

CONTEMPORARY FOREIGN AND INTERNATIONAL LAW IN CONSTITUTIONAL CONSTRUCTION

*John O. McGinnis**

My remarks today concern the use of international and foreign law as a source of authority in constitutional interpretation. First, I will discuss what it means to use foreign or international law as authority in the interpretation of the U.S. Constitution. Second, I will assume the truth of originalism as a theory of constitutional interpretation and show why the use of contemporary foreign or international law is incompatible with that theory. Because that lack of compatibility can be simply stated, I will then suggest that the use of foreign and international law is objectionable under even more pragmatic theories of constitutional interpretation.

First, what does it mean to use international law or foreign law as an *authority* in helping to construe the Constitution? The Supreme Court uses foreign or international law as authority when it gives weight in American constitutional law to propositions because they are part of international or foreign law. There are thus two conditions that must be met for international or foreign law to be treated as authority. The Court has to give such propositions weight and it has to give them weight as foreign or international law.

It is sometimes said by the apologists for the use of international and foreign law that, of course, such propositions have no authority because the Supreme Court is not treating them as binding. But that is a non sequitur. Even Supreme Court precedent does not bind the Supreme Court in that it may be overruled and yet no one would deny that precedent has authority in constitutional law. The real question is whether propositions of international or foreign law

* Class of 1940 Research Professor. This is an edited transcript of remarks presented at the Albany Law Review Symposium entitled *Outsourcing Authority? Citation to Foreign Court Precedent in Domestic Jurisprudence* on February 10, 2006. I offer a fuller discussion of these ideas in *Foreign to Our Constitution*, 100 NW. L. REV. 303 (2006).

are going to be given any weight (i.e. whether their existence could make a difference to the way the Court comes out). If propositions of international and foreign law are not going to be given any weight, I do not have a strong objection to citing them. I still have a quibble: the practice of citing material that is largely decorative may hurt the transparency of the opinion. Multiplying citations to propositions that do not make a difference to the outcome makes it harder to figure out what are the authorities that are doing the work in reaching the result. Certainly if the Court is not giving foreign or international materials weight, the Court should make clear in its citation practice that foreign and international legal material is being included for some reason other than its intrinsic authority.

Second, my objections are limited to propositions that are given weight by virtue of their presence in foreign or international law. Depending on their theory of constitutional interpretation, Justices may have other good reasons to use a proposition occurring in foreign or international law as a source of authority in constitutional interpretation. For instance, Justices may consider moral principles relevant to constitutional interpretation and may believe the proposition that happens to be contained in international and foreign law is a morally good one. But in that case the methodological question is what weight morality should have in constitutional construction, not the relevance of foreign or international law.

Let me make an analogy. Justices generally give our own domestic precedent weight, regardless of whether precedent is itself soundly reasoned. Justices could simply look at precedent to determine whether it contains reasoning that they judge to be good by some metric provided by the correct theory of constitutional interpretation. That would just be using precedent for informational value.¹ But Justices generally do use a precedent as authority as well, i.e. for its disposition value. Whatever its informational value, a precedent will make subsequent court opinions more likely to come out in its direction simply because it is precedent. My subsequent critique depends on international and foreign law being given weight beyond its informational value.

Assume then, as some Justices have in their speeches and law

¹ See Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1544 (2000) (distinguishing the information and disposition functions of precedent).

professors have in their law review articles, that a proposition of foreign or international law receives weight by virtue of its status as foreign or international law. If one is an originalist, the objections to this use of contemporary international or foreign law are relatively straightforward. Originalists believe that the meaning of the Constitution is established at time a provision is ratified. From the perspective of originalism, the problem thus with contemporary international or foreign law is the fact that it is contemporary, not the fact that it is foreign or international. Originalists would be pleased to consider Blackstone, or other foreign and international sources from the time of framing that shed light on what a reasonable person at that time would have thought the Constitution meant.

Now, there may be some exceptions to this general rule, but they are exceptions that prove the rule. It may be, for instance, that the intent of the Framers was to have a word in a constitutional provision, like “treaty”, be defined by whatever international law of the current day meant it to be.² In that case originalism would use it to give weight to contemporary international law.³ But in general originalists do not believe as a matter of fact that the Framers meant to define words according to some future meaning.⁴ Thus,

² I do not have space in this Essay to consider which constitutional provisions call for such references, but there clearly are some. See, e.g., U.S. CONST. art. I, § 8, cl. 10 (giving Congress the power “[t]o define and punish . . . Offenses against the Law of Nations”). Nor do I consider whether there are specific provisions that expressly contemplate being updated by reference to contemporary social norms. For reasons discussed below, however, it is doubtful that the Framers would want to make the evolution of our Constitution depend on the legal norms of other regimes which they knew to be hardly republican in practice or in spirit.

³ Some have argued that the Framers were so respectful of the law of nations that they would have wanted to interpret the Constitution in congruence with that law when possible. But the Framers viewed the law of nations as a limited set of principles that were a category of natural law. Blackstone, for example, described the law of nations as “a system of rules, deducible by natural reason,” and said that it “results from those principles of natural justice, in which all the learned of every nation agree.” WILLIAM BLACKSTONE, 4 COMMENTARIES 66–67; see also Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 509–11 (1998). But defenders of the use of contemporary international law want to use evolving standards of an international law that has grown in scope to become a kind of local municipal law and changed in nature from natural to positive law. In this respect, modern international law does not resemble the law of nations known to the Framers. I do not believe there is evidence that the Framers wished to use this distinct brand of international law to interpret the Constitution.

⁴ Some have also suggested that the Charming Betsy canon of construction, which requires statutes to be construed where possible in accordance with international law, be applied to constitutional construction as well. See Daniel Bodansky, *The Use of International Sources in Constitutional Opinion*, 32 GA. J. INTL & COMP. L. 421 (2004). But this canon rests on the separation of powers consideration that it should be the political branches, not the courts, which make the decision to violate international law. See Bradley, *supra* note 3, at 525–29.

contemporary foreign or international law is simply not relevant to construing the vast majority of constitutional provisions.

I think one should object to the use of foreign or international law in constitutional interpretation, even if one is a pragmatist about constitutional theory. Pragmatists believe that the Constitution should invalidate our laws, only if our laws have bad consequences. But does a conflict between our law and international or foreign law give us substantial reason to believe the consequences of our law are bad consequences? That is the central question for a pragmatic view of the relevance of foreign or international law, because we begin with some presumption that our democratically made legislation is beneficent and thus has good consequences for Americans. I do not have time to go into why we have that presumption about democratic legislation, but it is a default rule of our system.⁵

A rule of foreign law is not appropriately used to create doubt about the beneficence of our own law, because it is not formulated to be good with respect to the United States. Even assuming that the foreign nation has a flourishing political system, foreign law is formulated to be good for that foreign nation. There may be many differences between that foreign land and the United States that make its law appropriate for that nation and our law appropriate for ours. Indeed, foreign law viewed in isolation may seem contrary to our own, but that difference may be itself delusive. A provision of foreign law is really only the tip of an iceberg of some complex set of social norms in that nation.⁶ There may well be other legal provisions within their system that make the legal provision in question good for those nations. But since the United States does not have those other legal provisions, importing this single legal proposition may have bad consequences for the United States.

Moreover, the United States and many other nations are differently situated in a variety of ways. For instance, the United States is more entrepreneurial and far more religious than most European nations and it would be hardly surprising if a different set of rules is optimal for its people.⁷ Finally, it is very hard to see how

Thus, the canon should not be applied to the Constitution because its application would interpret the Constitution to accord with international law and thus tend to deprive the political branches of the opportunity to decide whether they want to violate international law.

⁵ Such process-based defenses of democracy are often associated with Condorcet. See DENNIS C. MUELLER, *PUBLIC CHOICE III* 128 (2003).

⁶ See Jed Rubenfeld, *The Two World Orders*, WILSON Q., Autumn 2003, at 22, 24–25.

⁷ On the dramatic difference between the United States and Europe in terms of religious

one could draw any conclusion from looking at the foreign law of selected nations, because selective attention would ignore many nations that have norms that accord with ours. Perhaps as a matter of abstract theory we could look at the law of all foreign nations on a constitutional issue and try to come up with kind of a weighted average of all that law as a standard of comparison for our own, but the courts are not institutionally competent to do that. That would be the work of a scholar for his lifetime.

International law is different from foreign law, because international law at least purports to claim some kind of universality, which foreign law does not. Here I address international law that has not been ratified by our political process to create actual domestic obligations. Such “raw” international law, includes the use of treaties the United States has not signed, customary international law, and the decisions of the International Court of Justice as law that may be given weight in interpretation of our Constitution. In my view, any discrepancy between international law and our law should not cast doubt on the beneficence of our own law. The basic reason is that international law does not purport to be democratic and thus its results do not impeach the product of our own democratic processes. International law reflects the consent of nation states, not the peoples of the world or global demos.

The democratic deficit of international law is not a mere theoretical problem. Take, for instance, the many human rights treaties that are basis of modern human rights law, but that have not been ratified by the United States. These treaties, including the rights of the Child Convention and many treaties on civil rights and human rights, were fabricated during the time when the Soviet Union and its allies were important actors on the international stage. I believe that provisions of treaties that required the give and take of negotiations with totalitarian nations cannot be presumed beneficial by virtue of the process that generated them. These provisions may be beneficial for some other reason, but are not good simply because they are a part of international law. Remember, my objection is only to the use of such provisions in constitutional interpretation from the authority of international law. Some of these provisions may be good for other reasons but it is those reasons not their status as international law that make

observance and influence, see Brian C. Anderson, *Secular Europe, Religious America*, PUB. INT., Spring 2004, at 143.

them suitable as an influence on the Constitution.

Customary international law in fact faces democratic deficits beyond the fact that nondemocratic nations are involved at many points in influencing its fabrication. Customary international law is not written down, and thus its principles depend on inferences about the propositions to which nation states have consented.⁸ Those responsible for inferring these principles from the confusing welter of state practices and declarations are not democratically chosen. These fabricators include publicists and international courts. You may wonder, what is a publicist? You are looking at a publicist. International law professors are publicists. But we have strong evidence that international law professors are not very representative of their fellow citizens, at least in the United States.⁹ International courts are not representative either, both because some members are appointed by authoritarian nations and because even those appointed by democratic government are appointed through processes that are unlikely to elicit the consensus of their societies.

These concerns about the democratic bona fides of foreign and international law that should give us pause before permitting these sources to be used as a factor in overturning our own domestic law. But I think some other pragmatic reasons militate against the systematic use of international or foreign law as a factor in constitutional construction. While I generally focus on the problematic consequences for Americans of using foreign or international law to construe our Constitution, my first pragmatic concern focuses on the welfare of foreign nationals as well. The systematic use of foreign and international law to interpret our Constitution will move United States' law, at the margin, to converge to the law of the rest of the world. It is at all not clear that such convergence through constitutional fiat is good. Competition among different laws in different jurisdictions often has advantages. The differences generate information about the effects of laws, and as a result democratic branches are better positioned to choose better laws for themselves. Particularly, if one believes in American exceptionalism, one will think it a loss to entire world to have our distinctive norms prematurely extinguished through the operation

⁸ I discuss the democratic deficit of customary international law at length in John O. McGinnis, *The Appropriate Hierarchy of Global Multilateralism and Customary International Law: The Example of the WTO*, 44 VA. J. INT'L L. 229 (2003).

⁹ See John O. McGinnis et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculties*, 93 GEO. L.J. 1167 (2005).

of a constitutional law constructed along the lines of international and foreign law.

Indeed, I cannot resist responding to those like, Justice Ginsburg, who use decent respect for the opinions of mankind language in the Declaration of Independence as an argument for construing our Constitution in light of foreign laws. If Thomas Jefferson had looked to the law of Louis XIV's France or indeed most European nations at the time he would have found support for a regime antithetical to the principles of the Declaration, but none for the self-evident truths which he proclaimed and which eventually diffused throughout the world.

My second large pragmatic objection is rooted in the protection of our sovereign democratic processes. If one takes the use of foreign or international in constitutional interpretation seriously, international or foreign law will have, at the margin, authority to change our law. It suddenly gives people in other nations some ability to affect the shape of our polity. It seems problematic to allow people in other nations to now be able to consciously think about how they are changing their law to change our own law. Perhaps even worse our own domestic interests groups will have another way of getting a second bite at the apple, because they will be more effective than ordinary citizens in working in foreign and international fora to make law that will have a blowback effect on the United States.¹⁰ Once again I would cite the Declaration of Independence in support of this position. One of the Declaration's charges was as follows: "King George the III has conspired with others to subject us to a jurisdiction foreign to our Constitution." I do not want to suggest that the Supreme Court is exactly like King George the III! But the Court's practice of citing to foreign law does permit people who are foreign to our jurisdiction to have some conscious influence over the consent of our law.

My final kind of pragmatic concern goes back to Alexis de Tocqueville. Tocqueville was very impressed by how much the Americans paid attention to their laws, and in particular, to their Constitution—how much reverence they felt to their system. He came, of course, from the country that had recently been under the *ancien regime*—a much more top down structure of social ordering, where people were indifferent or contemptuous of the laws that

¹⁰ See John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 558 (2000) (observing that the average citizen has a harder time following activities in Geneva than in Washington).

oppressed them. Tocqueville thought that one of the reasons that Americans were so psychologically invested in their law was because it was their own.¹¹ Americans' creation of their own Constitution remains an important reason for people's enthusiasm for their founding documents.¹²

Again, a systematic reliance on the authority of foreign or international law may have been effective alienating Americans from the fundamental law that is the source of stability and prosperity. I certainly fear that politicians in the long run will exploit that alienation to discredit the Court. Reliance on foreign and international authorities may seem chic, but that high style comes with a high price.¹³

Thus, for a variety of pragmatic reasons, the use of foreign or international law is of doubtful benefit even under pragmatic theories of constitutional interpretation. Pragmatists should join originalists in keeping contemporary foreign and international law, as interesting as those laws may be and useful as they may be in other contexts, separate from the Constitution that we Americans have made.

¹¹ See ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 247, 248 (Phillips Bradley ed., Alfred A. Knopf, Inc. 1945) (1835).

¹² Years ago this enthusiasm was actually marked by celebrations and even parades for the Constitution in particular. WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937, at 233 (1994) (discussing “Constitution Day” celebrations).

¹³ Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, at 1607 (2004).