invent such a body of law. Why empower Congress to “define” offenses against international law if judges do so in common-law fashion? Maybe it is possible for Congress to delegate a power to resolve *private* disputes under international common law. The antitrust laws, after all, are pretty open-ended delegation. So is admiralty. The Alien Tort Statute delegates some power when trans-border events are directly at issue.<sup>19</sup> But it is quite something else for the judiciary to insist that the government *itself* is bound by norms from outside our borders, and which our elected representatives have not adopted and are not allowed to change.

It is not just self-aggrandizement but also unconstitutional for the judiciary to insist that states, or the political branches of the national government, conform to international norms and understandings that do not meet the requirements of the Treaty Clause or the Law of Nations Clause. There is a treaty forbidding the execution of juvenile

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18. 9 U.S. (5 Cranch) 303 (1809).

19. Just how much power is a question that *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), leaves uncertain.

murderers.<sup>20</sup> The United States is not a party to that agreement. Judges violate the Constitution in holding the United States to its provisions, without the approval of the President and two-thirds of the Senate. Holding the United States to an unratified treaty is about as clear a contradiction of constitutional text as one can imagine.

This is not a novel point. Justice Story made it two centuries ago. He wrote: “[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty.”<sup>21</sup> And that view remains the law, as the Supreme Court held when discussing the Vienna Convention on Consular Relations.<sup>22</sup>

Foreign practices and laws may make strong *political* or *moral* claims that sovereigns disregard at their peril. But the extent to which these norms govern is a choice to be made by political or moral suasion.

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20. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/44/49 (Nov. 20, 1989).

21. *In re The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821).

22. See *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2679–80 (2006).