The Use of International and Foreign Law in Interpreting the U.S. Constitution

Introduction

International law and norms have influenced nations’ domestic policies for centuries. Formal agreements, such as ratified treaties and contracts bind parties of different nations (or the nations themselves), and governments often look to international or foreign law while policy-making, even when they are not required to do so. In addition, recent history abounds with instances in which international human rights standards have caused governments to work through international mechanisms and change their policies. Where international law lacks enforcement mechanisms, pressure resulting from publicity about violations and, in more extreme situations, economic sanctions have caused offending states to change their domestic behavior.

Though international law has long affected the policies of other countries, recently, there has been an increased focus on the role of international law in U.S. government decisions. A number of organizations are focusing on using international standards to expand the rights of disadvantaged groups both within and outside of the court system. In addition, the U.S. response to the attacks of 9/11 is rife with allegations of torture and other serious human rights violations that have caused many to take a

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2 Publications of reports by the United Nations Commission on Human Rights, as well as independent groups such as Amnesty International and Human Rights Watch have been used to name human rights abusers and publicly shame them for violating both binding agreements that they have ratified (such as the International Covenant on Civil and Political Rights) and non-binding agreements that have become customary international law due to their accepted practice throughout the international community. Countries named in these reports often have difficulty receiving both economic and military aid from multilateral and bilateral sources (See David L. Cingranelli and Thomas E. Pasquarello. “Human Rights Practices and the Distribution of U.S. Foreign Aid to Latin American Countries.” American Journal of Political Science, Vol. 29, No. 3 (Aug., 1985), 541, 545-546, 555-561; Michael Ignatieff. Human Right and Politics as Idolatry. (Princeton University Press: Princeton, NJ, 2001), 11.). While pressure from international human rights organizations often has greater effect with less powerful countries, it has successfully changed policies in major world powers like the United States. See Margaret E. Keck and Kathryn Sikkink. Activists Beyond Borders: Advocacy Networks in International Politics. (Ithaca, NY: Cornell University Press, 1998), 186-187; Robert O. Keohane and Joseph S. Nye. Power and Interdenpence. 2nd Ed. New York: Longman, 1989), 11.
closer look at America’s record both abroad and at home. And U.S. courts are continuing their practice of looking at international or foreign law sources in a variety of contexts, including cases involving constitutional questions. On the current Supreme Court, five justices (as well as retiring Justice Sandra Day O’Connor) have demonstrated a willingness to look to international or foreign law in resolving at least some constitutional questions, although the other three have expressed their disagreement with that practice.  

The question of whether a court can or should cite to international and foreign law in U.S. Constitutional cases has received significant attention in recent years for several reasons. First, the practice is commonly associated with recent, closely divided Supreme Court decisions on the death penalty, gay rights, and affirmative action. The majority opinion in Lawrence v. Texas, invalidating a state law criminalizing sodomy, a concurrence in Grutter v. Bollinger, upholding the University of Michigan Law School’s affirmative action plan, and the majority opinion in Roper v. Simmons, invalidating the juvenile death penalty, all noted that foreign legal decisions or international treaties were consistent with the outcome reached by the Court. Second, conservatives in Congress, who view international law as a mechanism for expanding rights that they oppose, have introduced legislation to prohibit federal courts from “rely[ing] upon any . . . law . . . or . . . other action of any foreign state or international organization or agency, other than English constitutional and common law up to the time of the adoption of the Constitution of the United States.” Third, the recent vacancies on the Supreme Court and the confirmation hearings of now-Chief Justice John Roberts and Judge Samuel Alito have resulted in additional scrutiny of the process of constitutional decision-making, including the use of international law in that process. Indeed, Chief Justice Roberts was specifically questioned about the practice by two senators on the Judiciary Committee who disapprove of the practice; Roberts indicated that he “d[idn’t] think it was a good approach,” but that he also did not believe judges who do so are violating their constitutional oaths. Judge Alito also expressed his disapproval of the practice at his confirmation hearing. 

Some conservative commentators have attempted to discredit the courts’ use of international and foreign law by portraying the practice as a novel, selective and illegitimate approach to constitutional interpretation that threatens national sovereignty. One conservative critic of the practice contended it was “alien to the American legal

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3 Justices Breyer, Ginsburg, Kennedy, Souter and Stevens support the practice, at least in some circumstances; Chief Justice Roberts and Justices Scalia and Thomas have criticized the practice.

4 This study guide specifically focuses on the use of international sources in interpreting the U.S. Constitution, particularly the Eighth Amendment, which prohibits cruel and unusual punishment, and the Fourteenth Amendment, which guarantees due process and equal protection. The use of international law in the context of constitutional law has been particularly contentious. Indeed, Justices Breyer and Scalia debated this specific topic at American University earlier this year. See Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer – American University Washington College of Law, Jan. 13, 2005. In contrast, there is general agreement, even among most conservative commentators, that it is appropriate to look to international or foreign law where a statute or contract requires it or where a ratified treaty provides the controlling law.

5 Senate Committee on the Judiciary, Hearings on the Nomination of John G. Roberts, Jr., to be Chief Justice of the Supreme Court of the United States. 109th Cong., 1st sess., 2005 (responding to questioning from Senators Kyl and Coburn).
system, historically." Other critics, including Attorney General Alberto Gonzales, described the practice as undemocratic and unworkable. They claim the practice is undemocratic because the American people have had no say in the election or confirmation of foreign judges, while state judges are often elected and federal judges are appointed by the President and confirmed by the Senate. Moreover, critics fear that because the practice of citing to international and foreign decisions is viewed as undemocratic, doing so risks “undermin[ing] public acceptance of our judicial system.” Critics view the citation of foreign and international sources as unworkable because there are numerous foreign judicial bodies, many of which have a different role than American courts and many of which do not issue their decisions in English. The large number of foreign courts allows for judges citing foreign law to do so selectively. As one critic complained, “In recent years, comparative analysis has appeared to be a one-way ratchet toward an expansion of individual rights and towards restriction of democratic prerogatives.”

Supporters of the use of international law note that the Constitution uses broad language to protect core human rights such as liberty, equality, and freedom from cruel and unusual punishment. Judges often look to international law sources in cases involving those core human rights. In other cases, looking at international or foreign norms can cast “an empirical light” on the consequences of a particular law. For these reasons, a number of jurists have noted that international or foreign sources constitute a body of potentially useful information. In addition, progressives have refuted conservative critiques, noting that the federal courts have looked at such sources for centuries and that in no case are such sources being used as controlling authority. State courts routinely cite the decisions of other state courts without raising state sovereignty concerns. Moreover, some have noted that technological advances have made it easier to research international and foreign law. And if advocates or judges think that a citation to an international or foreign source is inapposite, they can point that out and counter with better sources, as is routinely done in our adversary system. According to supporters of the practice, to ignore international or foreign law would be like pretending the rest of the world simply does not exist.

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7 Mark Sherman, Attorney General: Justices are Wrong to Cite International Law, Associated Press, Oct. 19, 2005.
8 Richard Posner, No Thanks, We Already Have Our Own Laws, Legal Affairs, July/August 2004.
10 Richard Posner, No Thanks, We Already Have Our Own Laws, Legal Affairs, July/August 2004.
12 See International Convention on Civil and Political Rights, Art. 4.2, 6, 7, 8, 11, 15, 16 and 18.
13 Vicki Jackson, Yes Please, I’d Love to Talk with You, Legal Affairs, July/August 2004.
14 See Jeffrey Toobin, Swing Shift, The New Yorker at 50 (Sept. 12, 2005) (quoting Anne-Marie Slaughter, dean of the Woodrow Wilson School of Public and International Affairs at Princeton University).
As the debate continues about the United States’ role in the international community and the application of human rights within the U.S., so too will the debate over the propriety of looking to international and foreign sources in resolving issues under the U.S. Constitution.

The Historical Use of Foreign and International Sources

Federal courts have looked to foreign or international law in interpreting the U.S. Constitution throughout the nineteenth and twentieth centuries. Indeed, America’s founding documents recognized the importance and influence of international norms on American governance. The Declaration of Independence itself explained the reasons for separating from Great Britain “out of a decent Respect to the Opinion of Mankind” and described its grievances “to a candid world.” Moreover, it described the rights of “Life, Liberty and the pursuit of Happiness” as “unalienable” human rights, not based on citizenship in a particular nation. Similarly, the Federalist Papers explained “that attention to the judgment of other nations is important to every government,” not only as a matter of foreign policy, but also as check on a “strong [national] passion or momentary interest.” The Constitution explicitly recognized the United States was to be bound by the “Law of Nations.”

In the nineteenth century, the Supreme Court referred to the law or experience of other nations in a range of contexts. For example, the Court looked to foreign law in defining the status of Indian tribes, see Worcester v. Georgia, 31 U.S. 515 (1832), and in holding that legislation prohibiting bigamy is constitutional, see Reynolds v. United States, 98 U.S. 145, 164-65 (1879). Both the majority and the dissent in Dred Scott v. Sanford, 60 U.S. 393 (1857) referred to foreign law; the majority decision looked at English involvement in the slave trade prior to the founding, while the dissenters considered contemporary norms, noting that “no nation in Europe . . . considers itself bound to return to his master a fugitive slave under the civil law or the law of nations.” Id. at 322.

The Court continued its practice of referring to foreign and international law in the following century: In Jacobson v. Massachusetts, 197 U.S. 11, 31-32 & n.1 (1905), the Supreme Court detailed the experience of mandatory vaccination programs of approximately twenty other nations and territories in holding that Massachusetts’ mandatory vaccination program was constitutional. In Wickard v. Filburn, 317 U.S. 111 (1942), the Court discussed Australian, Canadian, and Argentine regulation of wheat markets in holding that Congress could regulate the production of wheat for home

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15 While this section focuses on the Court’s historical use of international and foreign law in U.S. constitutional cases, the Court has long recognized that international law can properly be considered in its own right in federal courts. See Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (“[a]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”); see also The Paquete Habana, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice . . . . For this purpose, where there is no treaty, and no controlling executive of legislative act of judicial decision, resort must be had to the customs and usages of civilized nations.”)

16 The Federalist No. 63.
consumption. Justice Jackson’s concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 651-52 (1952), noted that the structure of government of the Weimar Republic in Germany as well as those of France and Great Britain “suggests that emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them.” And the Court considered the interrogation practices of England and several of its former colonies in *Miranda v. Arizona*. 348 U.S. 436, 486-490 (1966); see also id. at 521-23 (Harlan, J., dissenting) (disputing the persuasiveness of the foreign law citations).

The practice of looking at foreign and international law has a particularly strong tradition in the Eighth Amendment context, going back to one of the first cases challenging punishment as “cruel and unusual,” *Wilkerson v. Utah*, 99 U.S. 130 (1879). There, the Court looked to, *inter alia*, the practices of other countries to hold that the punishment of death by shooting passed Eighth Amendment muster. The trend of looking to foreign law continued in *Weems v. United States*, 217 U.S. 349 (1910), and again, perhaps most notably, in *Trop v. Dulles*, 356 U.S. 86 (1958). In *Trop*, the Supreme Court held that the use of denationalization as a punishment is barred by the Eighth Amendment. In coming to this conclusion the Court reasoned:

The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society . . . . The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime . . . . The United Nations' survey of the nationality laws of 84 nations of the world reveals that only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion. In this country the Eighth Amendment forbids this to be done.

*Id.* at 103. Two decades later, in determining that the death penalty was cruel and unusual punishment for the crime of rape, the Court declared: “It is thus not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue.” *Coker v. Georgia*, 433 U.S. 584 (1977).

While in 1989 the Court rejected “the contention . . . that the sentencing practices of other countries are relevant,” holding that “it is American conceptions of decency that are dispositive,” *Stanford v. Kentucky*, 492 U.S. 361 (1989), this shift in interpretation was short lived. In 2002, in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court noted that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.” *Id.* at 316 n.21. The Court considered international and foreign sources in even more depth in declaring the juvenile death penalty unconstitutional in *Roper v. Simmons*, 125 S. Ct. 118 (2005).

In sum, the Supreme Court has looked to international and foreign law in a range of contexts throughout our Nation’s history. This practice has been particularly
widespread in cases concerning the core human rights embodied in the Eighth Amendment.

The Context in Which International and Foreign Sources Have Been Used

American courts have used international and foreign law in constitutional cases in several different ways. First, it is often used for its empirical value. Second, foreign law is used in the Fourteenth Amendment context to provide insight into the underlying values of equality and liberty. Finally, it is used in Eighth Amendment jurisprudence to determine the “evolving standards of decency that mark the progress of a maturing society.”17

Perhaps the most common use of international and foreign law is as empirical evidence from societies facing issues similar to our own. As Justice Breyer stated, “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.” See Printz v. United States, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting) (emphasis added). The Court sought empirical guidance from international and foreign sources when it determined the constitutionality of the mandatory vaccination program in Jacobson v. Massachusetts, 197 U.S. 11 (1904) and limitations on wheat production in Wickard v. Filburn, 317 U.S. 111 (1942). The experience of other nations demonstrated the substantial state interest in the regulation at issue before the Court. See also Youngstown v. Sawyer, 343 U.S. 579 (1952) (Jackson, J., concurring) (noting the recent experience of various European nations in evaluating an American separation of powers question). Despite his assertion that “such comparative analysis [is] inappropriate to the task of interpreting a constitution,” Printz v. United States 521 U.S. at 921 n.11., even Justice Scalia has relied on foreign sources in this manner, referring to the actions of legislatures of foreign countries to illustrate that a prohibition on anonymous campaign literature does not violate principles of free speech. See McIntyre v. Ohio Elections Comm’n, 514 U.S. 334 (1995).

Beyond their empirical use, foreign and international sources have long been used to ascertain the scope of protection afforded by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Those clauses are drafted broadly and the rights they protect, liberty and equality, are considered core human rights. Thus, the Court considered foreign norms, as one part of its larger analysis of whether the criminalization of same-sex sodomy violated the constitutional protection of liberty in Lawrence v. Texas, 123 S. Ct. 2472 (2003). Indeed, the Court had looked to such norms in Bowers v. Hardwick, 487 U.S. 186 (1986), which Lawrence overruled, but as the majority opinion in Lawrence pointed out, Bowers disregarded the contemporaneous state of the law in “Western civilization.” At the time Bowers was decided, the British Parliament had repealed laws punishing homosexual conduct and the European Court of Human Rights had struck down such laws.

Recently, in *Grutter v. Bollinger*, 539 U.S. 306 (2003), Justice Ginsburg used international law to elucidate the meaning of “equal protection.” There, the majority opinion stated that race-conscious admissions programs must have a logical end point. In her concurrence, Justice Ginsburg observed that this statement accorded with the international understanding of affirmative action so long as the end point for such programs coincided with the full and equal enjoyment of human rights and fundamental freedoms across all racial groups.

Foreign authority plays a special role in the Eighth Amendment context because it helps to delineate the “evolving standards of decency that mark the progress of a maturing society.” *See Trop v. Dulles*, 356 U.S. 86 (1958). Application of this standard often includes a look to the standards of punishment in other nations, as was true most recently in *Roper v. Simmons*, 125 S. Ct. 1183 (2005), which struck down the juvenile death penalty.

It is important to note that the use of foreign authority is not a one-way ratchet. It has been used to both expand and restrict individual rights, by both liberal and conservative jurists. For example, in *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Court found that Washington’s ban on assisted suicide was rationally related to a legitimate government interest and did not violate the Due Process Clause of the Fourteenth Amendment. In doing so, the majority acknowledged that other countries were also debating the validity of laws penalizing assisted suicide and expressed concern with euthanasia as it was practiced in the Netherlands. Likewise, in *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004), the Court looked to international law in holding that the President had the power to detain individuals engaged in armed combat against the United States during the duration of hostilities. *See id.* at 2641.

In none of the cases discussed above, or indeed in any U.S. constitutional law case, has the Court relied upon international or foreign law as binding authority. This limitation on how international and foreign law is used undercuts criticisms that the citation of such law is undemocratic and undermines American sovereignty. Legal reasoning in the United States is often based on analogies, and as several judges have noted, additional information provides judges and lawyers with means to examine conflicting approaches and sort out what is most relevant and persuasive. In fact, state courts will frequently look to the opinion of other states for guidance without encroaching on state sovereignty or impinging on the democratic rights of its citizens. Federal courts’ voluntary, non-binding consideration of international or foreign law is akin to that practice.

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18 *Cf.* Jeffrey Toobin, *Swing Shift*, The New Yorker at 51 (Sept. 12, 2005) (speculating that the closer links between church and state in European nations could lead Justice Kennedy in a more conservative direction on that issue).

Why Courts Look to International and Foreign Sources

As Patricia M. Wald, former Chief Judge of the D.C. Circuit Court of Appeals has noted, foreign decisional law provides “a pool of potential and useful information.”\(^{20}\) First, international and foreign decisions provide additional reasoning and perspectives for the Court to evaluate in coming to its own conclusions. As Justice Breyer stated, “If I have a human being called a judge in a different country dealing with a similar problem, why don’t I read what he says, if it’s similar enough. Maybe I’ll learn something.”\(^{21}\) Justice Kennedy has similarly remarked that “other nations and other peoples can define and interpret freedom in a way that’s at least instructive to us.”\(^{22}\) Justice O’Connor has agreed with her colleagues in this regard, remarking that other legal systems find new solutions to new legal problems and we can learn from their experiences.\(^{23}\)

In addition, judges have found foreign law helpful in gleaning common principles of fairness and equality that are not dictated by state borders. According to Judge Wald:

> The United States has been investing billions of dollars . . . to spread the “rule of law” and human rights across the globe. Such an effort can only be justified on the premise that citizens of most countries have common . . . intuitions and feelings about justice . . . Increasing interchange among judges around the world is not a kind of conspiracy to impose the views of a few on the many but rather a genuine search for common denominators of basic fairness governing relationships between the governors and the governed.\(^{24}\)

Justice Kennedy recently echoed this theme, “Why should world opinion care that the American Administration wants to bring freedom to oppressed peoples? Is it not because there’s some underlying common mutual interest, some underlying common shared ideas, some underlying common shared aspiration, underlying unified concept of human dignity?”\(^{25}\) These common denominators can shed light on our own conceptions of fairness, equality and liberty. In fact, for years the Supreme Court has recognized the existence of customary international law, which, while not memorialized in binding treaties, represents norms to which civilized nations have felt obligated to conform.\(^{26}\)


\(^{21}\) Jeffrey Toobin, *Swing Shift*, The New Yorker at 50 (Sept. 12, 2005).

\(^{22}\) Id.


\(^{25}\) Jeffrey Toobin, *Swing Shift*, The New Yorker at 50 (Sept. 12, 2005).

Finally, by citing to foreign law, the Supreme Court recognizes the credibility of foreign judicial systems that are themselves looking to American constitutional law. Justices Kennedy and Rehnquist noted that European constitutional courts, which frequently cite American constitutional law, wonder why the United States does not look to their decisions. Justice Kennedy explained that judges from those courts “basically were saying, ‘Why should we cite yours if you don’t cite ours?’” If we are asking the rest of the world to adopt our idea of freedom it does seem to me there may be some mutuality there.”27 In addition, citing foreign law has the benefit of encouraging democracy in countries where court systems are struggling to gain their judicial independence. As Justice Breyer stated:

> In some of these countries, there are institutions, courts, that are trying to make their way in societies that did not used to be democratic . . . And they are trying to protect human rights, they are trying to protect democracy, they have a document called a constitution and they want to be independent judges. And for years, people all over the world have cited the [U.S.] Supreme Court so why do we not cite them occasionally. They will then go to some of their legislators and say, see, the Supreme Court of the United States cites us and that might give them a leg up (an advantage) even if we just say it is an interesting example.”28

New technology is making it easier to pursue international and comparative law inquiries. Foreign opinions from dozens of countries are available on the internet. As one scholar noted, “The opinions are out there, easy to get, and the briefs are being filed. If the Justices didn’t cite them, it would be like pretending the rest of the world didn’t exist.”29

Even those who support the use of international and foreign law recognize that courts should carefully evaluate whether an international or foreign authority is actually analogous to the issues before it.30 The context in which the authority made its decision, as well as a foreign nation’s history, governmental structure and demographics all may

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27 Jeffrey Toobin, *Swing Shift*, The New Yorker at 50 (Sept. 12, 2005); accord William H. Rehnquist, *Constitutional Courts – Comparative Remarks* (1989), reprinted in *Germany and Its Basic Law: Past, Present and Future – A German-American Symposium 411, 412* (Paul Kirchhof & Donald P. Krommers eds., 1993) (“Now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.”). Later in his career, however, Justice Rehnquist joined opinions criticizing the use of international and foreign law. See note 2 supra..


bear on whether the decision is a sound basis for comparison. These concerns with methodology, however, do not speak to the value that can be gleaned from international and foreign law. Rather, they speak to the level of care that should be used in analyzing such decisions and the importance of having transparent decisions, where lawyers and judges can engage in precisely such debates.

Legislative Efforts to Limit the Use of International and Foreign Law

Some conservatives in Congress and with various interest groups who oppose the citation of foreign or international law in cases involving U.S. constitutional issues are attempting to preclude the practice legislatively. This attempt fits squarely within a larger attack on judicial independence.  

In both 2004 and 2005, a number of conservatives in the House and Senate introduced the Constitution Restoration Act which would limit the jurisdiction of the federal courts and set forth specific grounds for impeaching judges. That bill includes a provision prohibiting federal courts from “rely[ing] upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional and common law up to the time of the adoption of the Constitution of the United States.” (Emphasis added).

In addition, resolutions are pending in the House and Senate stating that “judicial determinations regarding the meaning of the Constitution should not be based on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution.” Congressman Feeney, a supporter of this resolution, stated in an interview, “To the extent they (judges) deliberately ignore Congress’ admonishment, they are no longer engaging in good behavior in the meaning of the Constitution and they may subject themselves to the ultimate remedy, which would be impeachment.” The structure of the Constitution Restoration Act and Congressman Feeney’s comments both demonstrate that the current attempt to limit the use of international sources is closely tied to the broader effort to interfere with judges’ ability to decide cases independently.

Some conservative interest groups have been quite overt in linking the two issues. For example, Edward Whalen, president of the Ethics and Public Policy Center recently testified before Congress:

31 In recent years, conservatives have sought to limit the independence of the judiciary in a number of ways: Members of Congress have threatened to limit its resources and jurisdiction, the Department of Justice has tracked individual judges’ records on sentencing, and members of both branches of government along with conservative interest groups have criticized how judges perform their jobs. In extreme cases, members of Congress, their staffers and members of conservative interest groups publicly sympathized with those who physically attacked judges. See Dana Milbank, And the Verdict on Justice Kennedy Is: Guilty, Washington Post (Apr. 9, 2005) at A3; Max Blumenthal, In Contempt of Courts, The Nation, posted Apr. 11, 2005 (available at http://www.thenation.com/doc/20050425/blumenthal).

The six Justices who nonetheless resort to [foreign authority] do so because they embrace an essentially lawless--i.e., unconstrained--view of their own role as Justices . . . . The Framers established a constitutional structure under which American citizens, within the broad bounds delineated by the Constitution, have the power and responsibility to decide how their own states and communities and the nation should be governed. In their ongoing project to demolish that structure, these six Justices see foreign law as another powerful tool that they can wield whenever it suits them.\textsuperscript{33}

This testimony was offered as further support of the House Resolution.

These attempts to constrain judges’ use of international and foreign law “cuts to the core of the separation of powers and the traditional role that each branch of government has historically played.”\textsuperscript{34} As Yale Law School Professor Jack Balkin has explained, under \textit{Marbury v. Madison}, 5 U.S. (Cranch) 137 (1803), “it is the duty of courts to say what the law is, and although Congress may remove certain elements of their jurisdiction, they may not dictate how judges may interpret law or decide cases, because that is a core judicial function.” Thus, critics of the Constitution Restoration Act contend that it violates this basic separation of powers principle. Even those who believe that foreign or international authority have no place in American jurisprudence may be wary of any attempt by members of Congress to tell judges how to discharge their duties.

\textbf{Conclusion}

In the words of retiring Justice Sandra Day O’Connor, “no institute of government can afford to ignore the rest of the world.”\textsuperscript{35} As many judges, scholars and lawyers have observed, looking to international and foreign sources in the larger project of constitutional interpretation not only allows us to speak to commonalities, but can also “contribute to our understanding of our own distinctiveness as a nation, illuminate common concepts and challenge us to think more clearly about our own legal questions.”\textsuperscript{36}

\begin{footnotesize}
\textsuperscript{33} Testimony of M. Edward Whelan III, United States House of Representatives Committee on the Judiciary, Subcommittee on the Constitution Hearing on “H. Res. 97 and the Appropriate Role of Foreign Judgments in the Interpretation of American Law” (July 19, 2005).
\textsuperscript{34} Hadar Harris, “\textit{We are the World” – or Are We? The United States’ Conflicting Views on the Use of International Law and Foreign Legal Decisions}, 12 No. 3 Hum. Rts. Brief 5 (2005).
\textsuperscript{35} Sandra Day O’Connor, Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law (Mar. 16, 2002) in \textit{96 Am. Soc’y Int’l L. Proc.} 348 (2002); see also infra.
\textsuperscript{36} Vicki Jackson, \textit{Yes Please, I’d Love to Talk with You}. Legal Affairs, July/August 2004.
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