FOREIGN AND INTERNATIONAL LAW SOURCES IN DOMESTIC CONSTITUTIONAL INTERPRETATION

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In recent years, several controversial judicial decisions have pushed the use of foreign and international law sources for domestic constitutional interpretation to the forefront of scholarly discussion. Many legal scholars debate whether the use of these sources is proper in the context of constitutional interpretation.[1] Legal scholars have also discussed many pragmatic issues surrounding the use of foreign law, such as how judges can determine which foreign or international laws are reliable sources, and whether American judges can understand the scope and context of foreign laws.[2] In the last decade, decisions of the United States Supreme Court have added to this important debate.

In some of its most controversial decisions interpreting the U.S. Constitution, the Court has referred to foreign and interna-

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1. *See, e.g.*, Steven G. Calabresi, Lawrence*, the Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L.J. 1097, 1097 (2004) ("[F]oreign constitutional law is most relevant to good policy-making or to assessments of reasonableness and least relevant to questions of interpretation."); Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 12 (2006) ("[I]nternational law is an integral part of our constitutional tradition, and when applied in a principled manner, it can inform and enrich our constitutional analysis."); Joan L. Larsen, *Importing Constitutional Norms from a "Wider Civilization":* Lawrence *and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283, 1283 (2004) ("[E]xpository and empirical uses [of foreign and international law] are easily supported by conventional theories of constitutional interpretation, but . . . substantive use of such norms presents a more difficult and complicated case."); John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303, 308 (2006) ("[F]oreign and international law should not generally be used as legal authority in constitutional interpretation.").

2. *See, e.g.*, Mark Tushnet, *When Is Knowing Less Better Than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275, 1277 (2006) ("discuss[ing] . . . the proposition that judges are unlikely to do a good job in understanding—and therefore in referring to—non-U.S. law"); Jeremy Waldron, *Foreign Law and the Modern* Ius Gentium, 119 HARV. L. REV. 129, 132 (2005) ("argu[ing] that the citation of foreign law can rest on the idea of the law of nations . . . .").

tional laws. For example, in *Atkins v. Virginia*, the Court held that the Eighth Amendment bars states from executing murderers who are mentally retarded.[3] Writing for the Court, Justice Stevens noted that "within the world community" the execution of the mentally retarded is "overwhelmingly disapproved."[4] The Court declared in *Lawrence v. Texas* that a state criminal law prohibiting consensual homosexual sodomy violated the Fourteenth Amendment. In that case, Justice Kennedy observed that many other countries have accepted sexual liberty as "an integral part of human freedom."[5] Justice Ginsburg, in *Grutter v. Bollinger*, relied on international law in explaining why affirmative action does not violate the Fourteenth Amendment.[6] In *Roper v. Simmons*, the Court, with Justice Kennedy writing, declared unconstitutional the execution of murderers who committed their crimes while under the age of eighteen and lamented that the United States stood "alone in a world that has turned its face against the juvenile death penalty."[7]

In their public comments, some Justices have defended their reliance on foreign and international law. Justice O'Connor has called for increased reliance on international law in the new era of global interdependence. For instance, before her retirement, Justice O'Connor stated that "conclusions reached by other countries and by the international community, although not formally binding upon our decisions, should at times constitute persuasive authority in American courts."[8] Justice Breyer also has discussed publicly his perspective that the Court should consider foreign materials in domestic judicial opinions.[9]

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3. 536 U.S. 304 (2002).

4. *Id.* at 317 n.21.

5. 539 U.S. 558, 577 (2003).

6. 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring).

7. 543 U.S. 551, 577 (2005).

8. Justice Sandra Day O'Connor, Remarks at the Southern Center for International Studies 1–2 (Oct. 28, 2003), http://www.southerncenter.org/OConnor_transcript.pdf.

9. *See, e.g.*, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519, 522–524 (2005). Justice Breyer also has discussed his perspective in cases. *See, e.g.*, Printz v. United States, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting) ("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 experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem—in this case the problem of reconciling central authority with the need to preserve

Not every member of the Court agrees with this practice. In his dissenting opinion in *Atkins*, Justice Scalia, for example, stated that the "practices of the 'world community'" are "irrelevant."[10] Justice Scalia stated: "[W]here 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."[11]

This panel will discuss this issue from several perspectives. It will address both the history and practice of using foreign and international sources of law. This panel also will discuss when, if ever, it is appropriate for American judges to refer to these sources.

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the liberty-enhancing autonomy of a smaller constituent governmental entity.") (citations omitted).

10. Atkins v. Virginia, 536 U.S. 304, 347–48 (2002) (Scalia, J., dissenting).

11. *Id.* at 348 (alteration in original) (citing Thompson v. Oklahoma, 487 U.S. 815, 868–69 n.4 (1988) (Scalia, J., dissenting)). In response to Justice Breyer's dissent in *Printz*, Justice Scalia, for the majority, wrote: "Justice Breyer's dissent would have us consider the benefits that other countries, and the European Union, believe they have derived from federal systems that are different from ours. 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." 521 U.S. at 921 n.11.