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

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

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

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

I. THE JUDICIAL DEBATE

Attitudes towards the use of foreign and international law sources in U.S. constitutional interpretation can be grouped under three broad headings, although the views of individual justices do not fall neatly or consistently into discrete categories. For convenience, I label these attitudes "road to perdition," "tempest in a teapot," and

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

"ignore at our peril." Although the "road to perdition" view is generally associated with the political right, and the "ignore at our peril" view is associated with the political left, this is not an impenetrable division, nor are individual justices always rooted in one camp to the exclusion of the others. For example, many commentators have cited Chief Justice William Rehnquist's recommendation that U.S. judges look beyond U.S. borders for persuasive reasoning about constitutional questions, even though he has elsewhere criticized this practice. The Chief Justice wrote:

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

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

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

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

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

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

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

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

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

experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem. . . . "[6] And Justice Anthony Kennedy's belief that foreign sources can be relevant for U.S. judges formed the subject of a lengthy article in *The New Yorker*, which quoted him as follows:

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

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

> That 40% of our States do not rule out capital punishment for 15-year-old felons is determinative of the question before us here, even if that position contradicts the uniform view of the rest of the world. We must never forget that it is a Constitution for the United States of America that we are expounding. The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so "implicit in the concept of ordered liberty" that it occupies a place not merely in our mores but, text permitting, in our Constitution as well. *See Palko v. Connecticut,* 302 U.S. 319, 325 (1937) (Cardozo, J.). But where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution. In the present case, therefore, the fact that a majority of foreign nations would not impose capital punishment upon persons under 16 at the time of the crime is of no

[6] *Printz v. United States,* 521 U.S. 898, 977 (Breyer, J., dissenting).

[7] Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court,* The New Yorker, Sept. 12, 2005, *available at* http://www.newyorker.com/archive/2005/09/12/050912fa_fact.

[8] 487 U.S. 815, 826–30 (1988).

> more relevance than the fact that a majority of them would not impose capital punishment at all, or have standards of due process quite different from our own.[9]

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

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

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

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

As these quotations indicate, and as others have observed, one's opinion about the potential relevance of foreign and international law sources to the question of what constitutes "cruel and unusual punishment" depends in no small part on one's view of the role of judges in a constitutional democracy. In my view, it also depends critically on one's view of what the *relevant community* is for determining the meaning of concepts such as decency, cruelty, and due process: the citizenry of a particular state within the United States;[13] the United States population as a whole, either in the

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

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

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

[12] *Id.* at 325.

[13] As Chief Justice Rehnquist put it in *Atkins,* "The question presented by this case is whether a national consensus deprives Virginia of the constitutional power to impose the death penalty on capital murder defendants like petitioner. . . . " *Id.* at 321.

late eighteenth century or today; or the wider global community of those who share certain core democratic values embodied centrally, but not exclusively, in the U.S. Constitution.

II. PUBLIC REVERBERATIONS

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

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

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

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

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[14] 539 U.S. 558 (2003).

[15] 478 U.S. 186 (1986).

[16] 543 U.S. 551 (2005).

[17] 492 U.S. 361 (1989).

[18] *Lawrence,* 539 U.S. at 572.

[19] *Dudgeon v. United Kingdom,* 45 Eur. Ct. H.R. (ser. A) (1981).

[20] *Lawrence,* 539 U.S. at 576-77.

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

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

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

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

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

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

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

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

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

[24] 151 Cong. Rec. S3110 (daily ed. Mar. 20, 2005) (statement of Sen. Cornyn).

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

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

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

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

> Thus the broader long-term resolution to the problem that House Resolution 97 [the 2005 version of the Feeney resolution] usefully addresses is the confirmation to the Supreme Court of originalist Justices like Scalia and Thomas who understand that the Constitution constrains them to construe its provisions in accordance with the meaning those provisions bore at the time they were promulgated—Justices, in short, who understand that the Constitution does not give them free rein to impose their own policy preferences on the grand questions of the day.[29]

A central goal of these proposals, then, is to promote a certain method of constitutional interpretation. Although the proposed resolutions would not be binding on courts, Representative Feeney has indicated: "my friend from Virginia [Rep. Robert

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[25] *Id*.

[26] *Id*.

[27] *Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary,* 109th Cong., 1st sess. (July 19, 2005) at 72, *available at* http://commdocs.house.gov/committees/judiciary/hju22494.000/ hju22494_0.HTM [hereinafter *Hearing*].

[28] *Id*. at 35.

[29] *Id*. at 32.

Scott] suggested that all we could really hope for with the resolution is to chill certain activities from the bench; and I have to admit that that is entirely what some of us intend to do with this."[30]

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

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

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

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

> I continue to believe that this is a big fuss over nothing. No case has ever turned on a foreign source. No foreign source has ever been treated as binding, and this phenomenon of citing foreign sources is certainly nothing new. What is really dangerous is the threats that accompany our deliberations, and the suggestion that Congress may exercise its power to tell the courts what is or is not appropriate, what is or is not an appropriate way to consider a complex issue.[32]

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

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[30] *Id*. at 61.

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

[32] *Hearing, supra* note 27, at 12.

[33] *See, e.g.,* Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty,* Wash. Post, Apr. 9, 2005, at A3, *available at* http://www.washingtonpost.com/wp-dyn/articles/A38308-2005Apr8.html.

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

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

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

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

Perhaps these lengthy quotations give these legislative proposals more attention than they are due. But the challenge of maintaining and renewing the legitimacy of constitutional provisions, interpreted through the process of judicial review, depends on the perceptions of the people these provisions and interpretations ultimately impact. Arguments for an exclusively self-referential jurisprudence based on a purported foreign threat to U.S. sovereignty are easy for the public to understand, and can be compelling. Coupled with misunderstanding or misinformation—such as the false belief that U.S. justices and judges are treating foreign sources as binding in constitutional cases—objections to the citation of non-U.S. sources have become incendiary.[36]

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[34] S. 520, Title II, Sec. 201, 109th Cong., 1st Sess. (March 3, 2005); H.R. 1070, Title II, Sec. 201, 109th Cong., 1st Sess. (March 3, 2005).

[35] H.R. Res. 2898, 110th Cong., 1st Sess. (June 28, 2007).

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

III. OBJECTIONS AND RESPONSES

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

A. INSTITUTIONALIST OBJECTIONS

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

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

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

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

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

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

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

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

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

The second situation involves references to non-U.S. precedents as part of an attempt to elucidate broad conceptions, such as "the concept of ordered liberty"[45] that animates the requirement of due process. Unlike references for empirical purposes, this category of references lies more in the realm of political and legal theory than the realm of policy. The idea here is that the experiences and conclusions of

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

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

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

[43] *Id.* at 489.

[44] *Id.* at 521–22 (Harlan, J., dissenting).

[45] *Palko v. Connecticut,* 302 U.S. 319, 325 (1937) (Cardozo, J.).

other jurisdictions are relevant not because of the experiential lessons they teach, but because they are part of a common quest to identify and articulate the basic elements of human dignity that ought to be protected by the rule of law in a "civilized" society. Foreign and international law sources can be relevant in this context not because they are binding, or even because they evidence any sort of positive legal consensus in the world community, but because they get it (the right) right.[46]

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

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

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

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

B. INSTRUMENTALIST OBJECTIONS

For those who view the judiciary as Ulysses chained to the mast of "originalism," foreign and international law sources represent yet another siren song luring judges astray. In *Conroy v. Aniskoff*, Justice Scalia noted that "Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends."[48] He reprised this metaphor in *Roper v. Simmons*, stating that "all the Court has done today, to borrow from another context, is to look over the heads of the crowd and pick out its friends."[49]

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[46] Gerald Neuman usefully characterizes this aspect of a legal right as the "suprapositive" aspect, which "reflects the claim of the right to normative recognition independent of its embodiment in positive law." Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation,* 98 Am. J. Int'l L. 82, 84 (2004).

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

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

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

Chief Justice John Roberts popularized this image during his confirmation hearings.[50] In his view, "relying on foreign precedent doesn't confine judges. It doesn't limit their discretion the way relying on domestic precedent does."[51] However, contrary to the Chief Justice's assertion, the use of *any* non-binding authority involves judicial discretion, regardless of where that authority comes from.

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

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

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

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

[51] *Id.*

[52] Concededly, researching foreign and international law sources might increase a judge's workload (or at least that of his or her law clerks), but this does not inevitably magnify the degree of discretion reflected in that judge's opinions. Objections to increasing the quantity of sources might come under the rubric of what David Strauss has labeled "conventionalist" arguments for relying exclusively on U.S. precedents in constitutional interpretation. *See* David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle,* 112 Yale L.J. 1717, 1738 (2003).

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

> reports also make clear that the reasoning and holding in *Bowers* has *not* been rejected in much of the civilized world.[54]

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

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

C. INHERENTIST OBJECTIONS

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

The debate between "originalists" and "evolutionists" (or between a "dead" constitution and a "living" one) could be framed as a debate about which community's mores and commitments should provide the touchstone for U.S. constitutional interpretation: the community that existed in the United States at the time the Constitution was adopted, or the contemporary national community informed by, but not restricted to, eighteenth-century understandings.[56] Arguments about federalism are likewise, at bottom, arguments about which community's standards ought to govern interactions among individuals in a particular geographic area (state, federal, or, in certain instances, tribal). The inherentist view accepts the appropriateness of looking to the contemporary national community, but disputes that any non-domestic sources are relevant to this task unless they have been explicitly endorsed by the national

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

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

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

legislature (for example, in the form of a self-executing treaty, or a non-self-executing treaty accompanied by implementing legislation). While inherentists would generally accept that Illinois state decisions, for example, might be relevantly similar for the purposes of judicial decision-making on similar state law issues in Vermont, they would not extend this reasoning to encompass jurisdictions beyond U.S. borders.

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

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

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

One could point to abysmally low voter turnout rates, the *de jure* and *de facto* disenfranchisement of large segments of American society, and the various dysfunctions of our system of representative government to impugn the "democratic

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[57] Kenneth Anderson, *Foreign Law and the U.S. Constitution: The Supreme Court's Global Aspirations,* Pol'y Rev. (June–July 2005), *available at* http://www.hoover.org/publications/policyreview/2932196.html.

[58] *Id.*

[59] *Id.*

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

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

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

IV. CONCLUSIONS

The use of foreign and international law sources as non-binding authority in constitutional adjudication has created a furor in recent years. In part, this is attributable

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

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

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

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

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

The confirmation of Chief Justice Roberts and Associate Justice Alito might quell concerns over what some perceived as the Supreme Court's wayward leanings in cases such as *Lawrence* and *Roper*. This is both because the Court's decisions are likely to be more politically conservative (although perhaps just as—if not more—judicially "activist"), and because foreign and international law sources are not likely to figure prominently in these justices' written opinions. This development lends credence to the "tempest in a teapot" view of the debate over foreign and international law sources, at least for now. Even so, discussions about how open U.S. judges should be to learning about, and learning from, their foreign counterparts will continue. Participating in international judicial dialogue should be viewed as a means of strengthening, not weakening, our commitment to the democratic values embodied in the U.S. Constitution.