INTERNATIONAL LAW AS A RESOURCE IN CONSTITUTIONAL INTERPRETATION

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I.

Despite recent polemics, the use of international law in constitutional interpretation, as one factor among others, is highly traditional and eminently proper. Some international law is too important to the place of the United States in the world for our constitutional jurisprudence to ignore; some international law provides useful functional or normative insights on which constitutional adjudication can draw.

As a matter of division of labor,[1] I will concentrate here on the use of international—as opposed to foreign—law in constitutional interpretation. Some criticisms of recent Supreme Court decisions have coupled attacks on these two categories of law, and some criticisms suggest a lack of awareness that there is any difference between them. In fact, there are important differences between the two categories, and the arguments for their relevance do not entirely coincide. At the same time, the two categories partly overlap.

Judge Frank Easterbrook and Professor Steven Calabresi, in their contributions to this symposium, appear to treat these categories as interchangeable for purposes of their arguments about "foreign law," and within the limits of their respective

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1. This limitation of scope was intended to avoid excessive overlap with Professor Vicki Jackson's contribution to this symposium. Vicki C. Jackson, *Constitutional Law and Transnational Comparisons: The* Youngstown *Decision and American Exceptionalism*, 30 HARV. J.L. & PUB. POL'Y 191 (2006). In doing so, I do not mean to reject the propriety or usefulness of comparison with foreign constitutions, although the arguments for and against such comparisons are somewhat different.

methodologies that may be appropriate.[2] From the broader (and I believe more justifiable) perspective taken in this Article, the differences can be significant.

The category of "international law" covers a wide variety of different kinds of norms, such as customary international law, multilateral treaties, and bilateral treaties. It includes treaties to which the United States is a party, treaties that we have chosen not to ratify, and treaties that we are not eligible to ratify. Some international law is part of the basic legal architecture of the world we live in. Some international law is particularistic and ephemeral.

These distinctions are relevant to how various norms of international law should be used in constitutional interpretation, but their existence should not disqualify the entire category from consideration. International law as such is not ephemeral and cannot be dismissed as a pack of "foreign moods, fads or fashions."[3]

The category of "foreign law" could be understood principally as referring to the domestic legal systems of foreign states, including their national constitutions, statutes, and other domestic norms.[4] Sometimes discussions focus even more narrowly on foreign *constitutional* law, but the content of national constitutions varies greatly, and some systems give statutory answers to questions that other systems treat as constitutional. "Foreign law" can also be understood more broadly as further including the international obligations of a foreign state, and especially those that do not bind the United States, such as regional treaties on other continents, bilateral treaties among foreign states, and global multilateral treaties that the United States has not ratified. Thus, some "foreign law" may also be "international law."

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2. *See* Frank H. Easterbrook, *Foreign Sources and the American Constitution*, 30 HARV. J.L. & PUB. POL'Y 223 (2006); *cf.* Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 859 (2005) (referring to international law, such as treaties, as foreign law). Professor Calabresi participated in the panel discussion from which this Article derives.

3. Foster v. Florida, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring in denial of certiorari) (dismissing foreign and international views regarding lengthy detention on death row).

4. Because the institutional structures of foreign states may differ, the labels they use to describe subcategories of their norms may not correspond to those employed in the United States.

In recent cases that have excited controversy, such as *Atkins v. Virginia*,[5] *Lawrence v. Texas*,[6] and *Roper v. Simmons*,[7] the Supreme Court has primarily cited to foreign domestic law and to international law binding on other countries. The international sources included regional human rights treaties and jurisprudence thereunder, and the United Nations Convention on the Rights of the Child, which the United States has not ratified. The Court in *Roper* also noted the prohibition on the juvenile death penalty in the International Covenant on Civil and Political Rights, which the United States did ratify in 1992, but with a unique reservation excluding that particular provision.[8]

Treaties ratified by the United States without pertinent reservation, on the other hand, are not foreign law at all. The Supremacy Clause of the U.S. Constitution declares them to be supreme law of the land.[9] Treaties may be viewed as having a foreign aspect, in that the United States cannot adopt them unilaterally, and cannot modify them without the consent of treaty partners.[10] But the United States enters into treaties as an act of national will, even if its choice set is constrained by the need to accommodate others.

Customary international law arises less transparently from a variety of processes of interaction among states. It is traditionally described as resulting from a pattern of state practice accompanied by a belief in legal constraint (*opinio juris*).[11] The United States is usually a major and influential participant in these processes, but some rules may arise without its active

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5. 536 U.S. 304, 316 n.21 (2002) ("[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.").

6. 539 U.S. 558, 576–77 (2003) (noting that the European Court of Human Rights and other countries have recognized the right of homosexual adults to engage in consensual intimate conduct).

7. 543 U.S. 551, 575–78 (2005) (referring to foreign and international law prohibiting the death penalty for juvenile offenders).

8. *Id.* at 576.

9. U.S. CONST. art VI, cl. 2.

10. Under constitutional understandings in the United States, Congress can enact legislation that violates an earlier treaty, but such legislation does not dissolve U.S. obligations to treaty partners. The United States may be able to withdraw from (or "denounce") a treaty, but only at the cost of releasing its treaty partners from their reciprocal obligations.

11. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102(2) (1987) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.").

participation. More rarely, a customary norm may arise despite persistent U.S. objection, in which case the United States would ordinarily not be bound by the norm internationally.[12] Otherwise, customary international law obligates the United States on the international plane, and is presumptively law within the United States as well, although Congress can countermand it domestically. Thus, different customary international norms may enjoy different degrees of U.S. consent. In light of all this background, how does international law relate to U.S. constitutional interpretation?

II.

Methodologically, it is important to be realistic about the practice of constitutional interpretation. We should certainly be alert to the defects of international law, but at the same time we should not contrast a realistic account of international lawmaking with an idealized—or worse, fictionalized—account of U.S. constitutional interpretation.

It is necessary to begin with some preliminary words about "originalism," which is often put forth as an argument against the use of international or foreign law in constitutional interpretation. For example, in a 2004 address Justice Antonin Scalia based his argument against the use of modern foreign law in constitutional interpretation entirely on the contrast between originalism and the "living Constitution," insisting that for him the meaning of a constitutional right today should be "exactly what it was when it was adopted in 1791."[13] If constitutional interpretation proceeded solely by determining the historical public meaning of words and phrases in the text of the Constitution, then later international law might be irrelevant to the interpretive task.

Alternatively, even a purely originalist inquiry might conclude that the founding generation expected international law

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12. Under the persistent objector doctrine and its jus cogens exception, a state that persistently objects to a newly emerging rule of customary international law will not be bound by the rule, unless the rule has a (rare) peremptory character (jus cogens). *See id.* § 102, cmts. d & k.

13. Justice Antonin Scalia, Keynote Address at the American Society of International Law Annual Meeting: Foreign Legal Authority in the Federal Courts (Apr. 2, 2004), *in* 98 AM. SOC'Y INT'L L. PROC. 305, 306 (2004).

to be a resource in constitutional interpretation.[14] This would hardly be surprising with regard to certain constitutional provisions, which openly refer to international law in a manner that could require updating as international law evolves.[15] But more broadly, eighteenth century lawyers generally viewed international law as grounded in natural law,[16] and the courts have used international law in construing the Constitution from an early date. It could be a rather difficult puzzle for a consistent originalist to analyze the proper consequences of these propositions two centuries later, after the jurisprudential assumptions of international law have themselves evolved, first through the ascendance of positivism in the nineteenth century, and then through the tempering of positivism by the human rights paradigm in the late twentieth century.

But the consistent originalist is largely a hypothetical construct. No Supreme Court Justice has operated as a consistent originalist, including Justice Scalia.[17] An originalist would have to take very different positions than Justice Scalia on regulatory takings, affirmative action, the unitary executive, and campaign finance, among other issues. Ironically, Justice Scalia wrote one of his best-known condemnations of resort to foreign law in *Printz v. United States*,[18] a decision imposing for the first time an absolute rule against federal "commandeering" of state

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14. *Cf.* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 886–87 (1985) (emphasizing the complexity and diversity of the founding generation's "interpretive intentions").

15. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 10 (authorizing Congress to "define and punish . . . . Offences against the Law of Nations"); *id.* art. II, § 2, cl. 2 (authorizing the President, with the advice and consent of the Senate, to "make Treaties" and "appoint Ambassadors").

16. *See* Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 822 (1989) ("In the eighteenth century a consensus existed that the law of nations rested in large measure on natural law."); G. Edward White, *The Marshall Court and International Law: The Piracy Cases*, 83 AM. J. INT'L L. 727, 728 (1989).

17. Perhaps this point is overstated, as it may be too soon to identify the methodologies on which Chief Justice John Roberts and Justice Samuel Alito will settle. Nor do I mean to criticize Judge Frank Easterbrook, who argues from an originalist position on this panel. As a court of appeals judge, he has been obligated to follow non-originalist Supreme Court precedent in his decisions. If he were appointed to the Supreme Court, he might become the first consistent originalist Justice.

18. 521 U.S. 898, 922 n.11 (1997) ("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.").

executive officials to enforce federal law, despite an ambiguous historical record that was admittedly "not conclusive."[19]

In reality, original intent or meaning is at most one factor that contributes to constitutional interpretation, and not the only one. Personally, I think that this is desirable, but more importantly, it is true.

Moreover, anyone who has studied constitutional law knows that constitutional doctrine does not operate by simply applying a clause of the Constitution to the facts of the case at hand. The text of the Constitution indicates broad principles and concepts but rarely gives express instructions, or even hints, of how they are to be reconciled when they come into conflict. As Professor Richard Fallon has explained:

> [A] distinction exists between constitutional doctrine and the Constitution itself; the Supreme Court must sometimes frame doctrinal tests that cannot be linked directly, by ordinary interpretive means, to the meaning of the norms that those tests implement. What is more, the Court must not only take into account the practical adequacy of one or another test to protect underlying values, but must also weigh the costs, in practical and constitutional terms, of adding or subtracting increments of judicial protection.[20]

The Constitution does not tell us to apply strict scrutiny,[21] or the rational basis test,[22] or a three-pronged standing doctrine,[23] or the *Wickard* aggregation principle.[24] These are all subsidiary instruments of constitutional doctrine created in the twentieth century to give effect to the Constitution. The pervasive tech-

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19. *Id.* at 918. The majority opinion also incorporated the non-originalist argument that state enforcement of federal law would violate the unitary President's authority to control federal administration. *Id.* at 922–23. *But see id.* at 923 n.12 (admitting that "unitary" enforcement can also be undermined by the historically impeccable practice of voluntary state administration of federal law).

20. Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 66 (1997).

21. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (overruling prior precedent and applying strict scrutiny to affirmative action in federal contracting).

22. *See* Vill. of Willowbrook v. Olech, 528 U.S. 562 (2000) (per curiam) (upholding equal protection claim based on intentional differential treatment of an individual lacking a rational basis).

23. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (invalidating congressional grant of standing to any person to challenge violations of the Endangered Species Act).

24. *See* Gonzales v. Raich, 545 U.S. 1 (2005) (citing Wickard v. Filburn, 317 U.S. 111 (1942)); United States v. Lopez, 514 U.S. 549 (1995) (same).

nique of balancing is itself a twentieth century construct.[25] Given the inevitable element of judicial creativity in crafting doctrine, why would the Supreme Court be forbidden to look at international law when designing, or modifying, such rules?

III.

International law provides both a factual reality that constitutional law must inevitably take into account, and normative standards that may assist in constitutional interpretation. Some constitutional provisions refer openly to international law and institutions, like treaties, ambassadors, war, and offenses against the law of nations. The effective meaning of these provisions has evolved, as international law and institutions have evolved, rather than be frozen in the eighteenth century.[26] These clauses may provide the most obvious warrant for referring to contemporary international law in constitutional interpretation,[27] but international law has always played a broader role.

It is unnecessary to demonstrate in this Article the Supreme Court's interpretive use of international law, because Professor Calabresi has himself described part of the evidence in a lengthy article, concluding that "the Court has relied on such sources [foreign or international] to some extent throughout its history."[28] Even fuller documentation can be found in a recent article by Professor Sarah Cleveland.[29]

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25. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

26. *See In re* Yamashita, 327 U.S. 1 (1946) (recognizing congressional power to punish violations of the contemporary laws of war); United States v. Arjona, 120 U.S. 479 (1887) (recognizing congressional power to punish based on contemporary international obligation to protect against the counterfeiting of foreign securities).

27. It might be possible to give these clauses static meaning, requiring express constitutional amendment as the scope of treaty-making expanded or as the offenses against international law multiplied. One could limit the treaty power to authorizing treaties with foreign states, and not treaties with international organizations, or one could even limit it to treaties with those states that existed in 1789, such as Great Britain and France, and not newer states, such as Canada and Mexico. The Supreme Court has not done so.

28. Calabresi & Dotson Zimdahl, *supra* note 2, at 755 (discussing use of both foreign and international law).

29. Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006).

The decisions are numerous, and various authors propose various classifications. Here it may be useful to suggest the following (potentially overlapping) categories. Some decisions concern the external sovereignty of the United States, and its interaction with the international system of states.[30] Others concern the internal structure of the United States: the respective powers of the federal branches;[31] the division between federal and state power;[32] the relations between sister states, treated as analogous to independent nations;[33] or the relations between the federal government and its non-state territories.[34] A third category of decisions addresses the relationship between federal or state government and individuals, including limitations posed by individual rights.[35]

All of these uses of international law are essentially voluntary. International law does not require its norms to be given constitutional status even when they are directly at issue, let alone when they are relevant only by analogy (as in the sister-state federalism context). From the international legal perspective, the crucial point is that a state should comply with its international obligations by whatever means, and cannot use its domestic constitutional norms as an excuse for failing to do so (although it can use them as a reason for declining to take on inconsistent international obligations).[36] Nor does international

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30. *See, e.g.*, Cunard S.S. Co. v. Mellon, 262 U.S. 100 (1923) (construing the geographical scope of the Eighteenth Amendment in light of international law concerning regulatory power over foreign vessels in territorial waters).

31. *See* Brown v. United States, 12 U.S. (8 Cranch) 110, 125, 128–29 (1814) (holding that under modern international law a declaration of war does not automatically confiscate enemy property within the nation's territory, and that further legislation is required before the executive or the judiciary may do so).

32. *See* Chae Chan Ping v. United States, 130 U.S. 581, 604–05 (1889) (concluding that the national government rather than state governments possessed inherent sovereign power to exclude foreign nationals from the country).

33. *See* Pennoyer v. Neff, 95 U.S. 714, 722–23 (1878) (finding that, under principles of public law applicable to independent states, Oregon's exercise of jurisdiction over a resident of another state violated due process).

34. *See* Jones v. United States, 137 U.S. 202, 212 (1890) (holding that, in light of international law, the federal government could acquire new territories by discovery and extend federal criminal jurisdiction over them).

35. *See* Burnet v. Brooks, 288 U.S. 378, 405–06 (1933) (equating due process limits on federal taxation of a nonresident alien's property with those imposed by international law).

36. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 cmt. b (1987) ("A state cannot adduce its constitution or its laws as a defense for failure to carry out its international obligation.").

law require states to endow their governments with the full extent of power that its norms permit (although it may give them an incentive to do so).

International law can never *control* U.S. constitutional interpretation. It provides factors that judges (and other interpreters) can appropriately take into account among others. There is no sacrifice of sovereignty in that.

International law should, of course, be used carefully and intelligently in constitutional interpretation. So should other factors, such as history, dictionaries, and economic reasoning. Judges should not falsify these resources, or manipulate them for undisclosed purposes.

Although human rights advocates are currently among those defending the use of international law in constitutional interpretation, it cannot be expected that the consideration of international law will always lead to expanding the interpretation of a constitutional right. To the contrary, decisions invoking international law have often involved the expansion of government power, especially federal power.[37] Moreover, since rights can conflict, expanding one right may mean reducing the effect of another.[38]

The usefulness of international law in constitutional interpretation will vary with context, depending on the nature of the constitutional provision at issue and the nature of the international rule. For example,[39] some international law rules provide global rules of the road, conventions agreed upon to facilitate orderly interactions among states. These conventions are relevant to the interpretation of the external sovereignty of the United States, and may sometimes be relevant to issues concerning individual rights. Even when such conventions have no normative appeal in the abstract, their stability generates

37. *See, e.g.*, Downes v. Bidwell, 182 U.S. 244, 299–300 (1901) (White, J., concurring) (concluding that the federal government possessed the power, recognized by international law, to acquire new territories that would not be "incorporated" into the United States and therefore would not be protected by constitutional limitations applicable to "incorporated" territories).

38. From the U.S. constitutional perspective, it might be objected that individual rights rarely conflict because most rights can be violated only by state action. Nonetheless, when the state aligns itself with either of two conflicting rights claims, it may produce the necessary state action.

39. The examples given here are meant to be illustrative, and not to provide a taxonomy of international norms.

expectations that affect the reasonableness or fairness of possible government actions.

Other international treaty norms amount to ad hoc bargains with particular states or groups of states, arising at one moment and susceptible to replacement in the short term. It is not impossible that such a treaty might contain a uniquely felicitous articulation of a standard that the Supreme Court might choose to borrow, such as a standard for compensation for expropriated property. But if so, the persuasive force of the standard will arise primarily from its intrinsic merit, and not from its inclusion in one treaty among many.

Yet other international law norms self-consciously address fundamental human interests. The modern multilateral human rights treaties are a prime example, while earlier international norms condemned piracy and the slave trade.[40] Norms of this kind both exist as facts about international relations[41] and reflect moral claims about the duties of governments toward their citizens and other human beings.

Sometimes the constraints that international law places on U.S. action appear as relevant background facts influencing the interpretation of a constitutional provision. For example, in *United States v. Verdugo-Urquidez*,[42] Chief Justice Rehnquist construed the geographical scope of the Fourth Amendment in light of the realities of international relations and the fact that a

40. *See, e.g.*, United States v. Smith, 18 U.S. (5 Wheat.) 153, 162 (1820) (upholding conviction for piracy, as defined by the law of nations); Treaty to Settle and Define the Boundaries Between the Territories of the United States and the Possessions of Her Britannic Majesty in North America; For the Final Suppression of the African Slave Trade; and For the Giving Up of Criminals, Fugitive from Justice in Certain Cases (Webster-Ashburton Treaty), Aug. 9, 1842, *entered into force* Oct. 13, 1842, 8 Stat. 572, 12 Bevans 82.

41. I consciously avoid here the phrase "the international community," in order not to invite a debate about the sense in which our planet's states and societies constitute a "community." Also, by saying that human rights norms exist as facts, I do not mean to assert that they are always followed, but rather that their articulation as positive international law has an effect on the way that states and international institutions interact.

42. 494 U.S. 259, 274 (1990) (pointing out that a U.S. magistrate's warrant "would be a dead letter outside the United States"); *id.* at 278 (Kennedy, J., concurring) (noting the unavailability of U.S. magistrates abroad and the need to cooperate with foreign officials in conducting searches). Other aspects of Chief Justice Rehnquist's reasoning were less convincing, and failed to persuade a majority of the Court, despite Justice Anthony Kennedy's nominal concurrence in the opinion.

U.S. search warrant could not effectively authorize a search in the territory of a foreign state.

At other times, the content of an international norm receives persuasive force in the interpretation of a parallel constitutional norm. The persuasive quality may operate either functionally or normatively.[43] In the functional mode, experience with the international norm may shed empirical light on the workability and consequences of proposed interpretations of the constitutional norm. The ability of the United States to interact with other nations and international institutions is also a significant functional consideration in constitutional interpretation.

In the normative mode, international law rules may provide insights concerning the proper realization of values common to the domestic and international systems. In particular, the international human rights regime challenges states to reexamine the justifiability of their local practices. When international human rights protections exceed traditional U.S. interpretations of the same right, the Supreme Court may properly consider whether its own doctrinal formulations afford insufficient respect to some aspect of that right. This is not to say that international human rights law requires states to make constitutional law the means for domestic implementation of their obligations. To the contrary, international law seeks compliance by whatever effective method the state chooses. Moreover, international human rights law does not encourage states to *reduce* their domestic rights protections to the international minimum standard.[44]

Even "foreign" international law, such as European human rights norms, may provide useful normative insights on issues of common concern. Professor Vicki Jackson suggests that foreign constitutions that are genuinely implemented in democratic, rule of law systems deserve greater persuasive influence.[45] On this account, the binding adjudication and stronger

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43. For more on the distinction between normative and functional uses, corresponding to the suprapositive and institutional aspects of rights, see Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863 (2003).

44. Human rights treaties often contain savings clauses emphasizing that the treaties set forth minimum standards and are not meant to impair national provisions more favorable to the protected rights. *See, e.g.*, International Covenant on Civil and Political Rights art. 5(2), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171.

45. Jackson, *supra* note 1.

compliance record of the European human rights system earn it more credibility than other human rights tribunals that either lack equivalent powers or achieve less compliance. Furthermore, the multilateral character of the European human rights system, and its linkage to thick regimes of regional cooperation, give it an entrenched character more weighty than individual national constitutions, which tend to be easier to amend.

The entrenched quality of multilateral human rights treaties can give their provisions a stability well-suited to use in U.S. constitutional interpretation. In the United States, constitutional time flows slowly. Formal amendments have been relatively rare, and respect for precedent allows doctrine to persist longer than statutes that shift in the short term with political winds. Nonetheless, doctrinal shifts do occur over longer periods, both on specific provisions and on general manners of approach. International norms that have comparable staying power afford more reliable contributions. In *Roper v. Simmons*, Justice Kennedy concluded that "the United States now stands alone in a world that has turned its face against the juvenile death penalty."[46] He could have added that other nations have turned *durably* against that practice, embodying their condemnation of the practice not only in national law, but in multilateral international commitments that would be far more difficult to modify.

IV.

Whether public opinion is quick or slow to recognize the fact, U.S. law has never been intellectually isolated from foreign influences. Even that modern populist vehicle, lawmaking by voter initiative, was borrowed by the United States from Switzerland.[47] When introduced, the initiative was challenged on the ground that it was inconsistent with the republican form of government clause, which requires representative government and not direct democracy, an originalist conclusion that the Supreme Court avoided only by invoking the political question doctrine.[48]

46. 543 U.S. 551, 577 (2005).

47. *See* Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 U. COLO. L. REV. 47, 54 (1995).

48. Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912); *see* Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993).

It would be more beneficial to educate public opinion about the processes that actually produced our constitutional system, rather than encourage illusions that undermine its effectiveness. The notion that most constitutional disputes can be resolved by text or originalism is one such illusion; the notion that "foreign law" is per se inadmissible in constitutional argument is another.

The United States is a nation of immigrants, and it has always had the good sense to borrow sound ideas as well as smart people from abroad. That has been true in science and in political science, including the branch known as constitutional law. We rightly take pride in our national accomplishments, but the pragmatic assimilation of new perspectives is one of our national virtues. In the face of the avian flu, it would be better if the Supreme Court were still permitted to take into account imported foreign ideas like the theory of evolution[49] and the germ theory of disease.[50]

49. Epperson v. Arkansas, 393 U.S. 97 (1968) (invalidating statute prohibiting the teaching of evolution in the public schools).

50. *Cf.* Jacobson v. Massachusetts, 197 U.S. 11, 31 & n.† (1905) (upholding compulsory vaccination against smallpox, and surveying nineteenth century legislation of other countries).