



# Outsourcing American Law

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## Foreign Law and Constitutional Interpretation: The Debate Behind the Diatribes

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AEI WORKING PAPER #157  
[www.aei.org/paper/100039](http://www.aei.org/paper/100039)

## Introduction

Justice Antonin Scalia's public remarks can usually be expected to include a provocative and entertaining mixture of biting wit, crisp legal analysis, and good humor. His keynote address at the American Enterprise Institute did not disappoint.<sup>1</sup> He told the assembled crowd that he was there to talk about "the subject of the use of foreign law in American judicial opinions" and began by attempting to disarm some of his critics. "I am not a xenophobe," he explained patiently, and besides, foreign law was not entirely off limits in his view. According to Justice Scalia, if the question at issue involves the interpretation of a treaty or a U.S. statute that implicates international law, or if one is merely identifying empirical evidence about the possible effects of a given legal rule (for example, to respond to an argument that "the skies will fall" if a given interpretation is adopted), foreign law can be relevant and unobjectionable.<sup>2</sup>

But, contrary to Justice Scalia's stated topic—and the title of AEI's daylong event—the discussion over the use of foreign law in Supreme Court decisions was almost beside the point. The real debate was not about foreign citations at all; it was about a much deeper division on the Court and within the American legal community at large. At its core, it was a debate about the meaning of the U.S. Constitution and the proper way to interpret it. Although Justice Scalia assured the audience that it was "not my purpose here to debate originalism," he spent the next fifteen minutes of his talk doing precisely that.

In this essay, we argue that the current debate is only superficially about the propriety of citing foreign and international sources of law in judicial opinions. Rather, the controversy is a proxy for a deeper, more substantive, and ongoing debate about constitutional interpretation. Once the debate is boiled down it becomes clear that the current controversy over foreign law is simply an exercise in question begging. If one believes, as Justice Scalia does, that the Constitution meant one thing when it was ratified and has not changed since, then contemporary foreign law is irrelevant to its interpretation. If, conversely, one believes that the Constitution is a dynamic document that must and should evolve to keep up with changing conditions, then foreign law may well be a valuable tool when interpreting certain constitutional provisions. Hence, those who fiercely oppose—or staunchly support—the use of foreign law in American judicial decisions assume an answer to a more domestic threshold question: the meaning of our own Constitution.

This essay will track the current debate, focusing on the Supreme Court justices' recent comments on foreign law and their use of foreign citations, while placing a spotlight where it belongs: on the underlying debate over constitutional interpretation in general. We then offer a rough outline for the use of foreign law going forward. We

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<sup>1</sup> See Justice Antonin Scalia, keynote address at the American Enterprise Institute: The Outsourcing of American Law (Feb. 21, 2006) (transcript available at <http://www.aei.org/events/filter.all,eventID.1256/transcript.asp>) [hereinafter Scalia keynote address].

<sup>2</sup> *Id.*

propose a presumption in favor of the use of foreign law when the question confronting American judges and their foreign counterparts is genuinely the same no matter where on the globe it is arises. In such cases, we believe it is legitimate to mine the opinions of intelligent jurists, whatever their nationality. We propose a presumption against the broader use of foreign law, unless one can show that the framers intended certain constitutional provisions to be construed in light of international practice. We conclude with a request for a more focused debate over the use of foreign law, or at least an acknowledgment that it is merely a proxy battle in a broader war over constitutional interpretation.

### The Current Debate

Although the Court's recent use of foreign law in its interpretation of the Eighth and Fourteenth Amendments<sup>3</sup> has ignited a lively—and occasionally bare-knuckled—debate in legal and political circles, the reality is that there is nothing novel about the practice.<sup>4</sup> What is new, however, is the frequency with which the Supreme Court justices themselves have engaged publicly in the discussion. Justice Scalia's appearance at AEI is a recent example, but it is far from a solitary one. Justice Breyer publicly debated the issue with Justice Scalia at American University last year.<sup>5</sup> And Justices Kennedy and Ginsburg have entered the fray as well (as has now-former Justice O'Connor).<sup>6</sup> This

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<sup>3</sup> See *Roper v. Simmons*, 543 U.S. 551 (2005) (Kennedy, J.) (holding that the execution of juveniles is unconstitutional under the Eighth Amendment); *Lawrence v. Texas*, 539 U.S. 558 (2003) (Kennedy, J.) (invalidating a state law criminalizing homosexual sodomy under the Fourteenth Amendment); *Atkins v. Virginia*, 536 U.S. 304 (2002) (Stevens, J.) (holding the execution of mentally retarded individuals unconstitutional under the Eighth Amendment).

<sup>4</sup> For thoroughly researched chronologies of the use of foreign law dating back to the Marshall Court, see Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006); Steven G. Calabresi & Stephanie 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).

<sup>5</sup> See Discussion Between Justices Antonin Scalia & Stephen Breyer at American University Washington College of Law on the Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005) (transcript available at <http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument>) [hereinafter Scalia-Breyer discussion].

<sup>6</sup> See, e.g., Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, New Yorker, Sept. 12, 2005, at 42; Justice Sandra Day O'Connor, keynote address at the American Society of International Law (Mar. 16, 2002), in 96 AM. SOC'Y INT'L L. PROC. 348, 350 (2002); Justice Ruth Bader Ginsburg, keynote address at the American Society of International Law Annual Meeting: A Decent Respect to the Opinions of [Human]kind: The Value of a Comparative Perspective in Constitutional Adjudication (Apr. 1, 2005) (transcript available at <http://www.asil.org/events/AM05/ginsburg050401.html>).

public engagement follows a decade's worth of tête-à-têtes through footnotes and dissenting opinions in the pages of the U.S. Reports.

Given the heated debate over foreign law, it is unsurprising that there is also a broad and growing field of academic literature dealing with the subject.<sup>7</sup> We leave it to others to survey and synthesize this vast and growing field of work. But to provide context for the discussion, we highlight here four broad approaches to the use of foreign law while interpreting the Constitution.

First, the most restrictive view would essentially ban all reference to foreign law in American judicial opinions. This position is often characterized by gross overgeneralizations, and the tone of the debate proves the issue cuts deeper than it appears.<sup>8</sup> A prime example is “The Constitution Restoration Act of 2005,” a bill introduced in both the U.S. House of Representatives and the U.S. Senate.<sup>9</sup> The proposed legislation prohibited federal judges from using foreign sources of law in their decisions and threatens impeachment for noncompliance. Specifically, section 201 of the bill commanded:

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<sup>7</sup> For a mere sample of some of the more recent literature on this topic, see John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303 (2006); Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 88 (2005); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005); Calabresi & Zimdahl, *supra* note 4; Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J.L. & PUB. POL'Y 291 (2005); Joan L. Larsen, *Importing Constitutional Norms from a “Wider Civilization”*: Lawrence and the Rehnquist Court's Use of Foreign and International law in Domestic Constitutional Interpretation, 65 OHIO ST. L.J. 1283, 1288-91 (2004); Harold Koh, *International: Law as Part of Our Law*, 98 AM. J. INT'L L. 43 (2004).

<sup>8</sup> See, e.g., Toobin, *supra* note 6 (noting that a conservative group has called Justice Kennedy “the most dangerous man in America” in part because of his use of foreign law); Charles Lane, *And the Verdict on Justice Kennedy is: Guilty*, Wash. Post, Apr. 9, 2005, at A3 (quoting one conservative commentator as saying that Justice Kennedy should be impeached because he “upholds Marxist, Leninist, satanic principles drawn from foreign law”); Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 TEX. INT'L L. J. 353, 358 (2004) (“I am no fan of Justice Scalia. I find his militant provincialism embarrassing.”). For a startling example of how extreme the debate has become, see Charles Lane, *Ginsburg Faults GOP Critics, Cites a Threat from ‘Fringe’*, Wash. Post, Mar. 17, 2006, at A3 (recounting a death threat that appeared on the Internet, which read “Okay, commandoes, here is your first patriotic assignment . . . an easy one. Supreme Court 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. . . . If you are what you say you are, and NOT armchair patriots, then these two justices will not live another week.”).

<sup>9</sup> See Constitution Restoration Act of 2005, H.R. 1070, 109th Cong. (2005). The bill garnered 50 sponsors. Its companion bill in the Senate, S. 520, had nine. The legislation went nowhere, and subsequent Congresses have thus far failed to introduce similar bills.

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.<sup>10</sup>

Applied literally, this provision would have ruled out even the kinds of citations to foreign law that Justice Scalia has approved, such as referencing foreign experiences for the empirical light they shed on the possible effects of legal rules. Indeed, the late Chief Justice Rehnquist arguably ran afoul of this proposed legislation when he referenced the Netherlands' experience with assisted suicide in *Washington v. Glucksberg*, an opinion Justices Scalia and Thomas joined.<sup>11</sup> And Justice Scalia may also have offended his self-proclaimed supporters in Congress in *McIntyre v. Ohio Elections Commission*, when, in a First Amendment case, he relied on practices in Australia, Canada, and England to support his view that the “prohibition of anonymous campaigning is effective in protecting and enhancing democratic elections.”<sup>12</sup> Perhaps this helps explain Justice Scalia's lack of enthusiasm for congressional meddling in the legal feud. Indeed, in a 2006 speech before a Capitol Hill audience he pointedly told Congress, “As much as I think it's improper to use foreign law to determine the meaning of the Constitution, I don't think it's any of your business.”<sup>13</sup>

A second view, embraced by Justice Scalia, though still quite hostile to the use of foreign law in constitutional interpretation, recommends a far more limited approach to foreign law, allowing it only for rhetorical flourish, as a source of persuasive reasoning, or for purely comparative or empirical information regarding the likely consequences of a legal rule.<sup>14</sup> Under this view, the Court may not rely on foreign decisions as if they carried any precedential weight.

A third view splits the difference to some extent, limiting the use of foreign law to specific constitutional provisions that require objective reasonableness inquiries.<sup>15</sup> If one believed that the Eighth Amendment contains such an inquiry—that is, that “the word ‘unusual’ is essentially a synonym for the word ‘unreasonable’ in the Fourth Amendment”—then it would be valid to cite

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<sup>10</sup> H.R. 1070, § 201.

<sup>11</sup> See *Washington v. Glucksberg*, 521 U.S. 702, 734 (1997) (Rehnquist, C.J.).

<sup>12</sup> 514 U.S. 334, 381 (1995) (Scalia, J., dissenting).

<sup>13</sup> Pete Yost, *Scalia: Keep Foreign Law Out of Decisions*, AP Newswire, May 18, 2006.

<sup>14</sup> See, e.g., Scalia keynote address, *supra* note 1; Richard A. Posner, *No Thanks, We Already Have Our Own Laws*, Legal Affairs (July-Aug. 2004); Delahunty & Yoo, *supra* note 7, at 295; see also Larsen, *supra* note 7, at 1291 & n.14 (listing scholars who advocate “reason-borrowing”).

<sup>15</sup> Calabresi & Zimdahl, *supra* note 4, at 893-94 (“Where the plain text of the Constitution actually does impose a reasonableness requirement—as it does, in our view, in the Fourth and Eighth Amendments—we think it is appropriate for the Court to look to but not slavishly follow foreign law.”).

foreign law when interpreting both provisions.<sup>16</sup> But under this approach, foreign law should be left out of analyses under the Fourteenth Amendment, which do not include standards of “reasonableness.”<sup>17</sup>

Finally, a more “transnational” approach advocates a more generous use of foreign law to help give meaning to the broad concepts that underlie the U.S. Constitution, such as liberty, due process, equal protection, and cruel and unusual punishment.<sup>18</sup> These ideals, though “embedded in particular national constitutions,” are in this view “supra-positive” reflections of human dignity and autonomy.<sup>19</sup> Other countries’ views on the content of these universal ideas are therefore relevant to their interpretation and application here at home.<sup>20</sup> Under this approach, legal and moral conclusions reached abroad can inform our own understanding of the Constitution.

To clarify these theoretical approaches, it may be helpful to consider a hypothetical case. Suppose that a prisoner who had spent two decades on death row, (in no small part as a result of court proceedings he himself initiated), claimed that the lengthy delay constituted cruel and unusual punishment under the Eighth Amendment.<sup>21</sup> Suppose also that several foreign courts and international bodies had found the practice to be inherently cruel and refused to execute prisoners after such a long delay. Clearly, under the most restrictive view of foreign law, these foreign and international practices are both irrelevant and off limits. Similarly, those in the second camp would rule this use of foreign law illegitimate as a kind of “moral fact-finding,” in which the Court “look[s] simply to the fact that foreign or international jurisdictions have adopted a particular rule as a reason to conform the U.S. constitutional rule to the foreign or international norm.”<sup>22</sup> Those advocating a more moderate approach would allow reference to the practices of the international community as persuasive authority to the extent that the question is about the “reasonableness” of the punishment. Finally, those advocating a “transnational” approach to foreign law would allow the Court to look to “other mature legal systems” to find “the most relevant evidence of what Eighth Amendment jurisprudence calls the ‘evolving standards of decency that mark the progress of a maturing society.’”<sup>23</sup> Hence, foreign courts’ holdings and international proclamations disapproving of long delays between sentencing and execution constitute persuasive evidence that the practice should be considered cruel under the Eighth Amendment. Of course, these four views by no means

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<sup>16</sup> *Id.* at 892.

<sup>17</sup> *Id.* at 894.

<sup>18</sup> *See* Koh, *supra* note 7, at 52.

<sup>19</sup> Jackson, *supra* note 7, at 118.

<sup>20</sup> *See generally* Justice Ginsburg, keynote address, *supra* note 6; Harold Koh, *supra* note 7, at 54-56; Justice O’Connor, *Broadening Our Horizons: Why American Judges and Lawyers Must Learn about Foreign Law*, *Int’l Jud. Observer*, June 1997, at 2.

<sup>21</sup> *Cf.* *Knigh v. Florida*, 528 U.S. 990 (1990) (denying certiorari).

<sup>22</sup> Larsen, *supra* note 7, at 1288-91; *see also* Delahunty & Yoo, *supra* note 7, at 295-6; Posner, *supra* note 14.

<sup>23</sup> Koh, *supra* note 7, at 56 (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

comprise an exhaustive list of possible approaches, but they provide a framework for the current debate.<sup>24</sup>

### **Foreign Law as a Proxy for the Debate Over Constitutional Interpretation**

In our opinion, the furor over foreign law in Supreme Court decisions is not really about what kind of sources should be cited to support a judicial holding. It is rather a reflection of an enduring and passionate debate over our own Constitution and the proper way to interpret it.<sup>25</sup> To support this conclusion, our argument will proceed in two parts. First, we argue that the justices' views on foreign law closely parallel their underlying approaches to constitutional interpretation and that this high degree of correlation suggests an underlying causation. Second, we review the relevant case law with this idea in mind and conclude that a normative judgment about the value or propriety of citation to foreign law is impossible without first resolving the basic question of how the Constitution should be interpreted.

### **Tracing the Justices' Views on Foreign Law to Their Source**

Though it is far beyond the scope of this essay to analyze the distinct approaches to constitutional interpretation that currently prevail on the Court, this section will trace several of the more outspoken justices' views on foreign law to their basic and contrasting approaches to constitutional interpretation, with Justices Scalia and Thomas firmly planted on one side of the debate, and Justices Breyer and Ginsburg on the other, along with former Justice O'Connor. Justice Kennedy takes a more nuanced view of the use of foreign law, but also rejects a purely originalist approach to constitutional interpretation.

### **Originalism**

Justice Scalia is the Court's most vocal opponent of foreign law: while conceding that it can be relevant for empirical information or to interpret statutes and treaties that depend upon foreign or international law, he argues that it is irrelevant to the task of interpreting the Constitution.<sup>26</sup> It is noteworthy that this hostility to the use of foreign law precisely parallels his originalist approach to constitutional interpretation.<sup>27</sup>

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<sup>24</sup> For a more pragmatic approach, see Cleveland, *supra* note 4, at 9 (arguing that “the propriety of applying international rules must be resolved on a case-by-case basis, with due consideration of both the constitutional provision at issue and the relevant international rule”).

<sup>25</sup> For a theoretical exploration of this idea, see Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639 (2005).

<sup>26</sup> See Scalia, keynote address, *supra* note 1; *Scalia-Breyer discussion*, *supra* note 5.

<sup>27</sup> See generally Antonin Scalia, Response, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 129 (Amy Gutmann et al. eds., 1997).

As noted above, it does not take long for Justice Scalia's comments about foreign law to collapse into a conversation about original intent. For example, when Justices Scalia and Breyer appeared together at American University in January 2005 for a discussion about the use of foreign and international law in Supreme Court opinions, the real debate was on full display. Justice Scalia summed up their fundamental disagreement early on in the discussion: "Now, my theory of what I do when I interpret the American Constitution is I try to understand what it meant, what was understood by the society to mean when it was adopted . . . That's my approach. Justice Breyer doesn't have my approach."<sup>28</sup> Similarly, during the question-and-answer period at the AEI event, Justice Scalia succinctly responded to an audience questioner who asked whether his opposition to the use of foreign law was limited to certain constitutional provisions. Justice Scalia replied, "Well, as I say, with constitutional cases, I think it's never relevant. If you're an originalist, it wouldn't be."<sup>29</sup>

The reasoning for this claim is straightforward. Justice Scalia believes that the use of foreign law is "inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one."<sup>30</sup> In essence, he views his role as an American judge as limited to interpreting the document that the framers drafted and the people ratified. If contemporary Americans want to protect rights that are not in the original compact, they may do so through the legislative process, or by amending the Constitution in the manner prescribed in the document itself. This being the case, contemporary foreign law is simply irrelevant to the inquiry—indeed, contemporary *American* views are often beside the point. Justice Scalia has said that he "detest[s]" the current Eighth Amendment test for cruel and unusual punishment,<sup>31</sup> which compares the challenged practice with "the evolving standards of decency that mark the progress of a maturing society."<sup>32</sup> In Justice Scalia's view, the relevant standard for cruel and unusual punishment was codified, and remains fixed, in the founding period.<sup>33</sup> That being the case, contemporary foreign law cannot intrude upon the inquiry. Once a judge has departed from original sources, he or she is essentially "engaged in the process of writing [a] Constitution and there is no reason whatever not to consult foreign materials in doing it."<sup>34</sup>

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<sup>28</sup> Scalia-Breyer discussion, *supra* note 5; see also Tim Wu, *Should the Supreme Court Care What Other Countries Think?*, Slate, Apr. 9, 2004, <http://www.slate.com/id/2098559/> ("What Scalia and the House Republicans advocate is a kind of judicial mind-control: They want judges to banish sinful, foreign thoughts when deciding cases, in exchange for a pure focus on that founding moment in Philadelphia.").

<sup>29</sup> Scalia keynote address, *supra* note 1 (transcript of Q & A session available through Federal News Service, Feb. 21, 2006).

<sup>30</sup> *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997) (Scalia, J.).

<sup>31</sup> Scalia-Breyer discussion, *supra* note 5; see also *Roper*, 543 U.S. at 626 (Scalia, J., dissenting) ("The Court has, however—I think wrongly—long rejected a purely originalist approach to our Eighth Amendment . . .").

<sup>32</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

<sup>33</sup> See Alford, *supra* note 25 at 649.

<sup>34</sup> Scalia keynote address, *supra* note 1.

Justice Thomas, like Justice Scalia, is likewise an originalist who does not support the use of foreign law in constitutional interpretation.<sup>35</sup> Although he has not made public comments to this effect, he expressed his views bluntly while concurring in a denial of certiorari in a death penalty case, noting that the Supreme Court “should not impose foreign moods, fads, or fashions on Americans.”<sup>36</sup> Similarly, although it is too early to tell whether Chief Justice Roberts and Justice Alito will use foreign law in their opinions, or how vociferously they will object to their colleagues’ use of it, it seems safe to conclude that they will be less than receptive.<sup>37</sup>

In short, if one’s theory of constitutional interpretation holds that America’s constitutional experience is unique in the world, and that the meaning of the text has remained unchanged since ratification in 1791, then what a foreign judge says while interpreting his constitution in his foreign system is neither here nor there.<sup>38</sup> Justices Scalia and Thomas’ antipathy to foreign law is principally a byproduct of this underlying interpretive philosophy.<sup>39</sup>

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<sup>35</sup> This is true at least according to Justice Scalia, who told the audience at AEI, “the only colleague of mine that I know who does not believe in an evolving Constitution is Justice Thomas.” Justice Scalia, keynote address, *supra* note 1 (transcript of Q & A available through the Federal News Service, Feb. 21, 2006); *see also Knight v. Florida*, 528 U.S. 990, 990 n.1 (1999) (Thomas, J., concurring in the denial of certiorari) (noting that under eighteenth-century practice, a forty-eight-hour delay between the imposition of a death sentence and its execution was considered acceptable).

<sup>36</sup> *Foster v. Florida*, 537 U.S. 990, 990 n.\* (2002) (Thomas, J., concurring in denial of certiorari).

<sup>37</sup> *See* John G. Roberts, U.S. Senate Judiciary Committee Confirmation Hearing (Day Two), Sept. 13, 2005 (transcript available at <http://www.washingtonpost.com/wpdyn/content/article/2005/09/13/AR2005091301210.html>) (expressing “concern” over the lack of domestic political accountability of foreign judges and arguing that selectively citing foreign law “allows the judge to incorporate his or her own personal preferences [and] cloak them with the authority of precedent”); Samuel A. Alito, U.S. Senate Judiciary Committee Confirmation Hearing (Day One), Jan. 10, 2006 (transcript available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/10/AR2006011000781.html>) (“I don’t think that foreign law is helpful in interpreting the Constitution.”).

<sup>38</sup> *See* Alford, *supra* note 25 at 641 (“If a judge interprets the Constitution based on a theory of original intent, then contemporary global practices will be of little service.”).

<sup>39</sup> Although the Constitutional Restoration Act of 2005 ultimately died a quiet death in Congress, it nonetheless highlighted the fact that what we are really witnessing is a debate about our own Constitution and its interpretation. Indeed, the proposed legislation, which explicitly grandfathered in “English constitutional and common law up to the time of the adoption of the Constitution of the United States,” was essentially an attempt to codify originalism as the exclusive method of constitutional interpretation in American federal courts. *See* H.R. 1070, § 201.

## The “Living Constitution”

Several justices on the current Court believe that the Constitution should be interpreted more flexibly than an originalist would permit. To varying degrees, this includes Justices Ginsburg, Breyer, Kennedy, Stevens, and Souter, as well as former Justice O’Connor. The common thread among these justices’ views is that the U.S. Constitution does not exist in a vacuum or remain locked in a time capsule, but rather embodies to some extent evolving concepts of human dignity, autonomy, and liberty. Consequently, to give content to these ideas, a jurist should not chain him or herself to 1791, but should make a reasoned judgment “reflective of contemporary norms” as they have evolved in the past two centuries.<sup>40</sup> Originalists reject this view of the Constitution out of hand. The result is that those who believe the Constitution “is not static”<sup>41</sup> are willing to investigate how other courts around the world are grappling with the same basic questions contemplated under our own Constitution, while those who believe the Constitution still means what it did when it was written—and will until amended—find reference to foreign law and practice irrelevant, even “[d]angerous.”<sup>42</sup> At bottom, this is the real cleaving line in the debate over foreign sources of law.

It is no coincidence that Justice Ginsburg is both a staunch supporter of the use of foreign law and a vigorous defender of “the dynamism with which we interpret our Constitution.”<sup>43</sup> In her public comments, she has argued that “[w]e live in an age in which the fundamental principles to which we subscribe—liberty, equality, and justice for all—are encountering extraordinary challenges. But it is also an age in which we can join hands with others who hold to those principles and face similar challenges.”<sup>44</sup> Significantly, she has also explicitly noted the linkage between the debate over foreign law and constitutional interpretation:

The notion that it is improper to look beyond the borders of the United States in grappling with hard questions has a close kinship to the view of the U.S. Constitution as a document essentially frozen in time as of the date of its ratification. I am not a partisan of that view.<sup>45</sup>

Justice Ginsburg concludes that a judge could “honor the framers’ intent to create a more perfect union” by reading the Constitution “as belonging to a global 21st century, not as fixed forever by 18<sup>th</sup>-<sup>th</sup> century understandings.”<sup>46</sup>

This openness to foreign law follows from Justice Ginsburg’s underlying interpretive approach. A good example can be found in a rather mundane case about the federal equity power, *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*<sup>47</sup> The majority opinion, penned by Justice Scalia, held that a federal court lacked the

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<sup>40</sup> Alford, *supra* note 25, at 645.

<sup>41</sup> Trop, 356 U.S. at 101.

<sup>42</sup> Lawrence, 539 U.S. at 598 (Scalia, J., dissenting).

<sup>43</sup> Justice Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 Yale L. & Pol’y Rev. 329, 332 (2004)

<sup>44</sup> Justice Ginsburg, keynote address, *supra* note 6.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> 527 U.S. 308 (1999).

authority to issue a certain equitable remedy because that power did not exist at the time of the founding.<sup>48</sup> Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, wrote a vigorous dissent in which she chided the majority for “rely[ing] on an unjustifiably static conception of equity jurisdiction.”<sup>49</sup> Recalling this case later, Justice Ginsburg flatly rejected an originalist approach (which she faulted for the outcome in *Dred Scott v. Sanford*)<sup>50</sup> and argued for an approach that was “supple, adaptable to changing conditions.”<sup>51</sup> It is this view that drives her approach to foreign sources.

Similarly, Justice Breyer also advocates a more generous use of foreign law, arguing that it is legitimate to look to foreign law when “foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances.”<sup>52</sup> During his exchange at American University with Justice Scalia, Justice Breyer expanded on this view:

[Y]ou have a person who’s a judge, who has similar training, who’s trying to, let’s say, apply a similar document, something like cruel and unusual or—there are different words, but they come to roughly the same thing—who has a society that’s somewhat structured like ours. And really, it isn’t true that England is the moon, nor is India. I mean, there are human beings there just as there are here, and there are differences and similarities.<sup>53</sup>

This approach to foreign law squares with Justice Breyer’s unique brand of judicial pragmatism, which, drawing on his recent book *Active Liberty*,<sup>54</sup> may be summarized as follows: “Judging is a pragmatic and purposeful activity in which interpretation . . . should not focus exclusively on textual exegesis and uncovering original understandings.”<sup>55</sup> Instead, under his approach, it is reasonable to look to foreign law not because it is binding, but because the Constitution must operate in the real world and it would be foolish not “to look on the ground to see how other people are reacting” and “deal[ing] with” similar concepts such as “liberty” and “cruel and unusual punishment.”<sup>56</sup> Because he does not feel temporally shackled to the founding period, he is free to explore how similar concepts are applied across cultures.

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<sup>48</sup> *Id.* at 333.

<sup>49</sup> *Id.* at 336.

<sup>50</sup> See Justice Ginsburg, *Looking Beyond Our Borders*, *supra* note 43, at 331 (quoting *Dred Scott v. Sanford*, 60 U.S. 393, 426 (1857) (affirming the constitutionality of slavery and arguing that “[n]o one, we presume, supposes that any change in public opinion or feeling . . . in the civilized nations of Europe or in this country, should induce the court to give the words of the Constitution a more liberal construction . . . than they were intended to bear when the instrument was framed and adopted”).

<sup>51</sup> *Id.* at 334.

<sup>52</sup> *Knight v. Florida*, 528 U.S. 990, 997-98 (1999) (Breyer, J., dissenting from denial of certiorari).

<sup>53</sup> Scalia-Breyer discussion, *supra* note 5.

<sup>54</sup> Stephen Breyer, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

<sup>55</sup> Paul Gewirtz, *The Pragmatic Passion of Stephen Breyer*, 115 *Yale L.J.* 1675, 1676 (2006).

<sup>56</sup> Scalia-Breyer discussion, *supra* note 5.

Former Justice O'Connor has also argued that the Court is on solid ground when it considers the views of other nations while interpreting the U.S. Constitution. Specifically, she has stated that the decisions of "other constitutional courts," such as those in Germany, Italy, and South Africa, "have something to teach us about the civilizing function of constitutional law" because "[t]hey have struggled with the same basic constitutional questions that we have: equal protection, due process, the rule of law in constitutional democracies."<sup>57</sup> Speaking to a group of international lawyers, she argued that "conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts" because, "[w]hile ultimately we must bear responsibility for interpreting our own laws, there is much to learn from other distinguished jurists who have given thought to the same difficult issues that we face here."<sup>58</sup>

Justice O'Connor's views on foreign law flow from her underlying rejection of a purely originalist approach to constitutional interpretation. For example, she joined the majority in *Atkins*, which embraced the "evolving standards of decency" test first enunciated by Chief Justice Earl Warren in *Trop v. Dulles*.<sup>59</sup> And in one of her most articulate defenses of foreign law she argued that although American law is "distinctive in many respects" (such as the Fourth Amendment and the Establishment Clause), some provisions deal with an "evolving understanding of human dignity" which is "neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries."<sup>60</sup> For these sorts of questions—where the Constitution reflects broad concepts that evolve over time—Justice O'Connor was willing to look beyond the founding period, and beyond our native shores.<sup>61</sup>

Finally, Justice Kennedy also holds a more flexible approach to constitutional interpretation than his originalist colleagues on the Court. In fact, it was Justice Kennedy's citation to foreign law in *Lawrence* that principally ignited the current firestorm.<sup>62</sup> In defending the practice, he has referenced the idea that "there's some underlying common mutual interest, some underlying common shared idea, some underlying common shared aspiration, underlying unified concept of what human dignity

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<sup>57</sup> Justice Sandra Day O'Connor, *Broadening Our Horizons: Why American Judges and Lawyers Must Learn about Foreign Law*, Int'l Jud. Observer, June 1997, at 2; see also Jonathan Ringel, *O'Connor Speech Puts Foreign Law Center Stage*, Fulton County Daily Report, Oct. 31, 2003, <http://www.law.com/jsp/article.jsp?id=1067350962318>.

<sup>58</sup> Justice O'Connor, keynote address, *supra* note 6 at 350.

<sup>59</sup> See *Atkins*, 536 U.S. at 311-12 (citing *Trop*, 356 U.S. at 100-01).

<sup>60</sup> *Roper*, 543 U.S. at 604-05 (O'Connor, J., dissenting). Although O'Connor ultimately did not support the majority's holding in the case, she specifically rejected Justice Scalia's hostility to foreign law in constitutional interpretation.

<sup>61</sup> It is noteworthy, however, that Justice O'Connor did not join Justice Kennedy's opinion in *Lawrence* but instead decided to concur on equal-protection grounds without mentioning foreign law. See *Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring).

<sup>62</sup> See Toobin, *supra* note 6 (quoting Norman Dorsen as saying that "[w]hen Kennedy, who's hardly a liberal, started citing these international sources, that's when the subject exploded in the broader political world").

means.”<sup>63</sup> Justice Kennedy, however, offers a more tactical justification for the use of foreign law, suggesting that if Americans ask other nations to emulate its model of freedom and the rule of law, the least American courts could do is cite their opinions.<sup>64</sup>

Even so, Justice Kennedy is obviously willing to look outside the confines of original intent to give meaning to the Constitution. For example, finding a constitutional right to engage in consensual homosexual conduct in *Lawrence*, Kennedy argued:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.<sup>65</sup>

This approach to constitutional interpretation forms the basis for Justice Kennedy’s use of foreign law. Because, in his view, the concept of “liberty” embodied in the Fourteenth Amendment includes the individual’s “right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life,” it was sensible to investigate how other nations grapple with those same fundamental issues.<sup>66</sup> But to an originalist, as Justice Scalia derisively pointed out in his remarks at AEI, such reasoning is “surely not a happy state of affairs for a law court.”<sup>67</sup>

In sum, if one believes that the Constitution is a living document that can adapt to a changing world, then foreign law can prove useful while interpreting the broad ideals embedded in the document. The justices who are willing to look abroad for responses to shared problems and experiences do so as a direct result of their dynamic view of the U.S. Constitution.<sup>68</sup>

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.* (quoting Justice Kennedy, who argues that “other nations and other peoples can define and interpret freedom in a way that’s at least instructive to us”).

<sup>65</sup> *Lawrence*, 559 U.S. at 577-78.

<sup>66</sup> *Id.* at 574 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

<sup>67</sup> Justice Scalia, keynote address, *supra* note 1.

<sup>68</sup> Although Justice Stevens has spoken out less frequently about the subject, he did mention in a recent speech that it is appropriate to cite to foreign law, noting, “If we expect them to listen to us, we should at least be willing to listen to what they have to say to us.” John Strauss, *Supreme Court Justice Speaks at Indy Conference*, Indianapolis Star, May 24, 2005. Justice Stevens has joined several opinions that cite foreign law and authored the opinion in *Atkins*. See *Atkins*, 536 U.S. at 316 & n.21. Similarly, Justice Souter has joined opinions making reference to foreign law, including *Lawrence*, *Atkins*, and *Roper*. See also *Glucksberg*, 521 U.S. at 785-86 (Souter, J., concurring).

## Examples from Recent Case Law

As the discussion above makes clear, each of the justices' views on foreign law is really a reflection of their judicial philosophies. Consequently, one cannot make a normative judgment on which uses of foreign law are legitimate or illegitimate without first resolving this fundamental question about constitutional interpretation. Accordingly, the relevance of foreign law could easily vary depending on the particular constitutional provision involved.

### The Fourteenth Amendment

In *Lawrence*, Justice Kennedy cited a decision by the European Court of Human Rights (ECHR) (and made note of “[o]ther countries, too”) for the proposition that the right to homosexual sodomy is an “integral part of human freedom in many other countries” and is therefore protected under the Fourteenth Amendment.<sup>69</sup> Although Justice Kennedy was arguably using foreign law only to undercut a reference to “Western civilization” from Chief Justice Burger’s concurrence in *Bowers*,<sup>70</sup> the implication was that other foreign courts have recognized consensual homosexual behavior as an important right and those legal outcomes support the finding of the same right in the U.S. Constitution.

As noted above, this use of law is only legitimate insofar as one is willing to adapt the Constitution to changing societal norms. Indeed, Kennedy argued that *Bowers* was incorrect when it was decided because the Court should have noticed the “*emerging awareness* that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”<sup>71</sup> In proving this “emerging recognition,” Justice Kennedy placed significant weight on a case decided five years before *Bowers* by the European Court of Human Rights.<sup>72</sup> For Justice Scalia, history—primarily *American* history—easily decided the case, emerging recognitions notwithstanding.<sup>73</sup> The use of foreign law was ancillary to the real debate about our own Constitution—the same one the justices have been having for years.

Ironically, one of the Court’s most extensive uses of foreign law can be found in another Fourteenth Amendment case, *Washington v. Glucksberg*, which held that the state of Washington’s prohibition against assisted suicide did not violate the substantive due process clause.<sup>74</sup> This case is particularly noteworthy because the late Chief Justice Rehnquist authored the majority opinion, and Justices Scalia and Thomas joined it without so much as a whisper about the use of international precedent. In fact, the opinion is peppered with references to foreign law. Immediately after stating that the Court’s task was to “examin[e] our Nation’s history, legal traditions, and practices,” Chief Justice Rehnquist proceeded to note that in “almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide.”<sup>75</sup> In a footnote, the Court cited a 1993 Canadian case that listed countries currently prohibiting the practice: Austria, Spain,

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<sup>69</sup> *Lawrence*, 539 U.S. at 577.

<sup>70</sup> *Bowers*, 478 U.S. at 196 (Burger, C.J., concurring).

<sup>71</sup> *Lawrence*, 539 U.S. at 572 (emphasis added).

<sup>72</sup> *Ibid.* (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981)).

<sup>73</sup> See *id.* at 595-96 (Scalia, J., dissenting).

<sup>74</sup> 521 U.S. 702 (1997).

<sup>75</sup> *Id.* at 702, 710 (1997).

Italy, the United Kingdom, the Netherlands, Denmark, Switzerland, and France.<sup>76</sup> And this was only the opening salvo in the *Glucksberg* Court’s use of foreign law. Later in the case, the Court noted that “many proposals to legalize assisted-suicide have been and continue to be introduced in the States’ legislatures, but none has been enacted.”<sup>77</sup> In a footnote, the Court listed such states—from Alaska to Wisconsin—and then threw in a reference to Canada.<sup>78</sup>

But the most striking citation to foreign law came when the Court noted that “[o]ther countries are embroiled in similar debates” over assisted suicide, and cited judicial opinions and legislative enactments in Canada, England, New Zealand, and Australia that had considered and rejected the practice.<sup>79</sup> Perhaps anticipating a charge of selection bias, the Court noted that Columbia had gone the other way and approved “voluntary euthanasia for terminally ill people.”<sup>80</sup>

Finally, and more famously, in concluding toward the end of the opinion that Washington’s interest in preventing physician-assisted suicide from slipping into voluntary or involuntary euthanasia was a rational one, the Court looked to the Netherlands’ experience with the practice. It cited a Dutch study that revealed the real possibility that assisted suicide could lead to involuntary euthanasia.<sup>81</sup> In a concurring opinion, Justice Souter drew on the same facts, and concluded that current legislative standards and controls could not render the practice safe enough to prevent the possibility of abuse.<sup>82</sup>

This last use of foreign law is arguably empirical in nature; the Court simply looked to the only source of factual data available on assisted suicide, which happened to be in the Netherlands, and decided that it was rational for Washington to fear similar results at home. As Justice Scalia often muses, it is fine to cite foreign law to argue that “the sky won’t fall” if a legal rule is adopted.<sup>83</sup> In this case, the Court deemed it acceptable to use foreign law to argue that it very well might.

However, the other uses of foreign law in *Glucksberg* are more problematic from an originalist perspective. The foreign citations are unrelated to the Court’s stated goal of analyzing “our Nation’s history, legal traditions, and practices.”<sup>84</sup> Indeed, the only reason to mention the many other countries that are “embroiled in similar debates” seems to be to show that most “civilized nations” disapprove of assisted suicide.<sup>85</sup> If there is a difference between this usage and Justice Kennedy’s foreign citations in *Lawrence*, it is thin indeed. It is striking that Justice Scalia, who so often decries the more progressive justices’ selective use of foreign law, shows no discomfort with its repeated use in this case. It is perhaps less surprising that the late Chief Justice Rehnquist looked abroad; in

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<sup>76</sup> *Id.* at 710 n.8.

<sup>77</sup> *Id.* at 717.

<sup>78</sup> *Id.* at 717 n.15.

<sup>79</sup> *Id.* at 718 n.16.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Id.* at 734.

<sup>82</sup> *Id.* at 785-86 (Souter, J., concurring).

<sup>83</sup> See Scalia-Breyer discussion, *supra* note 5.

<sup>84</sup> *Glucksberg*, 521 U.S. at 710.

<sup>85</sup> *Id.* (quoting *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 280 (1990)).

1993 he stated: “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.”<sup>86</sup>

### **The Eighth Amendment**

Recent Eighth Amendment cases demonstrate the same inexorable linkage to the underlying interpretive debate. In *Atkins*, the Court held that the execution of mentally retarded individuals constitutes “cruel and unusual punishment.” In a footnote, Justice Stevens briefly referenced foreign law (along with religious sentiment and polling data) to support the conclusion that the execution of retarded people was “truly unusual.”<sup>87</sup> Justice Stevens cited an *amicus* brief filed by the European Union for the proposition that the “imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”<sup>88</sup> He explained that this use of foreign law was not an innovation in Eighth Amendment jurisprudence; since the Court announced the “evolving standards of decency” test more than fifty years ago in *Trop v. Dulles*, the Court had looked to “other nations that share our Anglo-American heritage” and “leading members of the Western European community” to support its holdings.<sup>89</sup> The current tempest over foreign law has less to do with its appearance in these cases than it does with what the Eighth Amendment means. Is it static? Or does it change? The answer to this question drives one’s reaction to the use of foreign law in such cases.

The same holds true for *Roper v. Simmons*, in which Justice Kennedy, drawing on the same precedent as Justice Stevens did in *Atkins*,<sup>90</sup> looked abroad and found that “the United States now stands alone in a world that had turned its face against the juvenile death penalty.”<sup>91</sup> Justice Kennedy considered this to be “respected and significant confirmation” of his conclusion that the death penalty could not be imposed upon persons younger than eighteen.<sup>92</sup> Again, without first coming to a conclusion on the meaning of the Eighth Amendment, the controversy over foreign law is quite beside the point.

Interestingly enough, however, references to foreign or international law are conspicuously absent from Justice Kennedy’s majority opinion in *Kennedy v. Louisiana*, in which the Court held that the Eighth Amendment bars the imposition of the death penalty for the crime of child rape.<sup>93</sup> Citing both *Roper* and *Atkins*, the Court found that, with only six states permitting the death penalty for child rape—and none actually

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<sup>86</sup> Chief Justice William H. Rehnquist, Constitutional Courts—Comparative Remarks, Address Before the German-American Conference (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).

<sup>87</sup> *Atkins*, 536 U.S. at 316 & n.21.

<sup>88</sup> *Id.* at 316 n.21.

<sup>89</sup> *See id.*; *see also* *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988); *Enmund v. Florida*, 458 U.S. 782, 796-797, n. 22 (1982); *Coker v. Georgia*, 433 U.S. 584, 596, n. 10 (1977); *Trop v. Dulles*, 356 U.S. 86, 102, & n. 35 (1958). Justice Scalia singled each of these cases out for criticism in his remarks at AEI.

<sup>90</sup> *Roper*, 543 U.S. at 575-76.

<sup>91</sup> *Id.* at 577.

<sup>92</sup> *Id.* at 578.

<sup>93</sup> 554 U.S. \_\_\_, 128 S. Ct. 2641 (2008).

imposing it—no national or social consensus existed for the practice.<sup>94</sup> Nowhere in the opinion, however, did Justice Kennedy mention that, according to an *amicus* brief filed in the case on behalf of British Law Associations, Britain had not authorized the death penalty for rape since 1841 and no other Western democracy did so at the time the case was heard.<sup>95</sup> Indeed, according to the brief, “only twenty-eight of the world’s 193 nations” authorized capital punishment for child rape, and of those, six had not carried out an execution in at least a decade.<sup>96</sup> Also missing from the opinion is any reference to the United Nations Commission on Human Rights, Article 6 of the International Covenant on Civil and Political Rights (ICCPR), and other sources of international law calling for the narrowing of the death penalty among nations retaining its use.

Justice Kennedy’s neglect of international sources of law in *Kennedy* is surprising both because those sources so strongly support the majority’s narrow 5–4 decision and because the case had so much in common with *Roper*, a case decided just three years earlier and in which he looked abroad. Justice Kennedy gave no explanation for this sudden shunning of foreign and international law in an area in which he had previously found such citations useful. Foreign law might have offered significant support for the majority’s opinion, especially after it was revealed that the Court had accidentally missed the fact that, in addition to the six states listed in the opinion, the Uniform Code of Military Justice also authorized the death penalty for child rapists.<sup>97</sup> In any event, either Justice Kennedy found domestic sources of law sufficient to support the decision, or criticism over his reliance on such sources in previous cases has scared him off the practice, at least for the time being.

One of the most controversial references to foreign law can be found in *Knight v. Florida*, an Eighth Amendment case that was never argued before the Supreme Court.<sup>98</sup> The Court denied certiorari to two convicted murderers who argued that executing them after delays “measured in decades” would constitute cruel and unusual punishment.<sup>99</sup> Dissenting from this denial of certiorari, Justice Breyer made extensive use of foreign practice and precedent. He argued that “[a] growing number of courts outside the United States—*courts that accept or assume the lawfulness of the death penalty*—have held that lengthy delay in administering a *lawful* death penalty renders ultimate execution inhuman, degrading, or unusually cruel.”<sup>100</sup> He went on to cite several foreign jurisdictions, including Jamaica’s Privy Council, the Supreme Court of India, the ECHR, and, strikingly, the Supreme Court of Zimbabwe.<sup>101</sup> Justice Breyer later joked that this last citation may have been a “tactical error,” since Zimbabwe is “not the human rights

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<sup>94</sup> 128 S. Ct. at 2653, 2657.

<sup>95</sup> See Brief for Leading British Law Associations et al. as *Amici Curiae* Supporting Petitioner 6, 30, *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) (No. 07-343).

<sup>96</sup> *Id.* at 29-30.

<sup>97</sup> See *Kennedy*, 128 S. Ct. at 2653 n.\*.

<sup>98</sup> *Knight*, 528 U.S. 990.

<sup>99</sup> *Id.* at 993. The Court denied certiorari to two petitioners. One had been on death row for nineteen years. The other had waited twenty-four.

<sup>100</sup> *Id.* at 995 (emphasis in original).

<sup>101</sup> *Id.* at 995-96.

capital of the world.”<sup>102</sup> Anticipating the charge that he was “cherry-picking” the foreign precedent that supported his position while ignoring contrary views—one of Justice Scalia’s favorite criticisms<sup>103</sup>—Justice Breyer cited a Canadian opinion and a United Nations Human Rights Committee report that came to a contrary conclusion.<sup>104</sup> Justice Breyer stated explicitly that “obviously, this foreign authority does not bind us,” but he argued that the foreign decisions he cited were nonetheless useful because they “considered roughly comparable questions under roughly comparable legal standards.”<sup>105</sup>

Again, the ultimate propriety of citing foreign law in this manner is secondary to a determination of the meaning of the Eighth Amendment’s prohibition on cruel and unusual punishment. Hence, Justice Scalia’s criticism of Justice Breyer’s use of foreign citations in *Knight* is only criticism of his anti-originalism, once removed.

### **The First Amendment**

*Glucksberg* was not the only case in which Justice Scalia has dabbled with foreign law. In *McIntyre v. Ohio Elections Commission*, Justice Scalia dissented from the majority’s holding that laws requiring political pamphleteers to disclose their identities violate the First Amendment.<sup>106</sup> According to Justice Scalia, the historical record surrounding anonymous political leafleting was inconclusive. He therefore looked to the widespread practices of the American people and found that forty-nine out of fifty states had enforced such laws for nearly a century.<sup>107</sup> Although he declared that this evidence “suffice[d] to decide the case,”<sup>108</sup> he went on to ask “whether the prohibition of anonymous campaigning is effective in protecting and enhancing democratic elections.”<sup>109</sup> Scalia scolded the justices in the majority for “answering this question no” after “set[ting] their own views—on a practical matter that bears closely upon the real-life experience of elected politicians . . . against the views of 49 . . . state legislatures and the federal Congress.”<sup>110</sup> But Justice Scalia did not stop there; he went on to argue: “We might also add to the list on to the other side the legislatures of foreign democracies: Australia, Canada, and England for example, all have prohibitions upon anonymous campaigning.”<sup>111</sup>

Arguably, Justice Scalia cited this foreign law purely for empirical purposes, namely that other democratic countries required disclosure and the “sky did not fall.” However, it is curious that Justice Scalia would imply, even weakly, that the Court should defer or even look to foreign practice when interpreting the First Amendment, especially given the differences between America’s democratic structures and other countries’ political institutions. A disciplined originalist would not steal such glances abroad.

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<sup>102</sup> Scalia-Breyer discussion, *supra* note 5.

<sup>103</sup> See, e.g., Lawrence, 539 U.S. at 598 (Scalia, J., dissenting); Roper, 543 U.S. at 625 (Scalia, J., dissenting); Scalia keynote address, *supra* note 1.

<sup>104</sup> *Knight*, 528 U.S. at 996.

<sup>105</sup> *Id.* at 997.

<sup>106</sup> *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 371 (1995) (Scalia, J., dissenting).

<sup>107</sup> *Id.* at 374-75.

<sup>108</sup> *Id.* at 378.

<sup>109</sup> *Id.* at 381.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

## Federalism

A final case demonstrates how differing and largely irreconcilable approaches to constitutional interpretation lie behind the debate over foreign law. In *Printz v. United States*, a closely divided Court held that the Tenth Amendment barred the federal government from compelling state executive branch officials to implement a federal gun registration law, popularly known as the Brady Act.<sup>112</sup> Justice Breyer dissented, arguing that experiences in the European Union showed that federal structures could thrive under similar systems of regulatory implementation.<sup>113</sup> Writing for the majority, Justice Scalia responded that “[w]e 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.”<sup>114</sup> Interestingly, Justices Kennedy and O’Connor joined this opinion without comment, though both have subsequently retreated from such a categorical position against foreign law. And in any event, Justice Breyer’s use in this case may fit squarely under Justice Scalia’s “sky won’t fall” exception to his ban on foreign law. In fact, Justice Breyer believed he had “registered an important concession” on this point when he debated Justice Scalia in 2005.<sup>115</sup>

The fact that Justices Kennedy and O’Connor signed on to the *Printz* majority opinion demonstrates that the underlying interpretive debate is the key one. For a “living constitutionalist,” a federalism case—unlike an Eighth or Fourteenth Amendment case, in which the constitutional standard could be seen to evolve over time—involves structural clauses of the Constitution that are less fluid and more fixed. This may provide an explanation for Justices Kennedy and O’Connor’s rejection of foreign comparative law in *Printz*, along with the possibility that their views, perhaps like the Constitution, simply evolved over time.

## Toward a Limited Use of Foreign Law

Because the propriety of the use of foreign law derives from one’s approach to constitutional interpretation more generally, we are still left in need of a framework for the use of foreign law in judicial decisions. It is far beyond the scope of this essay to prove what the framers meant when they drafted the Constitution, or what contemporary society understood that document to mean when it was ratified. However, we agree with Justice Scalia that the Constitution is, of course, a domestic document, drafted under unique circumstances in light of particular concerns. We believe that this sets up two presumptions about the correct use of foreign law. We suggest a presumption in favor of using foreign law when the question at issue is truly the same no matter where on the globe it arises. This approach is somewhat broader than the one Justice Scalia advocated in his AEI address. But we also propose a presumption against more expansive uses of

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<sup>112</sup> 521 U.S. 898 (1997) (Scalia, J.).

<sup>113</sup> *Id.* at 976. (Breyer, J., dissenting) (arguing that foreign experiences may “cast an empirical light on the consequences of different solutions to a common legal problem”).

<sup>114</sup> *Id.* at 921 n.11.

<sup>115</sup> Scalia-Breyer discussion, *supra* note 5 (recounting his use of foreign law in his *Printz* dissent, Justice Breyer told Scalia, “Now, I want to just point out that you’ve said some things that I take as consistent with my being right to do that.”).

foreign law unless the proponent of using that law can demonstrate that the framers intended the constitutional provision at issue to be construed in light of foreign law and practice.

### **Transnational Citations for Transnational Question**

Our suggested presumption in favor of the use of foreign law allows citations for informational and empirical purposes, as advocated by Justice Scalia and others, but extends somewhat farther.<sup>116</sup> When a foreign court has faced the same legal or factual question as the one confronting a domestic court, and that question is context-neutral—that is, it does not depend on the unique text of our own Constitution or on the specific doctrinal tests that have developed around that document—a domestic court may seek out the views of other smart judges who have grappled with similar problems and have had similar experiences. To the extent that these inquiries are unrelated to broad constitutional ideals and moral judgments such as human liberty, dignity, or autonomy, it is presumptively reasonable to cite foreign and international sources as persuasive authority.

For example, when interpreting the Eighth Amendment, part of the puzzle facing the Court may involve questions about the basic capacity of the human mind, such as does a seventeen-year-old understand right from wrong? Does a mentally retarded offender understand the consequences of his actions? These sorts of questions are distinct from those involving the cruelty of punishments or evolving standards of decency, and they ought to be fundamentally the same inquiries in France, Germany, or Virginia. If so, a foreign judge's reasoned and considered views on that question may be just as persuasive or valuable as those of a law professor, social scientist, or state court judge, and there is no reason to exclude them simply because they originated in a foreign courtroom.

To take an example rooted in the Fourteenth Amendment, consider a law that specifically targets homosexuals. In determining the constitutionality of that law, the Court may ask: is there any rational basis for this regulation, or does the law only reflect invidious discrimination? Embedded in that inquiry are narrower questions about the

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<sup>116</sup> Although the use of foreign citations for empirical purposes is generally accepted, one could argue that even empirical data from other countries cannot be separated from its cultural and historical context. After all, why should we expect the Netherlands' experience with assisted suicide to be replicated in Washington given the vast difference in social customs, history, and mores in those two jurisdictions? The honest answer is that even though facts drawn from foreign countries probably are, to some degree, specific to their unique social and historical contexts, even staunch opponents of the use of foreign law are prepared to accept such facts because they are useful, valuable, and can be neutrally applied to our own constitutional framework. That is why it is only a small step from this empirical usage to the one we advocate here, where foreign jurists face context-neutral questions that can be factored into existing American constitutional doctrine. But the acceptance of foreign law for empirical purposes across the ideological spectrum also highlights the fact that the debate is really not about which cases are cited in Supreme Court opinions. Rather, as we argue above, the debate is a more fundamental one over what our Constitution means.

persuasiveness of various policy justifications for the regulation at issue, and these questions should be the same across geographic boundaries. Foreign courts that have grappled with similar laws restricting homosexual activity may shed light on what is really going on underneath the surface of such regulations. When asked about this approach to foreign law at the AEI event, Justice Scalia rejected it out of hand, remarking:

No, I don't think there's much difference between a foreign court saying that it's stupid and a foreign court saying that it's really stupid. I mean, I don't care what their view of it is. My people have their own view. And I should make my determination on the basis of the traditions and the history and the text adopted by the American people.<sup>117</sup>

But there is a difference. For example, a foreign court may have analyzed a reason given in support of a regulation targeting gays—such as a public health rationale rooted in the premise that a restriction on homosexual behavior will halt the spread of AIDS, or a psychological rationale based on the idea that children of gay parents suffer developmentally—and found them to be without merit. A domestic court, facing the same rationales, may legitimately look to those shared experiences abroad in support of its reasoning. In this way, foreign law may aid the Court as it cuts through proffered policy justifications to see what is really going on: is the law based on morality, social custom, religion, or purely invidious discrimination against an unpopular group? Or, alternatively, do some of the state's policy justifications hold water? Once the logical field has been cleared of insubstantial or incorrect rationales—a process in which foreign law can legitimately play a part—a constitutional analysis (under American constitutional doctrine) can take place. This is different from citing foreign opinions or laws simply for their conclusions to support a similar outcome under American law.

When confronted with such genuinely universal questions, we believe it is legitimate and useful to seek out, read, and cite to foreign law as persuasive, though not controlling, authority. When moving beyond this presumption and making wider use of foreign law, the propriety of the citation turns once again upon the underlying mode of constitutional interpretation. The Court should proceed with caution, mindful of the fact that the Constitution is a domestic document drafted in light of a unique history and set of concerns. Just as many foreign nations did not share our view of antitrust policy for many years, or continue to reject our view of the separation of church and state, it would not be surprising if they reached different conclusions about what constitutes cruel and unusual punishment, due process of law, or equal protection. But the framers of our Constitution may have intended that some of its provisions would reflect the shared experiences of other nations, taking into account “a decent Respect to the Opinions of Mankind.”<sup>118</sup> At bottom, this is the fundamental debate underlying the relevance of foreign law.

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<sup>117</sup> Justice Scalia, keynote address, *supra* note 1 (transcript of Q & A available through the Federal News Service, Feb. 21, 2006).

<sup>118</sup> The Declaration of Independence para. 1 (U.S. 1776); *see also* Justice Ginsburg, *Looking Beyond Our Borders*, *supra* note 52, at 330 (“In the value I place on comparative

## The Approach Applied

A few examples from the relevant case law may help to illustrate our approach. Consider the denial of certiorari in *Knight v. Florida*.<sup>119</sup> Under our approach, Justice Breyer's use of foreign law in his dissent falls outside of the presumption we articulate here, since the examples were only used for their conclusions about the meaning of the terms "inhuman, degrading, or unusually cruel."<sup>120</sup> One could, however, imagine a different use of foreign precedent in the same case. If courts in Jamaica, India, or Zimbabwe had examined a more universal and objective question, such as whether a lengthy delay causes damage to the human psyche, the foreign court's observations on the matter could have been of some use. For instance, some foreign courts may have concluded that lengthy delays before an execution cause irreparable mental anguish and suffering. A different court may have confronted the same question and found that delay is a salve to a doomed prisoner. These foreign opinions could be persuasive, just as they would be had they come from a medical journal or law review article. After assessing these judgments, the Court could then factor the evidence into its traditional Eighth Amendment analysis.

In fact, one of the European Court of Human Rights cases on which Justice Breyer relied, *Soering v. United Kingdom*, appears to include this kind of reasoning in its opinion.<sup>121</sup> In *Soering*, the ECHR held that it would constitute "cruel, inhuman, or degrading treatment or punishment" under the European Convention on Human Rights to extradite a defendant to the United States, where he would likely face a lengthy delay between the imposition of his sentence and his execution.<sup>122</sup> The *Soering* Court reasoned that, even though the delay was often a function of "collateral attacks mounted by the prisoner himself in habeas corpus proceedings," the delay still caused "the anguish and mounting tension of living in the ever-present shadow of death."<sup>123</sup> Similarly, elsewhere in the opinion, the ECHR acknowledged "the sentenced person's mental anguish of anticipating the violence he is to have inflicted on him."<sup>124</sup> This question—whether a long delay on death row causes mental anguish and suffering—turns on an understanding of the human psyche, which is a question that is identical across the globe. Under our approach, Justice Breyer would have been on solid ground had he limited his transnational inquiry to this question.

However, *Soering* also stands as a cautionary tale about the value of foreign law. Foreign law should not be placed on a pedestal above other forms of persuasive authority merely because it is exotic. The Court should delve deeply into the foreign precedents to discover if the foreign tribunal really is grappling with the same question, and whether its reasoning is persuasive. The *Soering* Court did not cite any authority for its assertions that delay caused psychological harm. This obviously decreases its utility as persuasive

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dialogue—on sharing with and learning from others—I count myself an originalist in this sense.”).

<sup>119</sup> 528 U.S. 990 (1999).

<sup>120</sup> *See id.* at 995.

<sup>121</sup> *Soering v. United Kingdom*, 11 Eur. Ct. H. R. (ser. A) (1989).

<sup>122</sup> *Id.* ¶ 88.

<sup>123</sup> *Id.* ¶ 106.

<sup>124</sup> *Id.* ¶ 100.

authority. But, just as is the case when a court cites nonbinding domestic courts or legal scholars, it matters how respected foreign judges are, how prolific they are, how well developed the legal system in which they operate is, and what other expertise they bring. Such factors can affect the ultimate value of a foreign precedent. The Court should be wary of bald assertions, even if they address genuinely transnational questions.

As another example of a practical application of our approach, reconsider the use of foreign law in *Atkins* and *Roper*. It is certainly reasonable to conclude that the Court cited foreign law in those cases merely to show that other nations believe that the imposition of the death penalty to a given subset of prisoners (retarded individuals in *Atkins* and juveniles in *Roper*) is morally wrong, and that, consequently, American practice should be brought into conformity with this international norm. However, a close reading shows that the majorities in those decisions arguably used foreign law in the narrower way we describe here.<sup>125</sup>

In *Atkins*, Justice Stevens referenced foreign law (along with religious sentiment and polling data) to support the conclusion that the execution of retarded people was “truly unusual.”<sup>126</sup> Specifically, he cited an *amicus* brief filed by the European Union for the proposition that the “imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”<sup>127</sup> The European Union’s brief did not explore the legal reasoning behind the various countries’ decisions and laws. Instead, it simply listed the countries, courts, and treaties that have rejected the penalty for mentally retarded offenders.

However, Justice Stevens arguably relied on this foreign precedent precisely because it grappled with issues universal to all mankind and independent of nationality, namely the capacity of the human mind. After reviewing the jurisdictions—foreign and domestic—that had rejected the imposition of the death penalty for the mentally retarded, Justice Stevens concluded:

This consensus unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty. Additionally, it suggests that some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards.<sup>128</sup>

To the extent that the Court looked to foreign law in this case because these foreign decision-makers were confronted with the same question as the Court—namely, whether mentally retarded offenders understand right from wrong, or will be deterred by the threat of the death penalty—and reached a reasonable decision, it was in line with our suggested approach. However, as was the case in *Soering*, one must peer deeply into the foreign law to gauge its persuasive effect. Here, the brief upon which Justice Stevens relied focused primarily on a series of UN Human Rights Commission reports which

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<sup>125</sup> *Contra* Larsen, *supra* note 7, at 1292 (“[N]o opinion of a Supreme Court Justice in the Rehnquist Court years has actually looked to the reasons given by a foreign or international decision-maker to support a domestic constitutional interpretation.”).

<sup>126</sup> *Atkins*, 536 U.S. at 316 & n.21.

<sup>127</sup> *Id.* at 316 n.21.

<sup>128</sup> *Id.* at 317.

gradually recognized that mentally retarded individuals should be spared the death penalty.<sup>129</sup> One of the commission's resolutions is typical. The relevant provision simply urges states "[n]ot to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person."<sup>130</sup> Such a conclusory statement, reflecting a basic moral judgment, is less related to the kinds of basic questions about the human mind than Justice Stevens' dicta suggests.

In *Roper*, the Court cited foreign law for the stark proposition that "the United States now stands alone in a world that had turned its face against the juvenile death penalty," but the majority justified its use of foreign law because it "rest[ed] in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime."<sup>131</sup> Again, to the extent that the Court relied on the underlying reasoning of the foreign decisions—that is, the inherent "instability and emotional imbalance" of the immature human mind—the Court's use of foreign law stands in line with our presumption.<sup>132</sup>

The use of foreign law in *Lawrence v. Texas* is more problematic under our approach. Justice Kennedy cites an opinion by the ECHR and its European progeny to undercut what he described as one of *Bowers'* faulty rationales. Although the *amicus* brief that listed these cases did include some discussion of the foreign courts' reasoning,<sup>133</sup> Justice Kennedy's opinion makes no reference to any of it; the opinion cites the brief only for the fact that these countries have followed the ECHR opinion rather than *Bowers*.<sup>134</sup> Moreover, the foreign decisions cited in the brief did not test the validity of various policy justifications, which, as we argued above, would have been a legitimate tool to help the Court seek out the underlying purpose of the Texas statute. Instead, the foreign cases simply interpreted the term "private and family life" as used in the European Convention on Human Rights.<sup>135</sup> In fact, in the principal ECHR case on which Justice Kennedy relies, the only justifications offered by the state in support of its restriction on homosexual sodomy were "the moral attitudes towards homosexuality in Northern Ireland and the concern that any relaxation in the law would tend to erode existing moral standards."<sup>136</sup> The ECHR concluded that this rationale, "without more,"

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<sup>129</sup> See Brief of the European Union in support of the Petitioner 19, No. 00-8727, *McCarver v. North Carolina*, 533 U.S. 975 (2001) (Mem.) (The Court allowed amici from *McCarver* to file their briefs for consideration in *Atkins*).

<sup>130</sup> UN Commission on Human Rights, *Question of the Death Penalty*, E/CN.4/RES/2001/68, § 4(e) (2001).

<sup>131</sup> *Roper*, 543 U.S. at 577-78.

<sup>132</sup> Based on their references to the underlying logic of the foreign law, *Atkins* and *Roper* may be distinguished from *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977), which simply noted that it was "not irrelevant" that "out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue." In *Coker*, Justice White cited the foreign examples only for their conclusions.

<sup>133</sup> Brief of Mary Robinson et al. as *Amici Curiae* Supporting Petitioners 11-12, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 164151.

<sup>134</sup> *Lawrence*, 539 U.S. at 573 & 577.

<sup>135</sup> Brief of Mary Robinson, *supra* note 133, at 10.

<sup>136</sup> *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981), ¶¶ 48, 61.

did not “warrant interfering with the applicant’s private life to such a significant respect” because it was not “necessary to a democratic society” as required by the ECHR’s case law interpreting its convention.<sup>137</sup> This reasoning is, by its own terms, specific to Northern Ireland and the particular treaty at issue. In our view, therefore, Justice Kennedy’s use of foreign law in this manner was inappropriate.

### Conclusion

With a roster of federal judicial nominations in the works, not to mention the possible appointment of one or more Supreme Court justices in the near future, the debate over the use of foreign law in Supreme Court decisions is probably just heating up. It also provides fertile ground for ideological extremism, political pandering, and even xenophobia. Some of the uglier aspects of the public debate may be mitigated if partisans on both sides of the debate understand it for what it is: a deep, enduring, and divisive debate about the meaning of our Constitution and the proper way to interpret it today. Reasoned debate, especially about so weighty a topic, is always a positive development, and it is especially invigorating—and entertaining—to see the justices doff their robes and join the fray.

Looking forward on a more practical level, with so many justices publicly endorsing the practice, the question is not whether the Court will cite foreign law, but how. We argue for a presumption in favor of the use of foreign law when the Court confronts questions that are genuinely the same the world over. Beyond this, the Court should tread lightly, and the result will depend upon the underlying interpretive approach of the jurist. In the end, all of the participants in this national—indeed international—discussion about foreign law would do well to acknowledge that the fundamental debate is distinctly homegrown.

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<sup>137</sup> *Id.*