A conversation between U.S. Supreme Court justices

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The relevance of foreign legal materials in U.S. constitutional cases: A conversation between Justice Antonin Scalia and Justice Stephen Breyer

Introduction

Among the most hotly disputed questions at the United States Supreme Court in recent years has been whether it is desirable or even appropriate for the Court or individual justices to rely on judicial decisions or other materials from other countries in deciding American constitutional issues. Two of the Court's most important rulings in 2003—those relating to whether homosexual conduct can be criminalized consistent with the Constitution and whether the Constitution authorized racial "affirmative action" to assure a diverse student body—relied in part on foreign law. More recently, the Court used foreign law in its opinion that concluded that the death penalty could not be constitutionally applied to those under eighteen years of age. There are many other examples of the use of foreign law in American constitutional judgments.

In their judicial opinions and speeches Supreme Court justices have expressed sharply differing views on the use of foreign law in its cases. But there was no face-to-face discussion between Supreme Court justices until January 13, 2005, when Justice Antonin Scalia and Justice Stephen Breyer had an hour-long "conversation" on the validity of using foreign law in U.S. constitutional cases. A very lightly edited transcription of the discussion, which has been approved by the two justices, is presented below.

The origin of this event was a meeting among Professor Michel Rosenfeld, president of the U.S. Association of Constitutional Law, Professor Kenneth Anderson of the Washington College of Law, American University, and myself. The U.S. Association is an organization of law professors, judges, and practicing lawyers that, in cooperation with institutions and individuals in the U.S. and abroad, explores the increasingly important field of comparative constitutional law. It therefore seemed natural for us to invite the two justices to elaborate their views on the use of foreign law for the benefit of the general

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public as well as the legal profession. We are deeply grateful to Justices Scalia and Breyer for accepting our invitation and for thoroughly and engagingly addressing the issues in the short time that was available.

Joining the U.S. Association of Constitutional Law, as a cosponsor, was the Washington College of Law, at American University, in Washington, D.C., where the conversation took place before a large audience. This law school has long focused on comparative and international subjects and its dean, Claudio Grossman, has been a leading figure in the field of international human rights and other aspects of the subject that Justices Scalia and Breyer discussed. The warm welcome and efficient arrangements at American University's law school did much to make the event a success.

Norman Dorsen
New York University School of Law

Dorsen: This is a conversation between two leading Supreme Court justices that we look forward to hearing. I'm sure we all concur that we should allow Scalia to be Scalia and Breyer to be Breyer, with very little Dorsen. But the justices have agreed that I should put a few questions on the table and perhaps interpolate one or more questions as we go forward. Here are some questions, and I'll turn to Justice Scalia, to respond in any way he wishes, and the conversation can begin.

When we talk about the use of foreign court decisions in U.S. constitutional cases, what body of foreign law are we talking about? Are we limiting this to foreign constitutional law? What about statutes and, where it exists, common law? What about cases involving international law, such as the interpretation of treaties, including treaties to which the U.S. is a party?

When we talk about the use of foreign court decisions in U.S. law, do we mean them to be authority or persuasive, or merely rhetorical? If, for example, foreign court decisions are not understood to be precedent in U.S. constitutional cases, they nevertheless strengthen the sense that the U.S. assumes a common moral and legal framework with the rest of the world. If this is so, is that in order to strengthen the legitimacy of a decision within the U.S., or to strengthen a decision's legitimacy in the rest of the world? Or for some other reason?

Most generally, is it appropriate for our judges to use and cite to foreign materials in the course of deciding constitutional cases? If so, does the practice tend to undermine the uniqueness of the American constitutional experience? Or does it deepen the sources for constitutional decision making and thereby strengthen it?

So, I invite our distinguished guests to respond to any or none of those points, and to make whatever comments they wish in their conversation.

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Scalia: Well, most of those questions should be addressed to Justice Breyer because I do not use foreign law in the interpretation of the United States Constitution. [Laughter.] 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.

But you are talking about using foreign law to determine the content of American constitutional law—to be sure that we're on the right track, that we have the same moral and legal framework as the rest of the world. But we *don't* have the same moral and legal framework as the rest of the world, and never have. If you told the framers of the Constitution that we're to be just like Europe, they would have been appalled. If you read the Federalist Papers, they are full of statements that make very clear the framers didn't have a whole lot of respect for many of the rules in European countries. Madison, for example, speaks contemptuously of the countries of continental Europe, "who are afraid to let their people bear arms."

The *Miranda* rule,[1] concerning police warnings to suspects of criminal behavior, is a case in point. Well, I don't know the law in Russia. It is said that Russia has adopted the *Miranda* rule. Has it adopted the exclusionary rule that goes with it? I mean, *Miranda*'s a piece of cake so long as you don't say that any confession that was non-*Mirandized* is kept out of court. The exclusionary rule is distinctively American. I don't think there is any other country in the world that applies the exclusionary rule.

Should we say, "Oh my, we're out of step"? Or, take our abortion jurisprudence: we are one of only six countries in the world that allows abortion on demand at any time prior to viability. Should we change that because other countries feel differently? Or, maybe a more pertinent question: Why *haven't* we changed that, if indeed the Court thinks we should be persuaded by foreign law? Or do we just use foreign law selectively? When it agrees with what the justices would like the case to say, we use the foreign law, and when it doesn't agree we don't use it. Thus, we cited foreign law in *Lawrence*,[2] the case on homosexual sodomy (though not all foreign law, just the foreign law of countries that agreed with the disposition of the case). But we said not a whisper about foreign law in the series of abortion cases.

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

[2] Lawrence et al. v. Texas, 539 U.S. 558 (2003).

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What's going on here? Do you want it to be authoritative? I doubt whether anybody would say, "Yes, we want to be governed by the views of foreigners." Well if you don't want it to be authoritative, then what is the criterion for citing it? That it agrees with you? I don't know any other criterion to bring forward.

So, that may answer none of your questions, but that's what I wanted to say. [Laughter.]

Dorsen: Thank you. I now turn to Justice Breyer.

Breyer: I think my law clerk found a case where Justice Scalia referred to foreign law. [Laughter.] In any event, I'd first like to thank you for inviting us here. The work of the U.S. Association of Constitutional Law is important.

I believe, and I suspect Justice Scalia also believes, that the United States differs from some other nations in that law here is not handed down from on high, not even from the Supreme Court. Rather, law emerges from a complex interactive democratic process. We justices play a limited role in that process. But we are part of it. So are lawyers, law professors, students and ordinary citizens. The process amounts to a kind of conversation. That conversation is among judges, among professors, among members of the bar, among those who decide cases, among those who analyze and put together series of decisions, among those with practical experience at the bar. Law emerges from that messy but necessary conversational process. We judges participate in that conversation, when we decide cases and we can do so, too, when we speak more generally about the law and about the decision-making process itself.

I think it is important that we speak on occasion to professional groups about these more general matters. Contrary to the implications of the very kind introductions, we are not that well known among the general public. Out of every ten times someone asks me "Are you a member of the Supreme Court?" in nine instances the speaker thinks I am Justice Souter. [Laughter.]

Scalia: And he went along with it.

Breyer: Yes. [Laughter.] Now let's return to the main point. In many respects Justice Scalia and I will agree about how foreign law can and should influence judicial holdings in the United States Supreme Court and in the other courts as well. I shall discuss such instances, often involving routine matters, later. But let me first describe the more controversial instances, where we likely do not agree.

The best example arose at a seminar where several professors, a member of Congress, a senator, and another judge and I were discussing the relations among the branches of government. The congressman began to criticize the Supreme Court's use of foreign law in its decisions. At first, I was uncertain just what he had in mind. After a time I understood that he was discussing the issue that Justice Scalia and I disagree about. I said, "Well, your criticism seems aimed at me." I added that, when I refer to foreign law in cases

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involving a constitutional issue, I realize full well that the decisions of foreign courts do not bind American courts. Of course they do not. But those cases sometimes involve a human being working as a judge concerned with a legal problem, often similar to problems that arise here, which problem involves the application of a legal text, often similar to the text of our own Constitution, seeking to protect certain basic human rights, often similar to the rights that our own Constitution seeks to protect. To an ever greater extent, foreign nations have become democratic; to an ever greater extent, they have sought to protect basic human rights; to an ever greater extent they have embodied that protection in legal documents enforced through judicial decision making. Judges abroad thus face not only legal questions with obvious answers, e.g., is torture an affront to human dignity, but also difficult questions without obvious answers, where much is to be said on both sides of the issue.

I said to the congressman, "If I have a difficult case and a human being called a judge, though of a different country, has had to consider a similar problem, why should I not read what that judge has said? It will not bind me, but I may learn something. The congressman replied, "Fine. You are right. Read it. Just don't cite it in your opinion." [Laughter.]

I went further. I added, "Let me be a bit more frank. In some foreign countries, people are struggling to establish institutions that will help them protect democracy and human rights despite earlier undemocratic or oppressive governmental traditions. They want to demonstrate the importance of having independent judges enforce constitutionally protected human rights. The United States Supreme Court has prestige in this area. Foreign courts refer to our decisions. And if we sometimes refer to their decisions, the references may help those struggling institutions. The references show that we read, and are interested in, their reactions to similar legal problems." The congressman replied, "Fine. You are right. Read their opinions and write them a letter." [Laughter.] I thought that I was not making much headway.

The congressman's point—and he had a point—is similar to the point that Justice Scalia makes. Once we start to refer to foreign opinions, how do we know we can keep matters under control? How do we know we have referred to opinions on both sides of the issue? How do we know we have found all that might be relevant? The answers to these questions lie in the nature of the judicial process. We must rely upon counsel to find relevant citations. We must rely upon judicial integrity to assure a fair and comprehensive reading of any relevant foreign materials. Lack of either, of course, would mean faulty references, not just to foreign decisions, but to far more relevant domestic legal materials as well.

Of course, I hope that I, or any other judge, would refer to materials that support positions that the judge disfavors as well as those that he favors. For example, in a case where I took the position that the Establishment Clause

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prohibited extensive use of school vouchers,[3] I had to face the fact that in countries with somewhat similar traditions of church/state separation, governments subsidized religious school education. And most citizens of those countries, for example Britain and France, believed that doing so caused no relevant harm. Referring to such cases, practices, and views means extra work, even though a majority of our Court does so only occasionally. We understand that we are not experts in such matters. But we believe it is worth while, for doing so sometimes opens our eyes. And that is what I would say to those who wonder about the validity of the practice. The practice involves opening your eyes to what is going on elsewhere, taking what you learn for what it is worth, and using it as a point of comparison where doing so will prove helpful.

The European Human Rights Court, for example, decided a case called *Bowman*,[4] which involved a law limiting campaign contributions and a charter provision protecting freedom of expression. Both sides referred to this opinion (in amicus briefs) filed in a campaign finance case in the Supreme Court. I read the case. I am not certain which side it helped. But I am pleased the lawyers referred to it because I learned something from reading it. Could I read many foreign cases in my work? Not too many, for doing so is time consuming. Should I be aware of the existence of foreign cases involving issues very similar to the issue at hand? I believe so. Do I believe concern about the use of my time is driving the opposition to the use of such materials? No. I do not. Some cases in which members of our Court have referred to foreign law have involved the death penalty; others have involved the constitutional rights of homosexuals. These subject matters, I believe, have fed the foreign law controversy. But they raise other issues as well. Reference to foreign law does not lie at the heart of those issues.

In respect to the use of foreign law itself, I would say that I understand that a judge cannot read everything. But if the lawyers find an interesting and useful foreign case, and if they refer to that case, the judges will likely read it, using it as food for thought, not as binding precedent. I think that is fine.

Dorsen: Justice Scalia?

Scalia: I don't know what it means to express confidence that judges will do what they ought to do after having read the foreign law. My problem is I don't know what they ought to do. What is it that they ought to do?

[3] The Establishment Clause, which is in Amendment I to the US Constitution, states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The Supreme Court ruled in 2002 that it was constitutional for state governments to institute voucher systems that would use taxpayer money to help fund private or parochial schools. Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

[4] Bowman v. United Kingdom, 26 Eur. Ct. H.R. Rep. 1 (1998).

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Why is it that foreign law would be relevant to what an American judge does when he interprets—interprets, not writes—the Constitution? Of course the founders used a lot of foreign law. If you read the Federalist Papers, it's full of discussions of the Swiss system, the German system, etc. It's full of that because comparison with the practices of other countries is very useful in devising a constitution. But why is it useful in interpreting one?

Now, my theory of what to do when interpreting the American Constitution is to try to understand what it meant, what it was understood by the society to mean when it was adopted. And I don't think it has changed since then. That approach used to be orthodoxy until about sixty years ago. Every judge would have told you that's what we do. If you have that philosophy, obviously foreign law is irrelevant with one exception: old English law—because phrases like "due process," and the "right of confrontation" were taken from English law, and were understood to mean what they meant there. So the reality is I use foreign law more than anybody on the Court. But it's all old English law.

It should be easy to understand why, for someone who has my theory of interpretation, why foreign law is irrelevant. So Justice Breyer will never convert me. [Laughter.]

Dorsen: But suppose old English law tells you that the way this provision ought to be interpreted is in light of contemporary conditions, as the Commerce Clause[5] has been, for example?

Scalia: You'll find some English law that says that, and I'll use it—

Breyer: Blackstone. [Laughter.]

Scalia: Absolutely.

Breyer: Blackstone said follow Breyer. [Laughter.]

Scalia: But let me continue. That's my approach to interpreting the Constitution. Justice Breyer doesn't have my approach. He applies the principle that the Court adopted about sixty years or so ago—first in the Eighth Amendment area (cruel and unusual punishments) and then elsewhere—the notion that the Constitution is not static. It doesn't mean what the people voted for when it was ratified. Rather, it changes from era to era to comport with—and this is a quote from our cases, "the evolving standards of decency that mark the progress of a maturing society." I detest that phrase, because I'm afraid that societies don't always mature. Sometimes they rot. What makes you think that human history is one upwardly inclined plane: every day, in every way, we get better and better? It seems to me that the purpose of the Bill of Rights was to prevent change, not to foster change and have it written into a Constitution.

[5] U.S. Const. art. I § 8 cl. 3 (giving Congress the power to regulate interstate commerce, and interpreted as including the use of interstate commerce channels, its instrumentalities, and activities having a substantial relation to it).

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Anyway, let's assume you buy into the evolving Constitution. Still and all, what you're looking for as a judge using that theory is what? The standards of decency of *American* society—not the standards of decency of the world, not the standards of decency of other countries that don't have our background, that don't have our culture, that don't have our moral views. Of what conceivable value as indicative of *American* standards of decency would foreign law be? Of course, you can cite foreign law to show—Justice Breyer gave an example—to show that if the Court adopts this particular view of the Constitution, the sky will not fall. If we get much more latitudinarian about our approach to the Establishment Clause, for example, things won't be so bad, since France, which is probably the strictest on separation of church and state in Europe, allows much more state assistance to religion. It's useful for that.

But it is quite impossible for French practice to be useful in determining the evolving standards of decency of American society. The only way in which it makes sense to use foreign law is if you have a third approach to the interpretation of the Constitution, to wit: "I as a judge am not looking for the original meaning of the Constitution, nor for the current standards of decency of American society; I'm looking for what is the best answer to this social question in my judgment as an intelligent person. And for that purpose I take into account the views of other judges, throughout the world."

Let me ask the law students here: Do you think you're representative of American society? Do you not realize you are a small layer of cream at the top of the educational system, and that your views on innumerable things are not the views of America at large? And doesn't it seem somewhat arrogant for you to say, when you later become judges, I can make up what the moral values of America should be on all sorts of issues, such as penology, the death penalty, abortion, whatever? Yet that's the only context in which the use of foreign law makes sense—when what we're doing is not looking to history, as I do, and not looking to the mores of contemporary American society, which we did for a while. In the *Coker* case,[6] for example, we held the death penalty for rape to be unconstitutional because all the states except one had abolished it for that crime. You could realistically say that American standards on the subject had evolved. But we have put that behind us. In our last Eighth Amendment case, eighteen states out of the thirty-eight states that have capital punishment refused to impose it upon the mentally deficient. The other states left it up to the jury as to how mentally deficient the defendant was and whether his mental deficiency mitigated the crime, given how heinous it was. Nonetheless, we said that even though only eighteen out of thirty-eight—a minority—felt that way, America has now reached a change in its moral perceptions. I suggest that pronouncement rests not upon the moral perceptions of America, but upon the moral perceptions of the justices.

[6] Coker v. Georgia, 433 U.S. 584 (1977).

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And I frankly don't want to undertake that responsibility. I don't want to do it with foreign law, and I don't want to do it without foreign law. I sleep very well at night because I read old English cases. [Laughter.] And there's my answer.

Breyer: That is a good answer. Indeed, I think you have identified something that understandably worries many people. Still, judges are trying not to decide cases subjectively. And they understand the temptation, in difficult cases with open questions of constitutional law, to identify a general public view, or even a founder's view, with their own. Robert Braucher, one of my law professors and later a Massachusetts Supreme Judicial Court justice, used to say "When I want to know what the common man thinks, I ask myself what I think, and I'm right every time." [Laughter.] The judge in such cases looks, not to impose his own moral views, but for a more objective standard.

Scalia: He was kidding.

Breyer: Now let me emphasize a concession you have made (or should have made). Do you recall the case involving an important federalism principle, a case that held that a federal law could not directly order state officials?

Scalia: *Printz v. United States*.[7]

Breyer: Yes. In dissent, I argued that the majority's principle means that the federal government will have to build a federal bureaucracy to get the job done; in fact, the opposite view would permit the federal government to use existing state bureaucracies to enforce federal law. And I pointed out that in the European Union and in Switzerland federal governments do use state bureaucracies.

Scalia: You cited Switzerland, right?

Breyer: That's right. And I said Switzerland believes that a rule that would require the building of an unnecessary federal bureaucracy promotes the very opposite of what federalism is meant to achieve. I want to point out that some of your remarks are consistent at least with my having referred to Switzerland being appropriate.

The reason there is an argument about foreign law has little to do with citing Switzerland in federalism cases. It has a great deal to do with citing foreign law in death penalty cases. So I shall give an example of the latter, where, not surprisingly, I did so and believe I was right to do so. Nothing in Blackstone, nothing in Bracton, nothing even in the law books of King Arthur, says that a judge, in deciding what constitutes "cruel and unusual punishment," must confine his review to the United States alone or to the United States plus Great Britain. At least neither of us has found any such bar in those books and I suspect you have been looking. [Laughter.]

I wrote a dissent from a denial of a petition for certiorari in a case raising the question: Is it a "cruel and unusual punishment," hence a violation of

[7] Printz v. United States, 521 U.S. 898 (1997).

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the Eighth Amendment, for the government to force a person convicted of murder to remain on death row for more than twenty years before his eventual execution? I believed we should hear the case; and my dissent implied that the answer to the question could well be "yes." In referring to relevant cases, I included a decision by the Privy Council in England (overturning a Jamaica case)—

Scalia: Reversing an earlier one of their own cases.

Breyer: Right.

Scalia: So they don't even pay attention to their own opinions. [Laughter.]

Breyer: I referred to a decision by the Supreme Court of India and one by the Supreme Court of Canada. I referred to certain United Nations determinations—those that I thought useful. But I did not limit myself to decisions supporting my own position. I referred to decisions that went the other way as well. I may have made what one might call a tactical error in referring to a case from Zimbabwe—not the human rights capital of the world. But that case, written by a good judge, Judge Gubbay, was interesting and from an earlier time. I did not believe any of these foreign decisions were controlling. But I did think that the issue is not technically legal, but rather a law-related human question, and all concerned, American and foreign judges alike are human beings using similar legal texts, dealing with a somewhat similar human problem. Reaching out to those other nations, reading their decisions, seems useful, even though they cannot determine the outcome of a question that arises under the American Constitution.

Justice Thomas—disagreeing with me—wrote his own brief opinion arguing that I could not find American precedent supporting my view, so I must have looked to Zimbabwe out of desperation. He had a certain point. [Laughter.] But still, with all the uncertainties involved, I would rather have the judge read pertinent foreign cases while understanding that the foreign cases are not controlling. I would rather have the judge treat those cases cautiously, using them with care, than simply to ignore them. I would rather hope that judges will exercise proper control, taking the cases for what they are worth, than have an absolute rule that says judges may never look at foreign decisions. The fact that I cannot find any absolute legal prohibition—not even in the laws of King Arthur—gives me cause for hope.

Scalia: But let's talk about the precise case you brought up—

Breyer: I brought up a case that illustrated the difficulties of my own approach.

Scalia: That case presented the claim that it was cruel and unusual punishment to wait too long between pronouncing the death penalty and execution. We haven't decided that question yet; we have just denied cert.

Breyer: Right.

Scalia: One of the difficulties of using foreign law is that you don't understand what the surrounding jurisprudence is. So that you can say, for

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example, "Russia follows *Miranda*," but you don't know that Russia doesn't have an exclusionary rule.

And you can say every other country of the world thinks that holding somebody for twelve years under sentence of death is cruel and unusual, but you don't know that these other countries don't have habeas corpus systems which allow repeated applications to state and federal court, so that the reason it takes twelve years here is because the convicted murderer himself continues to file appeals that are continuously rejected.

In England, before they abolished the death penalty—and by the way, every public opinion poll in England suggests that the people would like to retain it, but maybe the judges and lawyers and law students feel differently about it—before they abolished the death penalty, whenever it was pronounced the judge pronouncing it would don a little skullcap. When you saw him reach for the skullcap you knew he was about to pronounce a sentence of death. And that sentence would be carried out within two weeks. So that's the reason twelve years seems extraordinary to them. It's extraordinary because we've been so sensitive to the problem of an erroneous execution that we allow repeated habeas corpus applications. I just don't think it's comparable. It's just not fair to compare the two.

But most of all, what does the opinion of a wise Zimbabwe judge or a wise member of a House of Lords law committee—what does that have to do with what Americans believe? It is irrelevant unless you really think it's been given to *you* to make this moral judgment, a very difficult moral judgment. And so in making it for yourself and for the whole country, you consult whatever authorities you want. Unless you have that philosophy, I don't see how it's relevant at all.

Breyer: Well, it's relevant in the sense I described. A similar kind of person, a judge, with similar training, tries to apply a similar document with similar language ("cruel and unusual punishment" or the like), in a society that is somewhat similarly democratic and protective of basic human rights. England is not the moon, nor is India. Neither is a question of "cruel and unusual punishment" an arcane matter of contract law where differences in legal systems are more likely to make a major difference. In fact, ironically in those more specifically legal areas—areas where results are more likely tied to the details of a different legal environment—references to foreign decisions are likely to prove less controversial. Indeed, we frequently look at foreign law in such cases, i.e., technical cases. If in a "cruel and unusual punishment" case the fact that everyone in the world thinks one thing is at least worth finding out, for I doubt that Americans are so very different from people elsewhere in the world in respect to such matters. And, if my having the legal power to do so adds some uncertainty to the law, I believe the legal system can adjust. That is because the law is filled with uncertainty. Its answers in difficult cases can rarely be deduced only by means of legal logic from clear legal rules and a history book. Were the latter possible, I would be more

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tempted to agree with your view that a system without reference to foreign law would better control subjective judicial tendencies. But it is not.

Scalia: Do you have another question?

Dorsen: Yes. I want to ask one question to each justice. I'll put them both on the table.

Let me put it this way to Justice Scalia. Although you have suggested a view about this, I'm still unclear about what the harm or risk is of considering foreign sources that may bear on problems that are common to both countries. For example, both of you have mentioned the death penalty. Why shouldn't U.S. constitutional decisions take account of shifting world standards on such things as the death penalty, on the execution of juveniles, on the execution of the mentally ill? Are we that far from the rest of the world in terms of the way life is lived?

The question to Justice Breyer is a variant of something that Justice Scalia said in his opening comments. Is it fair to criticize you and other members of the Supreme Court who refer to foreign sources, even though they do not consider them binding, that they refer in general to cases that support the positions they are taking? For example, in cases of the death penalty, in cases of abortion, in cases of other controversial issues, I'm not sure I see as many citations to East Asian courts, to South American courts, to Islamic courts. Is it a fair criticism that there's a certain selectivity that is result-oriented in the way foreign references are considered by you and those who agree with you?

Breyer: Yes, it is a fair criticism. We have referred to opinions of India's Supreme Court. But I confess that fewer opinions from other Asian nations come to our attention. That is one reason why it is important that we understand decisions of foreign courts are not binding. I would rather have this general "take it for what it is worth" rule than to try to develop a jurisprudence about just when American judges should, and when they should not, take account of a foreign decision. I would avoid the natural tendency of the legal mind, the tendency to make distinctions and then create rules. Foreign decisions in this respect are a little like legislative history. And criticism of their uses is the same.

Scalia: It sure is.

Breyer: The criticism can be encapsulated in Judge Harold Leventhal's remark: Using legislative history is like looking out over the crowd at a cocktail party to try to identify your friends. [Laughter.] But if a judge does, in fact, use legislative history or foreign material in that way, the judge is not doing his or her job. An opposite result does not make a foreign case less interesting; it may make the case more interesting. If a judge applies either legislative history or foreign materials improperly, that judge is not being conscientious. And if a judge is not conscientious, he will have many opportunities for distortion. But if you are not conscientious, why become a judge? What would be the pleasure or reward in entering a profession that prizes integrity, honesty, doing the job properly? The pleasure certainly does not lie in the

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pay [Laughter.], but in the internal pleasure of believing you have done the job properly.

Dorsen: Justice Scalia?

Scalia: That can't be the only explanation for not using other foreign sources—that we don't know what the other countries say. In my dissent in *Lawrence*, the homosexual sodomy case, I observed that the court cited only European law; it pointed out that every European country has said you cannot prohibit homosexual sodomy.

Of course, they said it not as a consequence of some democratic ballot but by decree of the European Court of Human Rights, which was using the same theory that we lawyers and judges and law students know what's moral and what isn't. It had not been done democratically. Nonetheless, it was true that throughout Europe, it was unlawful to prohibit homosexual sodomy. The court did not cite the rest of the world. It was easy to find out what the rest of the world thought about it. I cited it in my dissent. The rest of the world was equally divided.

Breyer: But the reason that the majority referred to foreign cases in *Lawrence* is that the Court, in its earlier decision of *Bowers v. Hardwick*,[8] had said that homosexual sodomy is almost universally forbidden. And I think that *Lawrence*, through its references, simply wanted to show that this was wrong.

Scalia: Well, I understand. For whatever reason, we said universally, yes, it's not universally. But don't just talk about Europe; let's look at the rest of the world.

Breyer: Why wouldn't a—

Scalia: I mean, it lends itself to manipulation. It invites manipulation. You know, I want to do this thing; I have to think of some reason for it. I have to write something that—you know, that sounds like a lawyer. I have to cite *something*. [Laughter.] I can't cite a prior American opinion because I'm overruling two centuries of practice. I can't cite the laws of the American people because, in fact, only eighteen of the thirty-eight states that have capital punishment say that you cannot leave it to the jury whether the person is mentally deficient and whether that should count. So my goodness, what am I going to use?

Breyer: Let me—

Scalia: I have a decision by an intelligent man in Zimbabwe or anywhere else and you put it in there and you give the citation. By God, it looks lawyerly! [Laughter.] And it lends itself to manipulation. It just does.

Breyer: I should like to mention a different, but related, matter, which more directly concerns many in this audience and in the law schools. The "foreign law" issue that I believe most important arises in dozens of less glamorous cases. Three of last year's cases involved terrorism. Those cases

[8] Bowers v. Hardwick, 478 U.S. 186 (1986).

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had foreign law implications; but they were special cases and I shall put them to the side. We then had one case involving the Warsaw Convention. And you wrote a fine opinion for the Court.

Scalia: You often join my opinions, Stephen. [Laughter.]

Breyer: Of course I do.

Scalia: But only the good ones, right? [Laughs, laughter.]

Breyer: Aren't they all good? [Laughter.]

Breyer: My point is that in the Warsaw Convention case you looked to how other courts in other nations applied the language in question. We also had a very interesting case involving the application of American antitrust laws, where a vitamin distributor in Ecuador sued a Dutch vitamin manufacturer seeking damages for price fixing engaged in by American and European firms that took place for the most part outside America. Can the victim of the price-fixing cartel ask an American court to award treble damages? We considered a suit brought by a Los Angeles firm seeking information from another California firm, in order (said the plaintiff) to present the information to the European cartel authority, which told us that it did not want the information. Could the plaintiff ask the federal district court to compel production of the information regardless?

We considered a case in which American truckers opposed the entry into the United States of Mexican truckers seeking to transport goods across the border, as NAFTA[9] indicated they could do. Does an environmental impact statement requirement nonetheless keep them out? We considered the legal effort of an heir who had brought suit to obtain from a Vienna museum five Klimt paintings seized from her family by Nazis in World War II.

Scalia: Wonderful case.

Breyer: It raised a very difficult question of interpretation of the Foreign Sovereign Immunities Act. We considered in *Sosa*[10] how the Alien Tort statute,[11] a statute enacted 200 years ago to deal with pirates, applies today given the current state of international law. Who are today's pirates?

Scalia: One more. Add the case on—a diversity case—whether you could get into federal court on diversity jurisdiction when the person on the other side is a corporation in the British Virgin Islands—

Breyer: Oh, yes.

Scalia: Whether that corporation is a citizen of the United Kingdom. It depended on U.K. law. I don't mind looking at that, absolutely.

Breyer: Right. What I found most interesting is that we received amicus briefs in these more technical cases from numerous foreign governments and other foreign institutions. In the antitrust cases, for example, the

[9] North American Free Trade Agreement.

[10] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

[11] Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350 (1789).

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government of Germany, the European Union and others filed briefs. The briefs were not cursory statements of position but highly substantive briefs examining the law in depth. They were very helpful.

This is today's world. It is a world in which law schools can no longer restrict those who teach about foreign law to a course called "foreign law." Rather foreign law today comprises part of ordinary contract law or other business law. The cases we hear—our docket—suggests that is so. And that fact reflects a truth about the world. Business is international; hence the law affecting business is international. Human rights, too, has become a more international subject. These facts about the world mean that lawyers and judges must know more about the world. They cannot know everything; they cannot learn the law of every nation. But lawyers do not know the law of one nation either. Rather they learn where to look to find the law; and they can learn the same about foreign law as well.

Dorsen: I'd like to ask one last question that you are, of course, free to avoid or respond to—

Scalia: I didn't answer your previous one. I forgot entirely what it was. [Laughter.]

Dorsen: I put that behind us—

Scalia: All right. [Laughter.]

Dorsen: —in the spirit of friendship.

The question I have is this—rather than looking at foreign courts, to say for example that Greece decided our way, the United Kingdom decided our way, X country decided a different way, rather than thinking about these courts and cases in terms of the results, to think about them in terms of the persuasiveness of the opinions, just as a New York court might look at a Montana decision and be influenced not by the result of the Montana court but by the cogency of the arguments, by the depth of the reasoning, by the logic. And if our courts look at another country's courts and they're able to find opinions that are persuasive on the merits, why couldn't that be a way of informing our judges in a positive way?

Scalia: Well, you're begging the question. I mean, your question assumes that it is up to the judge to find THE correct answer. And I deny that. I think it is up to the judge to say what the Constitution provided, even if what it provided is not the best answer, even if you think it should be amended. If that's what it says, that's what it says.

But even if you disagree with me, and if you think, well, no, that shouldn't be the test; the Constitution should keep up to date. Fine. But it should keep up to date with the views of the American people. And on these constitutional questions, you're not going to come up with a right or wrong answer; most of them involve moral sentiments. You can have arguments on one side and on the other, but what you have to ask yourself is what does American society think? And the best way, the only way to determine that is certainly not to ask a very thin segment of American society—judges, lawyers, and law

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students—what they think but rather to look at the legislation that exists in states, democratically adopted by the American people.

I'm sure that intelligent men and women abroad can make very intelligent arguments, but that's not the issue, because it should not be up to me to make those moral determinations.

Dorsen: Justice Breyer, do you want to comment on that?

Breyer: Well, consider Mrs. Bowman. Mrs. Bowman, I believe, favored the right to life. She is a citizen of Great Britain. She wished to contribute a small amount of money in the days prior to an election to print literature that would identify pro-life (or pro-choice) candidates. And the British law prohibited the making of that contribution so close to the election date. The European Court of Human Rights considered her claim that Britain's law violated the freedom of expression guaranteed by the European Convention of Human Rights.[12] Does that issue not sound familiar? One argument in Mrs. Bowman's favor was that it was unreasonable to prohibit her contribution while permitting newspapers to say about the same thing whenever they wished. Does that argument not sound familiar?

Why is it unreasonable for me to be curious about how the European Court dealt with these arguments. I am not bound by what the Court said. But why can I not look at it? Why should I not be able, in my opinion, to refer to what the Court said?

Scalia: Look, I'm not preventing you from reading these cases.

Breyer: Well, isn't that exactly [Laughter.]—

Scalia: I mean, go ahead and indulge your curiosity! Just don't put it in your opinions! [Laughter.]

Breyer: That's where we started. [Laughs.]

Dorsen: What I'd like now to do is turn to a question period. The justices have kindly agreed to answer questions.

Scalia: To take—TAKE—questions. [Laughter, applause.]

Dorsen: I stand corrected, but I know you won't be able to restrain yourself. [Laughter.]

A professor at American University's Washington College of Law, Kenneth Anderson, will now call on people who have questions.

Anderson: Thank you. We will start with Professor Michel Rosenfeld, president of the U.S. Association of Constitutional Law, which is a cosponsor of this event.

Rosenfeld: I'd like to ask one question to each justice. Listening to Justice Scalia, I have a sense that except for the question of the sentiment of the American people, his position has very little to do one way or another with foreign materials. Basically, as an originalist, Justice Scalia wants to know what the Constitution meant when it was adopted, and anything other than that should not be relevant.

[12] Bowman v. United Kingdom, *supra* note 4.

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Therefore, I assume if historians found it convincing that the framers had the intention of incorporating or being inspired greatly by French law or Dutch law of the seventeenth or eighteenth century, Justice Scalia would certainly look to that foreign source, as an originalist. The same thing in terms of moral issues, except those that deal with consulting the sentiment of the American people.

It seems to me that there are liberals who have certain moral views, and there are others who have different moral views, and Justice Scalia rejects, as far as I can tell, the liberal view on X, Y or Z, as not a proper constitutional matter. Whether it's American or foreign, it doesn't matter.

So my question to Justice Scalia is this. Suppose your court had never had any jurisprudence on abortion, and all of the abortion jurisprudence was by Canadian judges. Would there be any interest or would there be any point in reading that as well reasoned, not well reasoned, helpful or not helpful in developing doctrine?

Now my question to Justice Breyer. You've mentioned the example of the French allowing the state to subsidize religious schools, and I know you are very familiar with the situation in France. But another judge may not be as familiar with the French situation as you are. It's in a totally different context. In France, there is much less religiosity than in the United States. The French people seem to be much less religious and French institutions are often anti-religious. Therefore, one could argue that there is not the same risk of perception of the government fostering religion in France than there would be in the United States.

The question is, isn't the problem in using foreign materials that there is no way that a human being who is a judge in one country can have sufficient background information about another country to incorporate or to cite the jurisprudence of that other country?

Scalia: Okay. You remember my question? [Laughter.] . . . I wouldn't look to Canadian law. On the question of abortion, as an originalist, I would look at the text of the Constitution, which says nothing about the subject either way. You know, both sides would like me to resolve it constitutionally, to say that the Constitution requires the states to permit abortion, or requires the states to prohibit it. I look at the text; it says nothing about it. And I look at 200 years of history; nobody ever thought it said anything about it. That's the end of the question for me. What good would reading Canadian opinions do, unless it was my job to be the moral arbiter, which I don't accept?

I regard the Constitution as having set a floor to what American society can democratically do. That floor says nothing about abortion. It's not the job of the Constitution to change things by judicial decree; change is brought about by democratic legislation. Abortion has been prohibited. You want to change that? American society thinks that's a terrible result? Fine. Persuade each other about that, and eliminate the laws against abortion.

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I have no problem with change. It's just that I do not regard the Constitution as being the instrument of change by letting judges read Canadian cases and say, "Yeah, it would be a good idea not to have any restrictions on abortion." That's not the way we do things in a democracy. Persuade your fellow citizens and repeal the laws. Why should the Supreme Court decide that question?

Breyer: The last questioner implicitly asks how I go about my daily work. My daily job is reading and writing. I work at a word processor. I told my son years ago that if he does his homework well, he may eventually get a job where he will do homework the rest of his life. [Laughter.]

What do I read? Contrary to the impressions of some, I do not read the edicts of Colbert. I read briefs. Those briefs frequently explain law with which I was not previously familiar, for example Louisiana property law, highly relevant to interpreting an ERISA[13] provision, which the California State Bar Association explained beautifully in an amicus brief.

Those briefs will have to explain foreign law too, and ever more so. That is because foreign law comes before us ever more frequently in discovery cases, antitrust cases, EPA[14] cases, NAFTA cases. We shall have to learn something about foreign law to decide those cases properly. And the lawyers will have to explain it, separating the more important from the less important information. If there are important, interesting, and relevant matters of foreign law, the lawyers will point them out.

Perhaps I should add something relevant to the more "newsworthy" cases, involving capital punishment and the like. No judge believes that he or she is there to advance a political point of view in respect to such cases. No judge believes that he or she is there to advance an ideological point of view. If I find that I reach a result simply because I think it "morally good," then I am not doing my job. I do not mean I am there to foment evil. [Laughter.] I am there to follow the law. That is what we all think.

Moreover, each of us applies a framework that can be similarly described in general terms. We look to a document's text; we consider history; we consider tradition; we consider precedent; we search for the value or purpose that underlies the legal text; and we want to know the consequences of our decision, consequences viewed through the prism of the value or purpose that underlies the text. But we do not necessarily give the same weight to each of these factors. Some of us, over time, tend to place greater importance on some factors than others.

The differences are differences of emphasis. And it is important not to overstate them. From your point of view as a law student or even as a professor or judge or practitioner, the similarities are more important than the differences.

[13] Employee Retirement Income Security Act, 29 U.S.C. (1974).

[14] Environmental Protection Agency.

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Anderson: The floor is now open.[15]

Question: Article VI of the Constitution of the United States says that the Constitution and the laws made under it shall be the supreme law of the land and that judges and courts in every state shall be bound thereby. When you took your oath, Justice Breyer, and when President Bush takes his oath next week, the oath is not to defend the United States, it's to defend the Constitution and protect the Constitution. The Constitution doesn't say and the oath doesn't say that we protect and defend the Constitution as interpreted by a judge in Zimbabwe or Jamaica or India. I'm very curious as to how that's justified. Thank you.

Breyer: I believe that I am interpreting the Constitution of the United States. If, for example, a foreign court, in a particular decision, had shown that a particular interpretation of similar language in a similar document had had an adverse effect on free expression, to read that decision might help me to apply the American Constitution. That is what is at issue. To what extent will learning what happens in other courts help a judge apply the Constitution of the United States. As I have said, in today's world where similar relevant experience becomes more and more common we are more likely to learn from other countries. I doubt that Franklin or Hamilton or Jefferson or Madison or even George Washington would have thought we cannot learn anything of value from abroad.

Scalia: Can I respond to that?

Anderson: Please.

Scalia: You know, it's a Constitution that contains phrases of great generality such as due process of law. Now if you're following an originalist approach, you ask, what did the framers believe constituted due process of law? And if I find something there I don't like, that's too bad; I am chained. Because of my theory of the Constitution, that's what due process was and that's what it is today, unless you amend the Constitution. Whereas if you believe "due process of law" is an invitation for intelligent judges and lawyers and law students to imagine what they consider to be due process and consult foreign judges, then, indeed, you do not know what you're saying when you swear to uphold and defend the Constitution of the United States. It morphs. It changes.

Question: I wonder how serious we are about not subjecting U.S. citizens to the constitutional reasoning of foreign courts. I think this is going to become a big issue with Internet defamation lawsuits, which are all the rage right now and have very troubling implications for the First Amendment. Some Americans are being parodied by U.S. newspapers or magazines, then they rush abroad to a foreign court, which rules that they've been libeled, something that could never take place under our First Amendment

[15] Editor's note: Because not all of the questioners are known, we have refrained, in the interest of consistency, from identifying them selectively.

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jurisprudence of *New York Times v. Sullivan*[16] and *Hustler v. Falwell*.[17] There's nothing you can do to stop foreign courts from claiming jurisdiction over Americans just because their written material is online, but should American courts cooperate with these illiberal policies by enforcing foreign judgments against Americans for speech that would definitely be protected here in the U.S.?

Scalia: It really is a great problem. We haven't been confronted with a case involving it yet, but when the case comes up it will—will indeed—

Breyer: We'll give it serious consideration. [Laughter.]

Scalia: Listen, the one thing you know for sure is that we'll get it right. [Laughter.]

Question: I'm a little embarrassed because my comments are not in the form of a question because I think that the heart of the issue is really the function of the judge. Justice Scalia has said this many times. The question is, what is the role of the judge? And there is a very sharp disagreement here.

I would suggest, contrary to Justice Scalia's view, that the original intent theory is the novel one. The *Weems*[18] case, which has notions of evolving standards, goes back to 1908. It was pretty much reaffirmed in the Thirties. And the original intent notion really developed in the Seventies. The fact is, I don't think you'll find much about original intent until you go back to *Dred Scott*,[19] which is a decision based on original intent, as is, to a large extent, the *Bradwell* case,[20] which said that Illinois could exclude women from the bar.

By the way, Alexander Hamilton said we should pay attention to the judgments of other nations. And when Madison was preparing for the Constitutional Convention, he read everything he could get his hands on about other governments. That doesn't mean that when we read this stuff, we have to buy it, but I think it means that we should try to learn. But that all depends on the function of the judge.

Scalia: Let me answer that question. Alexander Hamilton, sir, was writing a Constitution, not interpreting one.

Breyer: That's right.

Scalia: And in writing one, of course you consult foreign sources, see how it has worked, see what they've done, use their examples and so forth. But

[16] New York Times v. Sullivan, 376 U.S. 254 (1964).

[17] Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

[18] Weems v. United States, 217 U.S. 349 (1910) (excessive punishment, including hard and painful labor, violates the "cruel and unusual punishment" clause of the Constitution).

[19] Dred Scott v. Sanford, 60 U.S. 393 (1856) (neither slaves nor freed blacks can ever be citizens of the United States; overturned by the Thirteenth and Fourteenth Amendments to the Constitution).

[20] Bradwell v. State of Illinois, 83 U.S. 130 (1872).

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that has nothing to do with interpreting it. As for evolving standards of decency, that does not come from 1908. It comes from a case in the Fifties involving—

Breyer: *Trop v. Dulles?*[21]

Scalia: Yes. *Trop* v. *Dulles*. All you have to do is to read the commentaries of Joseph Story to understand what the original interpretation of the Constitution was. It is unchanging. It is a rock to which the polity is anchored. And as for *Dred Scott*'s being the first originalist case: You know what *Dred Scott* was? *Dred Scott* was the first case to use the theory of "substantive due process," which has been the source of all of the inventiveness of the Supreme Court in developing an evolving standard of decency. So that's the answer to that question.

Breyer: I agree with Justice Scalia about the proper role of a judge. But—

Scalia: We're talking about a narrow category of cases, Stephen, and I agree with—

Breyer: It isn't just that. Our disagreement often concerns, not the role of the judge, which is, of course, to apply the law, but about the importance of explicit rules. Some believe that too few rules and too few clear approaches may mean judges with too much power, more power than an unelected judge should possess in a democracy. If a legal rule, or a decision-making practice, is too open-ended, it may permit judges to substitute their own subjective views for the views of a legislature. And that substitution runs counter to the principles of democracy. I recognize the problem.

Nonetheless, a legal rule, or a decision-making practice, that is not at all open-ended can produce a cure that is worse than the disease. Legal rules that are inflexible, that do not adjust adequately to changing circumstances, produce law that is divorced from life.

No one wants to divorce the law from life, and nobody wants unelected judges who routinely substitute their subjective views for those of elected officials. Some believe the former is the greater danger; some believe the latter is the greater danger. There is no magic solution to the problem. Both groups appeal to consequences in support of their preferred method of interpretation.

Discussion of the issue may help find better answers. And that is one reason why I appreciate today's opportunity for discussion.

Question: To you first, Justice Breyer. Justice Scalia responded to a question by saying, go ahead, read all these things as much as you want, but why do you have to put them in your opinions. I'd be interested to hear a response to that, because I think all of your arguments are very strong in terms of the usefulness of reading this material, but they don't necessarily translate to the opinions.

[21] Trop v. Dulles, 356 U.S. 86 (1958) (the government cannot cancel a person's U.S. citizenship as punishment for a crime).

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Slightly longer, to Justice Scalia, why does English law, British law, get special treatment in your analysis of the way we should treat foreign law? I ask that because I guess there are a couple of reasons why it would; our history and connection as former British colonies might justify it. But we fought a war for seven years to extricate ourselves from that government for various reasons, some of them very substantive, that would suggest not accepting British laws as the image of what we should do. Maybe a second reason would be well, we have more of a social and cultural connection with England, which we certainly do, but we also have a social and cultural link to about every other country in the world, given the nature of our immigration.

So, for example, on a question like how we should treat state governments in terms of lawsuits against them, seeking some sort of civil liability on the part of the governmental entity, why should we look to the way the British have thought about sovereign immunity as a tool for understanding, given the differences and the disconnection that we have over 200 years and a seven-year war between ourselves and the British?

Scalia: I wouldn't—I don't use British law for everything. I use British law for those elements of the Constitution that were taken from Britain. The phrase "the right to be confronted with the witnesses against him"—what did confrontation consist of in England? It had a meaning to the American colonists, all of whom were intimately familiar with my friend Blackstone. And what they understood when they ratified this Constitution was that they were affirming the rights of Englishmen. So to know what the Constitution meant at the time, you have to know what English law was at the time. And that isn't so for every provision of the Constitution.

The one you mentioned—what does sovereignty consist of?—that is probably one on which I would consult English law, because it was understood when the Constitution was framed in 1787 that the states remained separate sovereigns. Well, what were the prerogatives of a sovereign, as understood by the framers of the Constitution? The same as was understood by their English forebears. So that's why I would use English law—not at all because I think we are still very much aligned legally, socially, philosophically with England.

Breyer: I do not often put references to foreign materials in my opinions. I do so occasionally when I believe that a reference will help lawyers, specialists, or the public at large better understand the issue or the views expressed in my opinions. If the foreign materials have had a significant impact on my thinking, they may belong in the opinion because an opinion should be transparent. It should reflect my actual thinking.

Question: Justice Scalia has raised the concern, and has really put centrally, the concern that citing foreign law is an invitation to judicial elites to impose their own moral and social views. And yet neither Justice Scalia nor Justice Breyer has directly addressed a deeper concern about these materials; namely, that's it's not about elite imposition as such, but instead that these legal materials have no democratic provenance, they have no democratic

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connection to this legal system, to this constitutional system, and thus lack democratic accountability as legal materials. Let me put that out as a question.

Scalia: They're your materials; you defend them. [Laughter.]

Breyer: The point is interesting. It is common for an opinion to refer to material that, as you describe it, has no "democratic provenance." Blackstone had no democratic provenance. Law professors have no democratic provenance. Yet I read and refer to treatises and I read and refer to law review articles. My opinion is meant to reflect my actual method of reaching a legal conclusion; and references to those legal materials that had significance and will help the reader understand.

But your question has an interesting and deeper significance. It is sometimes difficult for those who live in foreign nations, say Europeans, to understand how Americans can react so negatively to the notion of foreign judges writing opinions that would bind Americans. They may believe that one judge, in a sense, is as good as another. Why does it matter that the judge in question is not American? Indeed, I have made a somewhat similar point in suggesting that sometimes—and I emphasize the word "sometimes"—there is nothing wrong in looking at the opinions of foreign judges.

Still, Madison pointed out that the American Constitution is a "Charter of Power granted by Liberty; not a Charter of Liberty granted by Power." In saying this, he was saying that our national government rests upon the theory that all power originates in the people; whatever power government possesses, it possesses by way of delegation from people. But in many foreign countries, governmental power originated in a central authority, perhaps a king, now an elected government; and liberty reflects a delegation of freedom by that central authority. The origins of power and of liberty differ conceptually, even if both nations end up in the same place.

For this reason Americans have a cast of mind that, in respect to anyone's exercise of power, asks, "Who is this person? What opportunity did I have, did the American people have, in authorizing him or her to exercise power over me?" When I hear criticisms of my views based upon this outlook, I do not complain. Even if I disagree with the specific criticism, it reflects a principle that is healthy and important. That principle, in which Americans strongly believe, is that all power has to flow from the people and the people must maintain checks on its exercise. That is a good thing.

That principle, of course, when properly applied, does not prevent me from sometimes looking at foreign opinions and on occasion even citing them.

Dorsen: Justice Scalia.

Scalia: I think it's fine to conclude on something that we undoubtedly agree upon. [Laughter.]

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