THE USE OF INTERNATIONAL LAW IN JUDICIAL DECISIONS

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I am delighted to be here today, and I thank the Federalist Society for inviting us to discuss such a timely and engaging topic. I am also honored to be here with Judge Wald, who has rendered such distinguished and collegial service to the federal bench. A ceremony dedicating Judge Wald's portrait at the D.C. Circuit this past month demonstrated the esteem and affection in which she is held by all who served with her.

The explicit use of international law in judicial decisions is increasing. More importantly, I think, the nature of the reliance is changing. The Court has recently turned to foreign courts to support key positions in major rulings on wholly domestic social issues. These changes in the way that the Court has used foreign precedents and the frequency with which it has done so are receiving increased attention.

Throughout our history, the use of foreign precedents to resolve purely domestic constitutional questions has been rare. In several cases, the Court even rejected the relevance of a comparative law perspective to constitutional decision-making. In *Stanford v. Kentucky*, when faced with substantial evidence that other countries condemned the execution of minors, the Court emphasized that it is "*American* conceptions of decency that are dispositive" for interpreting the Eighth Amendment.[1] In *Printz v. United States*, the Court rejected the dissent's argument that other nations' experiences with federalism should "cast an empirical light on the consequences of different solutions to a common legal problem."[2] And in *Raines v. Byrd*, the Court denied standing to congressmen challenging the Line

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1. 492 U.S. 361, 369 n.1 (1989).
2. 521 U.S. 898, 921 n.11 (1997); *id.* at 976-77 (Breyer, J., dissenting).

Item Veto Act. After noting that other countries permit such suits, the Court stated that the practices of foreign nations were irrelevant to its decision.[3]

But in the past two terms, the Court has increasingly turned to foreign sources, and has sometimes used them to support contestable propositions of constitutional law. In *Atkins v. Virginia*, the Court reversed its perspective in *Stanford v. Kentucky*, relied upon the observation that other nations "overwhelmingly disapprove[]" of executing mentally retarded offenders, and found the practice to be unconstitutional.[4] In *Grutter v. Bollinger*, a concurring opinion expressly relied upon several international conventions and treaties to support the proposition in the majority opinion that race-conscious measures should last as long as necessary to achieve their intended objectives.[5] And in holding in *Lawrence v. Texas* that laws sanctioning certain intimate conduct in same-sex relationships violate the Constitution, the Court cited a British Parliament report, a Parliamentary Act, and a decision by the European Court of Human Rights.[6] As Professor Mark Tushnet has recognized, never before in our history has the Court relied so directly on foreign precedents to support a position material to the Court's holding.[7]

One may agree or disagree with the result in these cases. The point here is not result, but methodology. One cannot dispute the unmistakable trend towards relying on international practice to resolve important domestic constitutional questions. It is this trend that gives me pause.

To begin with, certain principles are clear. In an age of increasing globalization, governments interact more and face common challenges more than ever before. So of course we have much to learn from other countries, although, I might add, learning from the experience of other states and nations is at least as much a legislative as a judicial enterprise.

I am proud to serve on the Judicial Outreach Advisory Board of the American Society of International Law. Its Handbook rightly notes that

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3. 521 U.S. 811, 828 (1997).
4. 536 U.S. 304, 316 n.21 (2002).
5. 539 U.S. 306, 342-43 (2003) (Ginsburg, J., concurring).
6. 123 S. Ct. 2472, 2481 (2003).
7. *See* Mark Tushnet, Transnational/Domestic Constitutional Law 3-6, 37 LOY. L.A. L. REV. (forthcoming 2004), *available at* http://ssrn.com/abstract=437382.

> whether it is the integrated international economy and trade disciplines, nuclear power and proliferation, space exploration and computer applications, environmental pollution and habitat degradation, or intellectual properties and entertainment, we are gradually living in a shrinking, interdependent world. International law has been compelled to respond to these functional demands of the international community.[8]

So of course international law should play a part in American judicial reasoning. It would be odd if it did not. In some areas, foreign and international law is made relevant by our Constitution, by statute or treaty, by the well-developed principles of common law, by overwhelming considerations of comity, or simply by private commercial agreement of the parties. But when judges, on their own motion and without any direction by Congress or the Constitution decide to make such precedents relevant, we are dealing with an entirely different question.

So judges must not wade, *sua sponte*, into international law's deep blue sea. Rather, we ought to ask: How does American law make foreign or international standards relevant? Why should we ask this threshold question? Because it is important that the United States speak with one, not multiple, voices in foreign affairs. The Constitution is explicit on this: Article I, Section 10 says that "[n]o State shall enter into any Treaty [or] Alliance" with a foreign power.[9] The Constitution leaves the conduct of foreign and military affairs largely to the political branches—not the courts. The diplomatic credibility of the United States would plummet if the actions and pronouncements of the executive and legislative branches in foreign and military matters were later repudiated and contradicted by judicial decree.

Where courts go too far, in my view, is where they rely upon international (and mostly European) precedents when resolving important and contentious social issues. This "internationalization" of the Constitution on domestic social issues raises three types of problems.

The first is that an over-reliance on foreign precedents may serve to compromise judicial decisions in the eyes of the American public. Judges serve as unelected stewards of the Constitution whose power rests in part on their ability to persuade. While majorities may simmer

8. David J. Bederman et al., *International Law: A Handbook for Judges*, 35 A.S.I.L. STUD. IN TRANSNAT'L LEGAL POL'Y 14-15 (2003).

9. U.S. CONST. art. I, § 10.

when judges vindicate the rights of minorities, in the long run judges can promote respect for their decisions by appealing to principles that Americans can relate to as part of an American constitutional tradition. The counter-majoritarian difficulty is thus alleviated when judges draw upon common principles and ideas that form our shared American heritage.

But when judges rely on foreign sources, especially for difficult constitutional questions concerning domestic social issues, they move the bases for judicial decision-making even farther from the realm of both democratic accountability and popular acceptance. They aggravate the risks already inherent in having unelected officials overrule popular enactments by creating the perception that foreign sentiment shapes domestic law. To be sure, examples from other countries may be illuminating. But the Court's legitimacy must ultimately rest on reliance and reference to the American Constitution and to American democratic outcomes, from which their judicial authority springs. By relying on foreign laws and rulings over which the American people have no control—either directly through the power of election or even indirectly through the process of judicial appointment—judges risk estranging and disempowering the public. I fear that the internationalization of our constitutional values may thus undermine public acceptance of our judicial system.

A closely related danger is that reliance on foreign precedents may stimulate popular perceptions that judges are out of touch with American culture. The risks of a common perception of judicial distance and removal should not be underestimated. The detachment and insulation which an independent judiciary properly enjoys should not be endangered by pronouncements that appear targeted at foreign and domestic elites rather than the American public at large. The power of persuasion which sustains judicial authority must not neglect those very people whose acceptance of judicial decree is most essential. Americans treasure their diversity and their identity. The great Willa Cather novels, *My Antonia* and *O Pioneers!*, still play a prevalent role in the American psyche, and the distance from American to European modes of thought remains in some vital particulars more psychological than physical. The distinguished Harvard historian, Bernard Bailyn, has noted that the power of the American Constitution derived from the fact that its framers were proud and stubborn provincials, that they did not accept all the received wisdom of the Continent, and that, for example, the

animating constitutional idea of dual and concurrent sovereignties actually rejected the contrary notions of the French theorist Montesquieu.[10]

This brings me to a second major problem. Over-reliance on foreign precedents conflicts with the structure and history of our own Constitution. Some countries, such as South Africa, have constitutions that explicitly call for the consideration and incorporation of foreign precedents into national constitutional law.[11] The American Constitution is far more skittish on this score.[12]

And the ad hoc judicial practice of incorporating foreign sources into American constitutional decision-making overlooks the distinct structural and historical features of our Government. The American Constitution was unique in creating a federal government of limited and enumerated powers and retaining considerable authority for the states. One great strength of our founding document was that its conception of federalism broke away from the age-old European model of hierarchy. American federalism was a clear rejection of the values that European governments held at the time. And it continues today to serve as a unique national compromise that vests states with broad and residual powers of governance.

Nowhere is our dual sovereignty more important than in dealing with contentious social issues. This is not the forum for debating whether courts are right to create national standards of conduct on difficult social questions, rather than deferring to the federalist framework and allowing the states to wrestle with these issues. There are good arguments for permitting state and local governments to determine social standards and values, and there are strong arguments for protecting minority rights on a national scale; these arguments have been well-rehearsed.

But regardless of how one comes out on that question, it is another matter altogether when courts embrace foreign standards as a justification for intervening on social questions historically left to the states. Appeals to *national* values may in some cases mitigate the

10. *See* BERNARD BAILYN, TO BEGIN THE WORLD ANEW: THE GENIUS AND AMBIGUITIES OF THE AMERICAN FOUNDERS 31-36 (2003).

11. *See, e.g.*, S. AFR. CONST. § 39(1) ("When interpreting the Bill of Rights, a court, tribunal, or forum . . . . (b) must consider international law; and (c) may consider foreign law.").

12. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 10 ("The Congress shall have Power...[t]o define and punish . . . Offenses against the Law of Nations . . . ."); art. VI, cl. 2 ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .").

erosions of federalism caused by overruling state laws, but appeals to *international* standards diverge from the letter of the Constitution and pose a profound threat to our federalism. Simply from a historical perspective, it is ironic that Americans, who broke sharply from the European model in establishing a federalist structure, now look to Europeans in undermining it. If state and local governments provide citizens a sense of control and empowerment in our democratic system, resort to international standards will convey a correspondingly magnified sense of helplessness and disenfranchisement.

A third set of problems concerns the methodology with which judges approach foreign sources. Which *countries* should judges consider, and which *issues* should judges address in a comparative context? The decision as to the number and type of countries to consider in comparative law decision-making is a complex one. It is particularly troublesome when approaching social issues because of the broad diversity of social practices throughout the world. Should judges be able simply to highlight examples from those countries that bolster their arguments and yet ignore other nations whose practices contradict their claim? The number and diversity of nations make this dilemma all the more acute.

Judges have not sought to consider these questions in a systematic way. To date, the foreign sources that have been cited come largely from Europe. Obviously, our historical connections with our European friends may make reliance on European cases more appealing. But American citizens come from *all* corners of the globe. I worry that judges will appear to indulge an unfortunate Eurocentrism by overlooking the practices of Asian, Middle Eastern, African, and Latin American states. Moreover, the Court's piecemeal approach has done little to illuminate why the experiences of some European countries have been chosen and others omitted. If the use of comparative law continues to expand, then we would need to think much more about which country's experiences are sufficiently relevant to our own to use as examples in our own case law. As the relevant academic literature suggests, the study of comparative law involves a careful assessment of different countries' historical, political, and demographic characteristics. Before importing another nation's views or law on a particular issue into our own law, we must determine whether that nation's history, governmental structure, demographics, and other relevant indicia are similar to our own. The

problems with this most sensitive of inquiries are legion.

Finally, I would note that the *increase* in the use of international sources has been matched by the *selectivity* in the use of international sources. In recent cases, comparative analysis has appeared to be a one-way ratchet toward expansion of individual rights and toward restriction of democratic prerogatives. The countries that take a more traditionalist view of social questions are almost never referred to. And foreign experiences seem to be consulted only on issues in which the United States is more traditional than other nations. Is this fair? Is this balanced? Again, my point today pertains not to results reached in recent decisions but to methodology. I hope there will be some recognition that the course on which courts are newly embarked presents the oldest form of legal danger—that of a treacherous and slippery slope.

In closing, I would like to reiterate my profound respect for the Supreme Court as an institution and for each of its members. All of us who serve in the federal judiciary have great appreciation for the Court and its continued contributions to American life. I hope I have also made clear my conviction that international law has many good and constructive places in our jurisprudence.

But the use of foreign sources in judicial deliberations also poses heretofore unexplored questions of legitimacy, accountability, selectivity, and scope. This is not some tempest in a teapot. It goes to the heart of how we interpret and conceive our founding document. The use of international law to resolve social issues of domestic import runs counter to the democratic accountability and federal structure envisioned by our Constitution. The Constitution is a distinctive American contribution to human freedom, a freedom that is due in no small measure to self-governance and judicial restraint. If we wish others to embrace those traditions—and I do—we must remain true to them ourselves. Those of us who interpret the Constitution must respect the source from which our authority alone can spring, a governing compact formed over two centuries ago by those who envisioned above all the authority expressed in and through the rule of law by the people of America.

I thank you.