

THE CONTROVERSY OF APPLYING FOREIGN SOURCES OF LAW TO US SUPREME COURT DECISIONS: TWO PERSPECTIVES IN A LONG AMERICAN DEBATE, AND WHY THE PRACTICE SHOULD CONTINUE

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Introduction

Should the U.S. Supreme Court cite to foreign sources of law when interpreting the U.S. Constitution in its adjudications? The answer to that question has been the source of heated debates across America in recent years, especially in an era when there have been four new appointments to the U.S. Supreme Court in almost as many years. Such debates reached a pinnacle following the Court's citations to foreign sources of law in cases that decided controversial issues, including whether the state can execute individuals who were under 18 years of age at the time of their capital crimes,² and whether a law prohibiting consenting male adults from engaging in acts of sodomy is constitutional.³

Conservatives on the Court have made their disapproval of citing to foreign sources of law quite clear, particularly Justices Antonin Scalia and Clarence Thomas. In his dissenting opinion in the case of *Roper v. Simmons* — joined by Justice Thomas — Justice Scalia wrote, “The basic premise of the Court’s argument that American law should conform to the laws of the rest of the world ought to be rejected out of hand.”⁴ Justice Scalia went on to add that to “invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decision making but sophistry.”⁵

The majority’s opinion, holding as unconstitutional the Texas law that banned sodomy among consenting male adults, as written by Justice Kennedy, was a controversial decision by itself. But what acted as a catalyst for the debate regarding the use of foreign sources of law in their decision making process was that the majority’s controversial decision was labeled “a conformity to the laws of the rest of the world” by Justice Scalia. For many people, accepting the majority’s decision would be difficult enough but the notion that a judgment was made in contradiction with the values of many Americans, yet in unison with the laws of foreign nations, was unacceptable.

Those who oppose citations to foreign sources of law in the adjudicative process, whether they are members of the Court or lawmakers in the U.S. Congress, cite four primary reasons for their opposition: (1) America does not

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² See *Roper v. Simmons*, 543 U.S. 551 (2005).

³ See *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁴ *Roper*, 543 U.S. at 624.

⁵ *Id.* at 627.

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have the same moral and legal framework as the rest of the world;⁶ (2) foreign sources of contemporary law has no bearing on the intent of the framers of the U.S. Constitution;⁷ (3) it's just another means for activist judges to discriminately manipulate the law;⁸ and (4) it circumvents the domestic constitutional lawmaking structure.⁹

Meanwhile, proponents of the U.S. Supreme Court's use of foreign law have defended the practice with the same zeal that critics have used to attack it. Among those who support the use of foreign law on the current court are Justices Anthony Kennedy and Ruth Bader Ginsburg. But support for the use of foreign sources of law are not restricted to the less conservative justices. Former Associate Justice Sandra Day O'Connor supported the use of foreign sources, as did the late Chief Justice William Rehnquist.¹⁰ Perhaps the most ardent supporter of the practice is Justice Stephen Breyer. Justice Breyer is quick to point out that the decisions of foreign courts are not binding upon American courts. Rather, according to Breyer, the decisions are merely informative for those issues that are not clearly addressed in the U.S. Constitution.¹¹

Furthermore, there is nothing new about the Court's references to foreign sources of law or tradition in their published opinions.¹² In fact, one of the reasons that foreign sources of law were cited in the case that sparked the recent controversy — namely, the case of *Lawrence* — was because it was overturning a ruling of the Court in the case of *Bowers v. Hardwick*, the published opinion of which stated that sodomy is almost *universally forbidden*.¹³

While it's true that foreign sources of law are not based on our domestic democratic process of creating law, it's also true that the various non-legal sources used in policy arguments are also not rooted in our democratic process of creating law, and yet we are encouraged to cite to those non-legal sources by legal writing scholars.¹⁴ In fact, the Court has a long history of citing to various treatises and scholarly journal articles in majority opinions, despite the fact that those references are not based on our domestic democratic process of creating law.

Many scholars, judges and lawmakers on both sides of this issue are entrenched in their respective positions. Indeed, this is a controversial topic with passionate positions staked out on both sides. However, those who analyze this

⁶ See Interview, *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, 521 (2005) [hereinafter Scalia-Breyer Interview].

⁷ *Id.*

⁸ *Id.*

⁹ See Ernest Young, *The Trouble with Global Constitutionalism*, 38 TEX. INT'L L.J. 527, 533 (2003).

¹⁰ See Steven 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, 750-751 (2005).

¹¹ See Scalia-Breyer Interview, *supra* note 5, at 541.

¹² See Calabresi, *supra* note 9, at 753.

¹³ See *Bowers v. Hardwick*, 478 U.S. 186, 192-193 (1986) (emphasis added).

¹⁴ See Ellie Margolis, *Closing the Floodgates: Making Persuasive Policy Arguments in Appellate Briefs*, 62 MONT. L. REV. 59, 81 (2001).

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issue, regardless of their position, ultimately tend to agree that there is nothing wrong with looking at the determinations of foreign courts that were faced with issues that were both similar to the issue at hand before our Court, and not expressly addressed by the U.S. Constitution.¹⁵ Rather, the point of contention is centered on whether those examinations of foreign law in similar issues should be *cited* in the published court opinion of the issue at hand.

To reach an answer to that question, this paper will first examine the extent to which the U.S. Supreme Court has cited foreign sources of law in part I. In part II, this paper will examine both the intensity and substance of the debate over the use of foreign sources of law in Supreme Court decisions, including the importance of transparency for each opinion of the Court.

I. The extent to which the U.S. Supreme Court has used foreign law

The extent to which the U.S. Supreme Court utilizes foreign sources of law in their deliberations of constitutional questions can be made clearer when placed in the comparative context of other court systems in democratic governments. Perhaps the most extreme example of a judicial review court utilizing foreign sources of law is South Africa. Section 35(1) of South Africa's Interim Constitution stated that "In interpreting the provisions of this chapter a court of law... shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law."¹⁶

The reasoning behind the mandate to refer to foreign sources of law in the newly created Constitutional Court of South Africa was best explained by Justice Arthur Chaskalson in *State v. Makwanyane*,¹⁷ the first case to come before that court. However, Chaskalson was careful to limit the extent to which their court may rely on case law that was foreign to them by pointing out that foreign law was not to be binding:

Comparative "bill of rights" jurisprudence will no doubt be of importance, particularly in the early stages of the transition when there is no developed indigenous jurisprudence in this branch of the law on which to draw. Although we are told by section 35(1) that we "may" have regard to foreign case law, it is important to appreciate that this will not necessarily offer a safe guide to the interpretation of chapter 3 of our constitution. This has already been pointed out in a number of decisions of the Provincial and Local Divisions of the Supreme Court, and it is implicit in the injunction given to the Courts in section 35(1), which is permissive terms allows the Court to "have regard to" such law. There is no

¹⁵ See Scalia-Breyer Interview, *supra* note 5, at 525-526.

¹⁶ S. AFR. (INTERIM) CONST., ch. 3, § 35(1) (1993) available at http://www.servat.unibe.ch/icl/sf10000_.html

¹⁷ *State v. Makwanyane* 1995 (3) SA 391 (CC) (S. Afr).

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injunction to do more than this... We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.¹⁸

Likewise, proponents of citing to foreign sources of law in the U.S. Supreme Court have pointed out that our own constitution was drafted by men, such as Alexander Hamilton, who were forming a new government after obtaining their independence, and were largely dependent on foreign examples of government and law to form the U.S. Constitution. When confronted with this point, Justice Scalia has been quick to point out that there is a difference between using foreign sources of law to write a constitution, and using it to interpret that constitution after it's written (implying that textual interpretation is more appropriate).¹⁹

However, as we have recently seen in South Africa, it seems that the United States also had an implied mandate to use foreign sources of law. Legal scholars have pointed out that the Declaration of Independence provided an implied mandate to use foreign sources of law, by referencing "decent Respect to the Opinion of Mankind."²⁰ Additionally, Federalist Number 63 stated that an "attention to the judgment of other nations is important to every government... [I]n doubtful cases, particularly where the national councils may be warped by some strong passion or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can be followed."²¹

Following the cite to foreign law in the Court's controversial opinions in *Roper* and *Lawrence*, many conservatives in the media, who did not approve of the Court's opinion, have led the public to believe that such a use of foreign law is unprecedented.²² However, a closer examination of the Court's history over the last 200 years reveals the opposite conclusion. In the same manner that the contemporary justices of South Africa have needed to consult with the already established body of foreign case law for nonbinding guidance, the U.S. Supreme Court has referred to foreign cases for nonbinding guidance several times over the last two centuries. Such references often went beyond the arena of British law, which Justice Scalia has stated would be the appropriate body of foreign law, as it existed in the late 18th century, to interpret the intent of the framers of our own constitution.²³

¹⁸ *Id.* at 37-39.

¹⁹ See Scalia-Breyer Interview, *supra* note 5, at 533-534.

²⁰ See Calabresi, *supra* note 9, at 756 (citing THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776)).

²¹ *Id.* (citing The Federalist No. 63, at 382 (James Madison)).

²² See Calabresi, *supra* note 9, at 53 (citing HANNITY & COLMES: INTERVIEW WITH CONSTITUTION PARTY NATIONAL COMMITTEE CHAIRMAN JIM CLYMEN (Fox News television broadcast July 9, 2003)). Sean Hannity has said that what concerns him most is "Justice Kennedy in particular, he's citing in his particular case foreign law, which is almost unprecedented." *Id.* Clymen responded to Hannity's statement, saying, "It is unprecedented. It's unprecedented in terms of citing law, or using a law for basis of overturning a state law as it's done here... In [*Lawrence*] they actually relied on foreign law." *Id.*

²³ See Scalia-Breyer Interview, *supra* note 5, at 540.

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Chief Justice John Marshall, a pioneering justice of the early U.S. Supreme Court, laid down a precedent to the uses of foreign law in the adjudication of issues before the Court, in much the same way that Justice Chaskalson has for the contemporary South African court. Fifteen years after the U.S. Constitution was ratified, the case of *Murray v. Schooner* came before the Court. At issue was whether the *Charming Betsy*, a ship, was “subject to seizure and condemnation for having violated a law of the United States.”²⁴ In his opinion, Marshall stated “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”²⁵ Marshall elaborated on this point by stating that an act “can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.”²⁶ Scholars have interpreted this dicta as saying that “when American courts exercise their constitutional power to interpret statutes, they must exercise that constitutional power by giving legal weight to foreign sources of law.”²⁷

One example in which Marshall cited to non-British sources of foreign law was the case of *Brown v. United States*.²⁸ The issue to be decided by the Court was whether “enemy’s [British] property, found on land at the commencement of hostilities [the war of 1812] may be seized and condemned as a necessary consequence of the deceleration of war.”²⁹ In the dicta to his holding, Marshall referred to the views of foreign jurists who were famous at the time, including Bynkershoek, Vattel and Chitty.³⁰ Marshall went as far as to state that the “modern rule then would seem to be, that tangible property belonging to an enemy and found in the country at the commencement of war, ought not to be immediately confiscated.”³¹

The Court also has several other examples of referencing foreign sources of law throughout history, that do not touch upon foreign relations or our interactions with other nations as the cases of *Murray* and *Brown* did. For example, one the most famous cases decided by the Court in the second half of the 19th century made significant references to foreign sources of law: *Dred Scott v. Sandford*.³²

Although *Dred Scott* has since been overruled, the soundness of the ruling — or notorious lack thereof — in that case is irrelevant to the discussion of the court’s history of citing to foreign sources of law. What is relevant to the

²⁴ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

²⁵ *Id.*

²⁶ *Id.*

²⁷ Calabresi, *supra* note 9, at 766.

²⁸ *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814).

²⁹ *Id.* at 123.

³⁰ *Id.* at 124-125. Cornelius Bynkershoek was a Dutch writer on international law in the early 1700s. ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/87010/Cornelius-van-Bynkershoek> Emmerich de Vattel was a Swiss philosopher and jurist. ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/624086/Emmerich-de-Vattel>

³¹ *Brown*, *supra* note 27, at 125.

³² *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857)(holding that Dred Scott, a slave, was not a citizen of Missouri and therefore the court did not have diversity jurisdiction over his complaint seeking freedom after being temporarily moved to a free state with his owner).

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discussion at hand is the fact that the Court in that case did indeed cite to foreign sources of law. In his concurring opinion, Justice Nelson referred to the English case of *Ex parte Grace* (also referred to as *The Slave, Grace*).³³ Justice Nelson made reference to that case from England, despite the fact that the case was heard in 1827, 51 years after American independence.

Like the case of *Dred Scott*, the English case referenced by Justice Nelson centered on facts in which a slave moved between free territory and slave territory. In his opinion, Nelson referenced the English Court's holding that "on return of the slave to the colony [slave territory], from a temporary residence in England [free territory], [the English Court] held that the original condition of the slave attached."³⁴ Justice Nelson used the opinion of a foreign court's case that had similar issues and facts to the case of *Dred Scott* as part of the reasoning behind his own ruling.

Moreover, in one of the most famous cases of the 20th century, the Court again made references to foreign sources of law. In the case of *Miranda v. Arizona*³⁵ the issue before the court was whether law enforcement should ensure the Fifth Amendment rights of arrested suspects not to incriminate themselves. The majority opinion was written by Chief Justice Earl Warren, and made references to foreign sources of law from several countries, including England, Scotland and India.³⁶

For example, Chief Justice Warren cited both the experience and specific procedures of the Judges' Rules of England to justify his opinion, by stating:

The experience in some other countries also suggests that the danger to law enforcement in curbs on interrogation is overplayed. The English procedure since 1912 under the Judges' Rules is significant. As recently strengthened, the Rules require that a cautionary warning be given an accused by a police officer as soon as he has evidence that affords reasonable grounds for suspicion; they also require that any statement made be given by the accused without questioning by police. The right of the individual to consult with an attorney during this period is expressly recognized.³⁷

As a final example of the Court's past citation to foreign law, among the litany provided throughout American history that cannot be listed in full for the purposes of this paper, is perhaps the most famous opinion handed down from the Court in contemporary America: *Roe v. Wade*.³⁸ In *Roe*, the opinion of the Court was written by Justice Blackmun, who referenced foreign law in two ways: (1)

³³ *Id.* at 466-467 (citing *Ex Parte Grace (The Slave, Grace)* (1827) 166 Eng. Rep. 179 (High Ct. Adm.); 2 Hagg. 94).

³⁴ *Dred Scott, supra*, note 31, at 468.

³⁵ *Miranda v. Arizona*, 384 U.S. 436 (1966).

³⁶ *Id.* at 486-90.

³⁷ *Id.* at 486-488.

³⁸ *Roe v. Wade*, 410 U.S. 113 (1973).

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English statutory law in the 19th and 20th centuries;³⁹ and (2) “looked to the experience of other foreign countries that had legalized abortion to rebut the argument that abortion, as a medical procedure, ‘was a hazardous one for the woman.’”⁴⁰ Unlike the intense reaction to the Court’s references to foreign law that followed the published opinions of *Lawrence* and *Roper*, the references to foreign law in *Roe* was never a point of contention because the opinion in *Roe* was already controversial for so many other reasons.⁴¹

Having established the Court’s long tradition of citing to foreign sources of law in its opinions and rulings, contrary to the impression that such references were new following the Court’s opinion in *Lawrence* and *Roper*, it becomes necessary to examine the current controversy’s arguments for and against the Court’s use of such foreign sources of law, before we can determine whether their use is justified.

II. The arguments for and against the Court’s citations to foreign law

As mentioned earlier, some conservatives on the Court have made their disapproval of citing to foreign sources of law quite clear, particularly Justices Antonin Scalia and Clarence Thomas. However, just as the practice of referencing foreign law in U.S. Supreme Court decisions is nothing new, likewise the criticism of that practice did not begin with Scalia’s dissenting opinion in *Roper*, when he wrote “the basic premise of the Court’s argument that--American law should conform to the laws of the rest of the world--ought to be rejected out of hand.”⁴² In *Dred Scott*, the majority opinion of Chief Justice Taney also dismissed the references to foreign law by Justice Nelson by writing:

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered it must be construed now, as it was understood at the time of its adoption.⁴³

It should be noted, however, that those justices of the Court who disapprove of the citation to foreign sources of law in the published opinions of

³⁹ *Id.* at 136.

⁴⁰ Calabresi, *supra* note 9, at 872 (citing *Roe v. Wade*, 410 U.S. at 148-49).

⁴¹ Calabresi, *supra* note 9, at 872.

⁴² *Roper*, *supra* note 1, at 624.

⁴³ *Dred Scott*, *supra* note 31, at 426.

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the Court do not disapprove of the practice universally. They do make exceptions when it comes international law (specifically, treaty interpretations brought before the Court).

They make exceptions for international (treaty) law because the U.S. Constitution leaves them little choice. Article 6 of the U.S. Constitution, states ‘[t]he Constitution and the Laws of the United States made in Pursuance thereof; and all Treaties made, or which should be made, under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound by thereby...’⁴⁴

Accordingly, Justice Scalia has said:

I will use it in the interpretation of a treaty. In fact, in a recent case I dissented from the Court, including most of my brethren who like to use foreign law, because this treaty had been interpreted a certain way by several foreign courts of countries that were signatories, and that way was reasonable--although not necessarily the interpretation I would have taken as an original matter. But I thought that the object of a treaty being to come up with a text that is the same for all the countries, we should defer to the views of other signatories, much as we defer to the views of agencies--that is to say defer if it's within the ballpark, if it's a reasonable interpretation, though not necessarily the very best.⁴⁵

This is an area in which Justices Scalia and Breyer can agree, since Justice Breyer also believes that international law — particularly treaties — should be interpreted in the context of how other signatory nations have interpreted the treaty. On this issue, Justice Breyer has said:

“We had a case for NAFTA, where NAFTA has certain requirements about what the president can do. And can congress pass a law that makes it tougher to bring in trucks from Mexico, which they say is an environmental based law. Can they do that? Does it violate NAFTA? Everyone thinks that you have to look at treaty law, and how the treaty works to resolve that. Of course you have to look at how other nations interpret it.”⁴⁶

However, Justice Breyer goes far beyond Justice Scalia by asserting that foreign sources of law (the holdings of foreign court) are just as informative to constitutional adjudication as international treaty law is. Justice Breyer’s has made it clear that this assertion is centered on the growing international economy, by saying:

⁴⁴ U.S. CONST. art. VI, § 2.

⁴⁵ Scalia-Breyer Interview, *supra* note 5, at 521.

⁴⁶ Stephen Breyer, Assoc. Justice, U.S. Supreme Court, Lecture at the Johns Hopkins Univ. Paul H. Nitze Sch. of Advanced Int’l Studies (Mar. 31, 2010)(on file with the author).

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“The supreme court of the United States, this year, compare it to 15 years ago and you will see an enormous number of cases in which everyone on the court will certainly believe that knowledge of foreign law, perhaps international law, perhaps the law of other nations, is necessary to the decision... Of course you have to know something about international law, and something about how the law of other countries work. In a world of international law and commerce, it happens more and more.”⁴⁷

Criticism of referencing foreign sources of law in non-treaty related U.S. Supreme Court decisions goes beyond the conservative members of the current Court. The reaction to some who work in the media have also been conveyed, and — to a large extent — rebutted in this paper. However, the opposition to the practice has not been exclusive to the justices in the judicial branch of the government or the so-called “fourth estate” that is the media.

Members of the legislative branch have also long complained of “activist judges” who create law when they should restrict themselves to merely interpreting the laws created by the U.S. Congress. By citing to foreign sources of law, some members of Congress have looked upon that practice as interpreting the wrong country’s laws. Subsequently, part of the recent backlash against the Court’s references to foreign sources of law in its opinions following *Lawrence* and *Roper* included efforts by congressmen to ban the citation of foreign sources of law in the adjudicative process of the U.S. Supreme Court.⁴⁸ Those efforts, however, have been unsuccessful.

Justice Breyer has publically told the story of an exchange he once had with an unnamed members of congress, in which the congressman criticized Justice Breyer for his references to foreign sources of law.⁴⁹ When Breyer stressed the fact that the foreign sources of law he examines are not binding, but merely an examination of how foreign judges have resolved very similar issues that are also not expressly addressed by our own constitution, the congressmen agreed that there is nothing wrong with merely examining the foreign source of law on point, but that he should refrain from citing to that foreign source of law in the opinion.⁵⁰ Justice Scalia has similarly acquiesced in allowing an examination of foreign sources law for knowledge, information and perspective, but also feels that those sources of law should not be cited in the opinions of the court.⁵¹

Therefore, the key question is not whether or not the justice of the U.S. Supreme Court should be free to examine foreign sources of law, but rather the key question is whether or not a justice of the U.S. Supreme Court should *cite* foreign sources of law, when that source was used not to create a binding precedent on the justice, but rather for informational purposes, a different

⁴⁷ *Id.*

⁴⁸ See H.R. 568, 108th Cong. (2004); S. Res. 92, 109th Cong. (2005).

⁴⁹ See Scalia-Breyer Interview, *supra* note 5, at 522-523.

⁵⁰ *Id.*

⁵¹ See *id.* at 525-526.

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perspective and knowledge (which everyone seems to agree is in itself a harmless practice). According to Justice Breyer, the answer is that the justices should cite to that foreign source of law for one primary reason above all others: transparency.⁵²

Justice Breyer raises a valid point. Without transparency, the basis of a justice's written opinion is non-existent. And without a written opinion that explains their decision, a justice cannot truly resolve a dispute.⁵³ As the legal scholar George Rose Smith wrote, "[j]udicial accountability and transparency of judicial opinions are fundamental concepts supporting the idea of the judiciary as a co-equal governmental branch."⁵⁴ Therefore, for people — such as Justice Scalia — to concede that examining foreign sources of law for issues and facts similar to cases before the Court is acceptable, while also criticizing the citations to that foreign source of law in the published opinion of the Court, they are essentially arguing for a non-transparent opinion to be published.

Such a position attacks the heart of the Court's function, for "the judiciary's power comes from its words alone — judges command no army and control no purse. In a democracy, judges have legitimacy only when their words deserve respect, and their words deserve respect only when those who utter them are ethical."⁵⁵

Conclusion

The Court's rulings in the controversial cases of *Lawrence* and *Roper* have sparked a national debate as to whether or not the Court should cite to foreign sources of law in their published opinions. Despite the intensity of the debate in recent years, there is nothing new about either the use of foreign law, or the criticism of the practice.

Those who oppose citations to foreign sources of law in the adjudicative process, whether they are members of the Court or lawmakers in the U.S. Congress, cite four primary reasons for their opposition: (1) America does not have the same moral and legal framework as the rest of the world;⁵⁶ (2) foreign sources of contemporary law has no bearing on the intent of the framers of the U.S. Constitution;⁵⁷ (3) it's just another means for activist judges to discriminately manipulate the law;⁵⁸ and (4) it circumvents the domestic constitutional lawmaking structure.⁵⁹

Proponents of the practice rebut the arguments of opponents by stating that: (1) the references to foreign sources of law are for informational purposes,

⁵² See *id.* at 530-531.

⁵³ See Gerald Lebovits, Alifya V. Curtin & Lisa Solomon, *Ethical Judicial Opinion Writing*, 21 GEO. J. LEGAL ETHICS 237, 237 (2008).

⁵⁴ George Rose Smith, *A Primer of Opinion Writing, For Four New Judges*, 21 ARK. L. REV. 197, 200 (1967).

⁵⁵ Lebovits, *supra* note 49.

⁵⁶ See Scalia-Breyer Interview, *supra* note 5.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See Young, *supra* note 8.

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and not legally binding; (2) the founding fathers argued for the use of foreign sources of law in the Federalist Papers and Declaration of Independence; (3) America has a long history and tradition of citing to foreign sources of law in some of our most landmark cases; (4) the Court already cites to various treatises, scholarly legal articles and non-legal sources regarding policy arguments that are also not part of the constitutional lawmaking structure; and (5) while it may be true that justices tend to cite foreign sources of law when it fits their intended ruling, it is also true that critics have tended to speak out against those references to foreign sources of law in cases that they vehemently oppose the ruling of, and in some cases have failed to criticize the references to foreign sources of law in the rulings they oppose the most (including *Roe v. Wade*).

The most outspoken critics of citing to foreign sources of law — including Justice Scalia — have acquiesced in the fact that there is no harm in examining foreign sources of law on similar issues and facts, but object to the *citations* to those foreign sources in the published opinions of the Court. However, failing to cite to foreign sources of law that have been examined in the decision making process would be a breach of the transparency necessary for the published opinions of the Court. The practice, therefore, should continue.