

AMERICAN JUDGES AGAINST JUDICIAL INDEPENDENCE

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Zdravstvuite! This presentation could have many titles. The one I finally chose is “American Judges Against Judicial Independence.” Today, as I speak, there is a growing movement linking several members of the United States Supreme Court, the former federal judge who is the U.S. Chief of Homeland Security, and a sizeable cohort within the U.S. Congress. The affiliates hope to prohibit federal judges from relying on foreign and international resources when deciding cases arising under federal law.¹ This issue is very personal for some non-affiliated members of the U.S. Supreme Court. They are now the targets of death threats because they dared to refer to foreign law in their judicial work product.

If this movement succeeds, there would be a remarkable difference between the state and federal courts of the United States. This potential federal judicial limitation would not be binding upon state courts. This contemporary anti-foreign legal sources movement has the more modest objective of barring at least federal judges from relying upon foreign resources in their judicial opinions. I am unable to comment on judicial independence in Russia. I am able to offer an opinion on how this political movement, if ultimately successful, could impact over two-hundred years of judicial independence in the U.S.

Our analytical point of entry today will be three relevant U.S. Supreme Court cases from the 18th, 19th, and 20th centuries. They provide an informative backdrop for the 2005 U.S. Supreme Court’s decision in *Roper v. Simmons*.² It sparked a legal firestorm at the seat of power in Washington, DC.³ Members of the two political branches of our government, including key legislative and executive officials, relied on *Roper* to launch their campaign to bar federal judges from using foreign legal resources in their judicial opinion writing.

Recalling the vintage adage that those who do not know their history are bound to repeat it, I will now disinter three historical U.S. Supreme Court cases. They may actually *support* U.S. Supreme Court Justice Antoine Scalia’s “originalist” theory that the U.S. Constitution is not a living document. He essentially argues that the meaning of the Constitution is limited to what the drafters intended—not any subsequent interpretation *du jour*. Thus, federal judges should not be incorporating evolving post-1789 standards of decency to interpret how constitutional clauses should be interpreted.

In the first of these three cases—each decided in a different century—the first Chief Justice of the U.S. Supreme Court observed in 1793 that the U.S., “by taking a place among the nations of the earth, [had] become amenable to the laws of nations.”⁴ The Court therein embraced the view that the U.S., as a federal entity, was responsible to foreign nations for the conduct of each of its state entities, relative to national obligations arising under the law of nations.

The second of these background cases is an 1815 U.S. Supreme Court case. It dealt with goods of a neutral Danish citizen. His sugar was being shipped from a British-occupied island (belonging to Denmark and six-hundred miles west of Ecuador). It was destined for London via Maryland. The sugar was seized during the U.S. War of 1812 with England. The question before

the Supreme Court was whether the U. S. should seize goods belonging to this Danish citizen, although: (a) the U.S. was not at war with Denmark; and (b) they were being shipped to England. The key passage authoritatively declared that American courts should rely upon “[t]he law of nations ... [as] a great source from which we derive the rules which respect the belligerent and neutral rights recognized by all civilized states of Europe and America.”⁵

The court unanimously relied upon this theoretically ubiquitous legal regime as a source for deriving the rules respecting the rights of non-belligerent merchants, who were selling goods which passed through one belligerent country into another. Of course judges cannot ascertain the content of International Law as readily as the content of their own domestic law. A part of International Law is unwritten. It is not stated in treaties. When it is unwritten, they have often invoked a source of law referred to as Customary International Law. Per the Supreme Court’s 1815 guideline: “we resort to the great principles of reason and justice: but, as these principles will be differently understood by different nations under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions.”⁶

If we were listening to the oral arguments in this enduring opinion, we could almost hear the Supreme Court’s articulation that it should reach beyond U.S. borders, not in search of binding *precedent*, but to explore what other nations had done in like circumstances. The resulting rule of immunity for private merchants was that the goods of neutral merchants were thus immune from seizure by the belligerent nations. The Court therein acknowledged that a decision of an English court could fill a legal gap in U.S. decisional law via resort to the customary practices evinced by other nations. The resulting immunity was premised upon a common rule that many countries had routinely applied—expressly including the courts of the enemy.

So a customary practice is not binding authority. But it can be treated with great respect. This borrowing of principled decision-making has been used by federal courts when filling gaps in federal law via persuasive *state* case law. State law does not thereby *define* the content of federal law. As noted in U.S. Supreme Court Justice Ruth Bader Ginsberg’s 2005 articulation for the American Society of International Law in Washington, D.C.:

Judges in the United States are free to consult all manner of commentary--- Restatements, treatises, what law professors or even law students write copiously in law reviews, for example. If we can consult those writings, why not the analysis of a question similar to the one we confront contained in the opinion of the Supreme Court of Canada, the Constitutional Court of South Africa, the German Constitutional Court, or the European Court of Human Rights?”⁷

Moving to my *third* historical case, the time frame is eighty-five years later. The 1900 U.S. Supreme Court was, once again, looking to the law of nations. In this instance, the U.S. was conducting a blockade of Cuba during the Spanish-American War. The U.S. admiral had seized the cargo of some Cuban fishermen. Their boats were merely plying the Cuban coast to collect fish, sell them, and use them for their own personal use. These fishermen were not aiding the Spanish enemy in its war efforts against the U.S. The Supreme Court reviewed the public statements of your Russian executive branch, as well as several other great maritime powers. They discovered an ancient usage amongst civilized nations, beginning centuries ago, that had

gradually ripened into a generally-applied rule of Customary International Law. Private coastal fishing vessels had, for at least five centuries, been accorded an exemption from capture during time of war.

The most famous passage from this 1900 case—one which has been cited many times by American academics—is as follows: “International law is a part of our law and it *must* be ascertained and administered by our courts.”⁸ That decision sent a directive to all federal judges. When there is no legislative act that governs the particular dispute before the court, and no executive proclamation to the contrary, federal judges can rely upon the so-called “unwritten” source of law known as Customary International Law. In fact, this 1900 opinion noted the executive branch directive to the U.S. Admiral, whereby he was expected to apply International Law to issues arising under U.S. blockade.⁹

To cross this historical “t,” Justice Scalia argues that the meaning of the U.S. Constitution may be properly derived only from evidence of the drafters’ intent, and relevant pronouncements leading up to ratification of that document in 1789. America’s constitutional blueprint should not fade with the times; for example, by invoking twentieth and twenty-first century international human rights regimes. There are two counter-arguments. One is the perhaps dominant view that the Constitution is a *living* document. This widely-held perspective would lead to the conclusion, in the foreign legal resource debate, that contemporary human rights approaches should thus be taken into account. The Constitution was not intended to freeze all future applications as of 1789.

The other counter-argument is rooted in Justice Scalia’s originalist view. The above Supreme Court cases, at least those of 1793 and 1815, relied on foreign legal resources in their constitutional interpretations. Thus, only four years after the Constitution became effective, Supreme Court judges—who were active in events leading up to ratification in 1789—concluded that the U.S., as of the 1793 case I summarized earlier, had “become amenable to the laws of nations.” Recall also that justices in the above 1815 case reaffirmed that the “law of nations ... [is] a great source from which we derive the rules....”

Even under the originalist view of constitutional interpretation, one can readily draw upon a poignant analogy regarding the post-U.S. Civil War constitutional amendments. Subsequent, but proximate-in-time juridical pronouncements—during and just after the drafting of those amendments—may be used as indirect evidence of originalist intent. As explained by a prominent constitutional law scholar:

Post-ratification evidence, by definition, could not have influenced the understanding of the members of Congress who proposed the Amendment or the state legislators who ratified it. Thus, strictly speaking, it is not direct evidence of the original understanding at all. But early post-ratification materials can be useful indirect evidence. They tend to illustrate prevailing views. Evidence that politicians, lawyers, or commentators believed, soon after ratification, that the [1868 14th] Amendment incorporated the [1791 constitutional] Bill of Rights would corroborate evidence that it was *originally* understood to do so—or vice versa.¹⁰

I will now fast-forward a hundred years. Our historical journey has just landed on the year

2005. A contemporary U.S. Supreme Court is now deciding whether or not capital punishment, meaning the death penalty, should apply to a seventeen-year-old murderer. As you all know, both the U.S. and Russia do not treat you as an adult until you have reached the age of eighteen. You may also be aware that Russia ratified the U.N. Convention on the Rights of the Child, which prohibits executing individuals for crimes they commit when under eighteen years of age.¹¹ I will return to this treaty in a moment.

Justice Kennedy wrote the majority opinion for the *Roper v. Simmons* court. He lamented the relative uniqueness of the U.S. It was the only country in the world to officially approve the juvenile death penalty. His opinion invoked the U.N. Rights of the Child treaty prohibition on the death penalty for crimes committed by children under eighteen. Justice Kennedy focused on this treaty's ratification by every country in the world except two: Somalia and the United States.

Three judges in this seminal 2005 case dissented. The heart of their dissent was that federal courts ought not to rely upon foreign legal resources when deciding matters of U.S. constitutional law. I will address the dissenters' viewpoint in more detail, after I first frame the debate.

Justice O'Connor's separate opinion responded to this dissent in the following terms: "I disagree with Justice Scalia's contention ... that foreign and international law have no place in our Eighth Amendment [cruel and unusual punishment] jurisprudence. Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency."¹² She noted that in the period between World War II and 2005, the Supreme Court had consistently referred to foreign and International Law in its assessments of the evolving standards of decency. She reasoned that the nation's evolving understanding of human dignity is neither isolated from—nor inherently at odds with—the values that prevail in other democracies. She concluded that: "we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement—expressed in international law or in the domestic laws of individual countries—that a particular form of punishment is inconsistent with fundamental human rights."¹³

The *raison d'être* for former Justice O'Connor's invocation of foreign resources is vividly portrayed in her earlier 2002 keynote speech to the American Society of International Law:

Although international law and the law of other nations are rarely binding on our decisions in U.S. courts, conclusions reached by other countries and by the inter-national community should at times constitute persuasive authority in American Courts.

...

For instance, we have looked to international law notions of sovereignty when shaping our federalism jurisprudence and to international law norms in boundary disputes between American states. ... [I]t would be a mistake to ignore the rich resources developed in the law of nations. *I suspect that, with time, we will rely increasingly on international and foreign law in resolving what now appear to be purely domestic issues.*¹⁴

The italicized portion of this quote would become a lightning rod for the subsequent death threats to Justices O'Connor and Ginsberg I mentioned in my introduction.¹⁵

We should now focus on Justice Scalia, who is at the heart of this foreign resources controversy. Justice Scalia was joined by Chief Justice Rehnquist and Justice Thomas in their feisty dissent. In the 2005 *Roper* juvenile death penalty case, all three were apparently shell-shocked. They could not understand how the majority of the Court would rely on *non-U.S.* law, such as the U.N. Convention on the Rights of the Child. It had *not* been ratified by the U.S. In an earlier case, the same dissenters expressed stomach-turning disgust at the majority opinion's reliance upon foreign law. *Lawrence v. Texas* dealt with consensual sodomy between two males.¹⁶ As Justice Scalia complained, the Court's citation of foreign law was both meaningless and dangerous: "Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda..."¹⁷ As you might imagine, this particular passage spawned remarkable resentment within the U.S. gay and lesbian community.

Back to the *Ropers v. Simmons* juvenile death penalty case: Scalia's essential point was that the U.S. President and Senate are the actors that the Constitution empowers to enter into treaties. Only *they* are constitutionally empowered to decide what treaties to ratify and observe. But these actors had effectively decided *not* to ratify the Convention on the Rights of the Child, which would have otherwise prohibited execution for crimes committed while a minor. So the U.S. had either *not* reached a national consensus on this point; or, the U.S. had reached a consensus that was *contrary* to the majority opinion's claim that the Constitution's Cruel and Unusual Punishment Clause bars such executions.

Justice Scalia bitterly complained that the basic premise of the majority's argument, whereby American law should conform to the laws of the rest of the world, "ought to be rejected out of hand."¹⁸ So he and Justices Rehnquist and Thomas constituted a three-judge block on the nine-judge U.S. Supreme Court. They were consistently upset with the Court's majority opinions that dared to incorporate foreign and international human rights articulations.

In the interest of full disclosure, Justice Scalia has *never* said that such resources are *never* relevant. In fact, in his 2004 speech before the American Society of International Law in Washington D.C., he advocated as follows:

To take the most obvious example: When federal courts interpret a treaty to which the United States is a party, they should give considerable respect to the interpretation of the same *treaty* by courts of the other signatories. Otherwise, the whole object of the treaty, which is to establish a single, agreed-upon regime governing the actions of all the signatories, will be frustrated.¹⁹

Justice Scalia has likewise supported judicial resort to foreign law when ascertaining the meaning of certain federal statutes, as illustrated in the following passage from that speech:

If, for example, the *statute* is designed to implement the obligations of the United States under a treaty, and if one of the two plausible meanings of the controverted

provision has been held by other signatories to be *required* by the treaty, I would think that those judgments should properly be taken into account. Congress presumably wants to live up to the treaty, and what the treaty demands should be determined ... with appropriate deference to the reasonable views of other signatories.²⁰

In fact, Judge Scalia was then “happy to advise” that he “probably use[s] more foreign legal materials than anyone else on the Court, with the possible exception of Justice Thomas.”²¹ What Justice Scalia does assert, however, is that “modern foreign legal materials can never be relevant to an interpretation of—to the *meaning* of—the U.S. Constitution.”²²

At this point, we might reflect upon the U.S. Supreme Court’s previously-referenced 1793, 1815, and 1900 cases. Those, and others since,²³ have drawn upon foreign and International Law in three different centuries that span more than 200 years of Supreme Court decision-making. The Court has historically cited foreign legal resources as non-binding precedent, rather than—as the proverbial ostrich—bury its judicial head into domestic legal sand. As stated by Justice Steven Breyer, in his 2003 speech for the American Society of International Law:

We are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups. For irrational prejudice and rank discrimination are infectious in our world.

... It is not that we are, in any political sense, “internationalists.” Nor are we trying to move the law in a particular substantive direction. Rather, our perception of the need and usefulness of international and foreign law arises out of our daily experience....²⁴

But as of 2005, the Supreme Court’s dissenting triumvirate believed that: “It is beyond comprehension why we should look ... to a[nother] country that has developed, in the centuries since the Revolutionary War—[given]...the United Kingdom’s recent submission to the jurisprudence of European court dominated by continental jurists—[which is] a legal, political, and social culture quite different from our own.”²⁵

One would have to agree with Justice Scalia that the law of the U.K. now differs from that of the U.S. For example, U.K. domestic law prohibits the death penalty for children. The U.K. is also a party to the U.N. Convention on the Rights of a Child, which also prohibits juvenile death penalty in ratifying nations. So, in this context, U.K. law *is* remarkably different from U.S. law.

Justice Scalia’s Spring 2007 address at my law school offered three reasons for his fear that the Court’s use of foreign law, when interpreting the U.S. Constitution, will continue at an accelerating pace. First, there is the now prevailing *living* Constitution paradigm, which he rejects. In his view, evolving standards of decency, as they impact constitutional interpretation, could never evolve over time. They should be limited to the *originalist* approach he so passionately advocates. But one could argue that the Supreme Court case law—in the immediate post-Constitutional era, which includes the Court’s 1793 reliance on foreign law—might arguably

support the conclusion that it was then engaged in an originalist interpretation of the Constitution. Put another way, wouldn't Supreme Court jurisprudence dating back to 1793 fall within even the originalist theory of interpreting the meaning of the Constitution?

Second, Justice Scalia's believes that resort to foreign and international resources is on the rise "because it's there." He is thereby referring to the rampant citation of foreign authorities used in support of the philosophic, moral, and religious convictions of a particular judge or bench. Third, Justice Scalia believes that "adding foreign law to the box of available legal tools is enormously attractive to judges because it vastly increases the scope of their discretion."²⁶ They are thus free to adopt those external practices they like, and to eschew those that they don't.

Justice Scalia has spoken enough today. It's now my turn. I believe that Justice Scalia missed one important argument in his objection to the use of foreign law regarding constitutional interpretation. The decisions of international courts do *not* enjoy universal precedential value. In fact, a decision of the International Court of Justice (I.C.J.) is not precedent for its own future cases. Under Article 59 of the Statute of the Court, I.C.J. decisions are not entitled to stare decisis status. That is, they purportedly have *no* precedential value. Of course the reality is that the I.C.J. often cites its own jurisprudence. Article 59 was designed to encourage greater use of the I.C.J. by the international community. When drafted, the Statute envisioned that disputes would be resolved in the courtroom rather than on the battlefield. Country C might be more inclined to agree to the I.C.J. alternative, if the Court's jurisprudence involving countries A and B were *not* considered binding precedent in a future suit by A or B against C in that forum. There is also the related question about whether decisions of *regional* courts should be given deference in other regions. For example, should a decision of the Inter-American Court of Human Rights be considered by the European court of Human Rights?²⁷

National supreme courts, in countries with jurisprudential systems similar to both the U.S. and the U.K., clearly embrace decisions from foreign sources. The High Court of Australia provided one of the more useful illustrations. That Court drew upon Article 38.1 of the Statute of the International Court of Justice. It contains the globally-recognized restatement of the sources of International Law.²⁸ Even U.S. courts have referenced to the I.C.J. Statute in their quest for useful foreign legal resources.²⁹ Like *amicus curiae* briefs, these venerable sources are not controlling; but they may nevertheless be legal tender for the analytic value they represent.

The question in this illustrative Australian Supreme Court case was whether the post-WWII Australian War Crimes Act could apply to conduct occurring during WWII. The court determined that the Act did not *retroactively* criminalize the defendant's conduct. It was *already* criminalized by International Humanitarian Law war crimes jurisprudence—actually decided well before WWII.³⁰ Although this case dealt with a matter of *statutory* interpretation, rather than Australian *constitutional* law, its Supreme Court nevertheless relied upon globally-recognized sources of Customary International Law. Not one judge claimed that the Australian Supreme Court was prohibited from resorting to foreign legal authorities, when resolving this novel legal issue arising under Australian law.

Back in the United States, Justice Scalia and his fellow U.S. Supreme Court dissenters are not alone in their attack on judges who consider foreign legal sources in their constitutional decision-making. Members of the legislative branch of the U.S. government joined the assault via the 2004 proceedings in the House Subcommittee on the Constitution. Its 2004 draft bill is

entitled the Reaffirmation of American Independence Resolution 568. It provides as follows: “Today’s Bill is a salute to the framers of the Constitution and a victory to those dedicated to the protection of American sovereignty. This resolution reminds the Supreme Court that their [*sic*] role is interpreting US law, *not* importing foreign law.”³¹

These members of Congress therein complained that Article VI of the U.S. Constitution provides, in no uncertain terms, that the Constitution and the laws of the U.S. are the “Supreme Law of the Land.” With growing frequency however, as these congressional representatives advocate that justices of the U.S. Supreme court are misguided by their reliance upon decisions of foreign courts. Of course, the 2004 resolution is far more sweeping, and far less balanced, than Justice Scalia’s reasoned approach. He acknowledges the role of foreign resources in both the treaty and implementing legislation contexts.³²

My question to these legislators would be as follows: Isn’t your legislative attack on the Supreme Court’s use of foreign legal sources inherently dangerous to the U.S. Constitution’s Separation of Powers Doctrine?³³ Should it not be up to the judiciary, as opposed to the *political* branches of government, to determine the relevant resources for supporting their articulations of the law of the United States—especially since the Supreme Court has been doing exactly that since 1793?

The legislative history of House Resolution 568 goes on to complain about five *named* Supreme Court justices who were writing or joining opinions citing foreign authorities to justify their decisions—including decisions from the courts of Jamaica, India, Zimbabwe, and the European Union. It is at this point, that the 2004 House Resolution gets *really* personal. It cites conference speeches by Justice Sandra Day O’Connor, in which she said as follows: “I suspect that over time the U.S. Supreme Court will rely increasingly on international and foreign courts examining domestic issues.”³⁴ Resolution 568 responds to her prediction in the following terms: “Judges in the U.S. are charged to interpret both the intent of Congress and other American legislative bodies. Views of foreign bodies are not relevant to this task unless they can aid in determining either the original meaning of the United States Constitution, or the Legislative intent of state or federal statutes.”³⁵

The legislative attack on judicial independence does not stop here. The following year on Capitol Hill yielded the 2005 Constitutional Restoration Act, which was introduced in *both* Houses.³⁶ It has not yet become the law. If it does, it would prohibit U.S. federal judges from relying on resources from any foreign or international organization or tribunal. Should that occur, judges “guilty” of such activism would be sanctioned by impeachment, resulting in their removal from office.

Individual members of our Congress have joined this legislative assault on judicial independence. A once-prominent member of the legislative branch, former Republican House Majority Leader Tom Delay, singled out a particular Supreme Court Justice for criticism. This is *quite* unusual for a congressional leader. In Delay’s words to the New York Times: “We’ve got Justice Kennedy writing decisions based on international law rather than the Constitution of the United States. That’s just *outrageous*.”³⁷ The real threat in Delay’s remark is that judges can serve only so long as they serve with good behavior. Representative Delay apparently meant that it would be “bad” behavior to cite decisions of foreign or international courts. Mr. Delay was of course suggesting an impeachment remedy. This suggestion posed a significant threat to the

independent operation of the judicial branch of government.

The executive branch of the U.S. government has also jumped into the fray. The Chief of Homeland Security is a former federal appellate judge. In Judge Michael Chertoff's speech to the conservative Federalist Society on November 17, 2006, he said:

I'm going to ask you to confront a new challenge, and that is the rise of the increasingly activist, left-wing, elitist philosophy of the law, flourishing in foreign and various international courts. For decades the judges, the lawyers, and academics who provide the intellectual firepower for the development of international law, have increasingly advocated a broad vision of legal activism.³⁸

So you're scratching your head and asking yourself, why does the U.S. Secretary of Homeland Security care about this? He explained as follows: "Much of what I do intertwines with what happens overseas. And what happens in the world of international law increasingly has an impact on my ability to do my job." The Homeland Security Chief then gave examples of "bad" decision-making by foreign courts. His first example was the 1998 International Court of Justice decision addressing the Paraguayan national who had not been given access to a Paraguayan consular official in Virginia. The legal issue was this foreign national's right of access to a consular official under the Vienna Convention of Consular Relations.³⁹ The I.C.J. later ordered the U.S. not to carry out such executions, until fifty-one Mexican defendants had been given their VCCR right to consul.⁴⁰

This is very personal to those of us who travel abroad for the following rather practical reason: If I were arrested here in Moscow, why would the Moscow police extend the VCCR Article 36 right of consul to me—an American citizen—if my own country is not automatically extending that right to Russian or other foreign nationals when they are arrested in the U.S.?

Chief of Homeland Security Chertoff's second example of bad international decision-making was the International Court of Justice *Israeli Wall Case*.⁴¹ The I.C.J. concluded that Israel could not rely upon the threat of terrorist attacks emanating from the Palestinian territories to justify the wall. Judge Chertoff considered that I.C.J. decision as being contrary to a fundamental attribute of state sovereignty. That is to protect a nation's citizens from people beyond its borders from entering to kill them. This is an intriguing point, given the continuing Hamas rocket attacks on Israel from Gaza. The Wall does not stop rockets. But it has impeded the number of suicide bombing attacks.

As Judge Chertoff further complained: "Like it or not, international law increasingly is entering the domestic domain." Secretary Chertoff essentially complains that the U.S. Supreme Court's activism, exemplified by reliance on foreign law, is troublesome because of recent cases like the 2006 decision in *Hamdan v. Rumsfeld*, involving Usama bin Ladin's personal driver.⁴² For the first time in history, the Supreme Court held that the Writ of Habeas Corpus was available to foreign nationals, regarding their conduct outside of the U.S., even when they are incarcerated outside of the U.S.

The director of Homeland Security's speech joins an increasingly loud chorus that considers federal judicial reliance on foreign law as being unacceptably off-key. Judge Chertoff cites such "judicial activism" as an *extremist* philosophy that endangers the U.S., especially where

the executive branch has made the decision not to ratify a relevant treaty—or there has been no treaty-based implementing legislation. This is precisely the same point that Justice Scalia made in his 2005 dissent in the juvenile death penalty case about reliance on the U.N. Convention on the Rights of the Child. So both political branches of government are now pursuing their quest to bar foreign and international court analyses from infecting judicial opinion writing in U.S. federal courts.

Academic writers have jumped onto this band wagon as well. An outspoken lawyer-author makes this point in his 2004 book on the federal judiciary. His rhetoric is especially caustic regarding the U.S. Supreme Court's *Lawrence v. Texas* consensual sodomy case: "This decision upholds the Marxist, Leninist, satanic principles borrowed by foreign law."⁴³ I do not know about you; but for me, this is the first time that I have ever heard the suggestion that the laws of Russia are "satanic!"

Justice Scalia fortunately motivated me to delve further into this subject, which I had too briefly mentioned in the current edition of my International Law text.⁴⁴ My research revealed three representative Scalia opinions with which you will be quite intrigued.⁴⁵ I found them remarkable because Justice Justice Scalia cited foreign law in his opinions, or ones in which he joined. The first example is a 1995 dissenting opinion, where he concluded as follows: "We might also consider the legislatures of foreign democracies such Australia, Canada, and England, for example, all of whom have prohibitions on anonymous campaigning."⁴⁶ The Court was assessing whether a state campaign literature statute violated the federal Constitution's First Amendment freedom of speech. One might question whether this reference was consistent with Justice Scalia's contemporary assertion that foreign legal resources should *not* be used, when assessing the interpretation of a federal constitutional provision.

In a more recent 2004 dissent, Justice Scalia referred to French law in support of his position. Justice Scalia, therein "recall[s] that France has proposed banning religious attire from schools, invoking interests in secularism, no less benign than those that the court embraces today."⁴⁷ Here, he invoked French law when assessing whether a state statute, which prohibited state aid to a college student pursuing a theology degree, violated the First Amendment's Free Exercise (of religion) Clause. Is this not relying on French law as basis for resolving a question of American constitutional law?

In a third example, Justice Scalia joined in a 1997 majority opinion written by Justice Rehnquist—wherein Justice Scalia joined in the Chief Justice's citation of foreign law. This case involved the legality of assisted suicide. The pertinent passage in this majority opinion reads as follows: "This concern is further supported by evidence about the practice of euthanasia in the Netherlands."⁴⁸ The Court was addressing whether a state statute banning assisted suicide violated the Due Process Clause of the federal constitution's 14th Amendment. Note that all of these opinions arise in the state statute-federal constitution context—as opposed to the treaty or treaty-implementing statute contexts, where Justice Scalia acknowledges the value of citing foreign law. One is of course free to change one's mind. However, one cannot assert that Justice Scalia has consistently disavowed judicial reliance on foreign legal resources. His contemporary quest is to eschew foreign legal resources *only* in those federal cases interpreting the meaning of the U.S. Constitution.

Let me conclude with my concerns, as a long-term professor of International Law, for

consideration by the faculty and students of Moscow State University. I do not know all the answers. I have spent a career teaching a generation of law students *not* to focus on the answers. I have instead motivated them to ask the right questions. I will thus begin the question and answer period by proposing the two following questions:

Question 1: U.S. Supreme Court judges are appointed by the President, and confirmed by the Senate, because of their extraordinary intellectual and legal ability. We now have legislators and executive branch officers proposing and supporting legislation to “restore sovereignty.” They would thus prohibit judicial access to all available legal sources—something which would no doubt offend the Supreme Court benches sitting in the 1793, 1815, and 1900 cases I mentioned earlier in today’s remarks. Aren’t the political branches of government therefore engaging in their *own* form of misguided activism? Are they not intruding upon the historical judicial quest to seek out all relevant sources, marshaled in the pursuit of a reasoned judicial resolution of the great issues of the day? If a federal judge can still borrow from state court decisions, and books, and law review articles, why not foreign and international legal resources as well?

Question 2: How can the political branches of U.S. government, who are attacking the Supreme Court for its reliance on foreign law, *not* be violating the U.S. Constitution’s Separation of Powers Doctrine, which they *too* are bound to uphold?

Paragraph one of the U.S. Declaration of Independence of 1776, accords “A decent respect to the opinions of mankind.” The new republic therein sought a place “among the powers of the earth.”⁴⁹ The eighty-five Federalist Papers are the fabric from which the Constitution was drawn. They refer to some fifty locations elsewhere in the world.⁵⁰ The U.S. Constitution itself effectively refers to “foreign” legal sources. For example, Congress has the constitutionally derived power to define and punish violations of the law of nations. But how could Congress do so, without resort to the evolving legal resource known as Customary International Law?⁵¹ The first Judiciary Act of 1789 refers to the law of nations.⁵² Decisions of the Supreme Court since 1793 have incorporated Customary International Law into the Court’s decision-making process.

So, why is it that International Law is suddenly so dangerous, as proclaimed by the dissenters in various opinions including the 2005 Supreme Court juvenile death penalty case? Why should foreign and international judicial analyses no longer count among the sources used historically by federal judges, since 1793, to best decide the great issues of the day? Might there be a political *raison d’être* for this skirmish, that is associated with post-911 isolationism?⁵³

Bal shoye speciba!

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1. Eighty percent of the U.S. federal case load consists of cases arising under the federal constitution, international treaties, and federal statutes. For the first one hundred years of the American Republic, however, Diversity Cases were almost the entire caseload of the U.S. Supreme Court. That percentage ultimately dropped to about twenty percent, after Congress passed the Federal Question Jurisdiction Act of 1875. For further details, see John J. Gibbons, *Federal Law and the State Courts 1780-1860*, 36 RUTGERS L. REV. 399 (1984). A “Diversity Case” is a state-based claim which may be lodged in federal court, when the plaintiff and defendant are domiciled in

different states; or when one is a U.S. citizen and the other party is a foreign citizen. 28 U.S.C. § 1332.

2. 543 U.S. 551 (2005) [hereinafter *Roper*].

3. In a 1987 case, three Supreme Court justices disavowed the majority's reference to international norms as being "totally inappropriate." Writing for the dissent, Justice Scalia urged that "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." *Thompson v. Oklahoma*, 487 U.S. 815, 869 n.4 (1987) (J. Scalia, dissenting). The same bantering occurred in a 1989 decision, when Scalia's majority opinion stated emphasized that "it is *American* conceptions of decency that are dispositive, rejecting the contention ... that the sentencing practices of other countries are relevant. *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989), abrogated by *Roper*, *supra* note 2, at 574.

4. *Chisholm v. Georgia*, 2 U.S. 419, 474 (1793), superseded on other grounds by U.S. Const., Amend. XI.

5. *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. 191, 198 (1815).

6. *Id.*

7. Keynote Address (Ginsburg) at the Ninety-Ninth Annual Meeting, "'A Decent Respect for the Opinions of [Human]kind:'" *The Value of a Comparative Perspective in Constitutional Adjudication*, print version in Christopher J. Borgen (ed.), "A DECENT RESPECT FOR THE OPINIONS OF MANKIND:" SELECTED SPEECHES BY JUSTICE OF THE U.S. SUPREME COURT ON FOREIGN AND INTERNATIONAL LAW 125, 134-135 (ASIL, Wash., D.C., 2007) [hereinafter SPEECHES].

8. *The Paquete Habana*, 175 U.S. 677, 700 (1900) (italics added).

9. Justice Fuller's dissent, *id.*, at 715, argued that there was in fact no such independently binding rule. It was an executive proclamation, not Customary International Law, which dictated the admiral's compliance with international practice.

10. Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67*, 68 OHIO STATE L.J. 1509, 1527 n.57 (2007).

11. Convention available online at: <<http://www.unhchr.ch/html/menu3/b/k2crc.htm>>.

12. *Roper*, *supra* note 2, at 604, where Justice O'Connor cites representative Supreme Court cases).

13. *Roper*, *supra* note 2, at 605.

14. Keynote Address at the Ninety-Sixth Annual Meeting, SPEECHES (O'Connor), *supra* note 7, at 91 & 93 (italics added). See also: So. Center Internat'l Studies, Atlanta, GA, Oct. 28, 2003), available online at: <http://www.southerncenter.org/OConnor_transcript.pdf>.

15. See Bill Mears, *Justice Ginsberg Details Death Threat*, CNN.com (Mar. 15, 2006).

16. *Lawrence v. Texas*, 539 U.S. 558 (2003).

17. *Lawrence*, at 602 (J. Scalia, dissenting).

18. *Roper*, *supra* note 2, at 624 (2005) (J. Scalia, dissenting).

19. Keynote Address at the Ninety-Eighth Annual Meeting, *Foreign Legal Authority in the Federal Courts*, SPEECHES (Scalia), *supra* note 7, at 110 (italics added).

20. SPEECHES (Scalia), *supra* note 7, at 111 (italics added).

21. SPEECHES (Scalia), *supra* note 7, at 113.

22. SPEECHES (Scalia), *supra* note 7, at 114. As a matter of U.S. *recognition* of foreign judgments, U.S. courts generally recognize foreign judgments seeking monetary but not equitable relief. See Restatement (Third) of Foreign Relations Law § 481, Comments *c.* and *b.*, respectively (1987). As to treaties, they must be self-executing to be enforceable in courts of the U.S.—as recently confirmed in *Medellin v. Texas*, 128 S.Ct. 1346, 1365 (2008).

23. See, e.g., the case law authorities referred to in note 11 *supra*.

24. Keynote Address at the Ninety-Seventh Annual Meeting, SPEECHES (Breyer), *supra* note 7, at 101.

25. *Roper*, at 626-627 (2005) (Scalia dissent). For an analysis of Justice Scalia's position on the matter of drawing upon continental jurisprudence, see Noga Morag-Levine, *Judges, Legislators, and Europe's Law: Common-Law Constitutionalism and Foreign Precedents*, 65 MARYLAND L.REV. 32 (2006).

26. These three concerns are reprinted in SPEECHES (Scalia), *supra* note 7, at 119.

27. For I.C.J. precedent, see generally Mohamed Shahabuddeen, *Precedent in the World Court* (Cambridge Univ. Press, 2008). For regional precedent, see generally, Pierre-Marie Dupuy, *The Danger of Fragmentation or*

Unification of the International Legal System and the International Court of Justice, 31 N.Y.U. J. INT'L L. & POLICY 791 (1999).

28. I.C.J. Statute, art. 38.1, available online at:

<<http://www.yale.edu/lawweb/avalon/decade/decad026.htm>>.

29. *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233 (2003) is perhaps the leading case.

30. *Polyukhovich v. Commonwealth of Australia*, 172 C.L.R. 501 (1991).

31. Resolution 568 is available online, at:

<http://www.house.gov/list/press/fl24_feeney/ResConstitutionSubPassage.shtml> [hereinafter Resolution 568].

32. See Justice Scalia's quotes in text accompanying notes 19 & 20 *supra*.

33. See generally, Lawrence Tribe, 1 AMERICAN CONSTITUTIONAL LAW 124 (3d ed. Thompson-West: 1999).

34. SPEECHES (O'Connor), *supra* note 7, at 93. See *supra* note 14, and its accompanying italicized text.

35. See Resolution 568, *supra* note 31.

36. The Restoration Act is available online at: <<http://thomas.loc.gov/cgi-bin/query/z?c109:S.520>>.

37. See David Stout, *3 Justices Respond Personally to Criticism of U.S. Judiciary*, NEW YORK TIMES ON THE WEB, April 22, 2005, page 1.

38. Speech presented at American Enterprise Institute, Nov. 17, 2006. To listen, go to:

<<http://fedsoc.server326.com/audio/MP3s/fsaudio.xml>>, then scroll down to "Address by Hon. Michael Chertoff 11-17-06."

39. Vienna Convention of Consular Relations, art. 36.1(c), available online at:

<<http://fletcher.tufts.edu/multi/texts/BH444.tx>>. Case: *Breard v. Gilmore*, 523 U.S. 371 (1998).

40. *Case Concerning Avena and other Mexican Nationals (Mex. v. U.S.)*, 2003 I. C. J. No. 128 (Order of Feb. 5). See Consular Notification and the Death Penalty: The ICJ's Judgment in *Avena*, ASIL Insight #130 (April 2004), available on line at: <<http://www.asil.org/insights/insigh130.htm>>.

41. *Wall Case* available online at: <<http://sломanson.tjsl.edu/PalestWall.pdf>>.

42. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

43. Edwin Viera, HOW TO DETHRONE THE IMPERIAL JUDICIARY (Vision Forum Ministries: Walter, Oregon 2004).

44. William R. Slomanson, FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW (5th ed. Thompson-Wadsworth 2006).

45. These cases are informatively described in David J. Seipp, *Our Law, Their Law, History, and the Citation of Foreign Law*, 86 BOSTON U. L.REV. 1417 (2006).

46. *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 381-382 (1995).

47. *Locke v. Davey*, 540 U.S. 712, 734 (2004).

48. *Washington v. Glucksberg*, 521 U.S. 702, 734 (1997).

49. A thoughtful analysis of the U.S. Declaration of Independence and Federalist Papers, in the citation of foreign resources context, is provided by David T. Hutt & Lisa K. Parshall, *Divergent Views on the Use of International and Foreign Law: Congress and the Executive versus the Court*, 33 OHIO NORTHERN U. L.REV. 113 (2007).

50. The Federalist Papers are available online at: <<http://thomas.loc.gov/home/histdox/fedpapers.html>>.

51. U.S. CONST., art. I § 8.

52. Its Alien Tort Statute (A.T.S.), although dormant for nearly two-hundred years, was classically described in this constitutional context in the leading case of *Filartega v. Pena-Irala*, 630 F.2d 876 (2d Cir.1980). The A.T.S., codified at 28 U.S.C.A. § 1350, authorizes suits between foreign citizens, regarding conduct that violates the law of nations, which occurs outside of the U.S. See generally, Ralph G. Steinhardt & Anthony D'Amato, THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY (Transnational, 1999).

53. For further research resources, see C. Gerety, *Roper v. Simmons* and the Role of International Laws, Practices and Opinions in United States Capital Punishment Jurisprudence, 4 CHIN. J. INT'L L. 565 (2005); S.Murphy, Interpretation of US Constitution by Reference to International Law, in Contemporary Practice of the United States,

97 AMER. J. INT'L L. 683 (2003); and H. Harris, "We are The World"—Or Are We?: The United States' Conflicting Views on the Use of International Law and Foreign Decisions, 12 HUMAN RIGHTS BRIEF 5 (Wash., DC: Amer. Univ., 2005).