

Foreign Law in United States Courts:  
Selected Articles

Steve Sanders, American Legal Conservatives Oppose the Citation of Foreign Law, But What About the Hallowed Practice of Citing to Blackstone?

[http://writ.news.findlaw.com/commentary/20081010\\_sanders.html](http://writ.news.findlaw.com/commentary/20081010_sanders.html) (October 10, 2008).

FindLaw guest columnist and attorney Steve Sanders contends that legal conservatives, including Justice Antonin Scalia, indulge in serious hypocrisy when they both decry the Supreme Court's citation to sources of foreign law and, at the same time, themselves frequently cite to work of the British legal giant Blackstone. Though conservatives may counter that Blackstone's thought is especially relevant because he influenced the Constitution's Framers, Sanders responds that this points actually cuts in favor of allowing modern courts to follow the Framers' example by similarly citing to, and being influenced by, their own modern foreign contemporaries

Adam Liptak, Supreme Court's Global Influence Is Waning. *New York Times* (September 18, 2008).

Judges around the world have long looked to the decisions of the United States Supreme Court for guidance, citing and often following them in hundreds of their own rulings since the Second World War. But now American legal influence is waning. Even as a debate continues in the court over whether its decisions should ever cite foreign law, a diminishing number of foreign courts seem to pay attention to the writings of American justices.

Daniel A. Farber, The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History. 95 Cal. L.R. 1335 (2007).

... The Supreme Court's reliance on "foreign" law has become the subject of heated controversy, particularly with regard to the relevance of foreign authority in constitutional cases. ... My thesis is that foreign law has deeply permeated our legal system from the very beginning, not only in private law but also in constitutional discourse and adjudication. ... It really began with the Holocaust, when international law started to concern itself with how nations treated their own citizens... . So you had the beginnings of things like the European Court of Human Rights. ... The views of foreign law currently espoused by the conservative wing of the Supreme Court are far removed from the perspective of the Framers. ... Vattel's work mainly involved international law but contained some important observations on natural law. ... Certainly, the Framers had no qualms about looking to foreign and international law. ... When we consider the historical use of foreign authority by the Framing generation and numerous Supreme Court Justices since John Marshall, this argument might raise some question about whether the United States actually ever has had full sovereignty. ... None of these uses of foreign law remotely impairs U.S. sovereignty. ... For example, the supporters of the Thirteenth Amendment believed that slavery was a universal wrong, not just a violation of some peculiarly American norm. ...

Paul Finkelman, Foreign Law and American constitutional Interpretation: A Long and Venerable Tradition. 63 N.Y.U. Ann. Surv. Am. L. 29 (2007).

... In his dissent in *Lawrence v. Texas*, Justice Antonin Scalia called the majority's use of foreign law "dangerous dicta. ... The appeal to history, implicit in the jurisprudence of Justice Scalia, ought to take into account the long history of the Court's use of foreign law. ... The debate over the African slave trade illustrated the importance of foreign law to the Framers. ... " Can it be that Justice Scalia has a monopoly on what sources of law are appropriate for American courts, and that Chief Jay, Marshall, Taney, Chase, and Waite, as well as various Associate Justices and other American jurists of the eighteenth, nineteenth, and twentieth centuries, were jurisprudentially 'un-American?' Moreover, if it was appropriate to use foreign law to contract liberty in the nineteenth century, why is it inappropriate to use foreign law to expand liberty in the twenty-first century? Equally important, if the court could use foreign law to protect the rights of the accused during the nation's greatest crisis - as the Court did in *Milligan* - is it inappropriate to use similar sources of law to protect the rights of the accused in our current age of terrorism? ...

Osmar J. Benvenuto, Reevaluating the Debate Surrounding the Supreme Court's Use of Foreign Precedent. 74 *Fordham L.R.* 2695 ((2006).

... Who would have thought that citing certain legal materials could start such rancorous and vituperative debate? The U.S. Supreme Court's use of foreign precedent has done just that. ... The Justices' extrajudicial writings and speeches on the subject of foreign precedent are also analyzed and an argument is made that the analysis reinforces the conclusion that the Court's use of foreign precedent is more rhetorical than substantive. ... The Court then went on to discuss two precedents on which its holding was most reliant: *Planned Parenthood of Southeastern Pennsylvania v. Casey* and *Romer v. Evans*. *Casey* is important to the Court's decision in *Lawrence* because it acknowledged the continuing validity of modern substantive due process, thus "confirming that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. ... The Supreme Court's use of foreign precedent and the Justices' extrajudicial treatment of the subject are more rhetorical than substantive. ... That is, using foreign precedent as a source of an argument or rationale, but then searching for and deploying domestic precedent to support that argument. ... Informational citations allow America to learn from foreign experience, while limiting the substantive, undemocratic influence of foreign law.

Steven G. Calabresi and 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 (2005).

... On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement- expressed in international law or in the domestic laws of individual countries-that a particular form of punishment is inconsistent

with fundamental human rights. ... He too considered the 1827 English case of *The Slave, Grace*, but viewed its holding less conclusively than did the concurring Justices. ... Justice O'Connor wrote separately in dissent, in part to make clear her disagreement with Justice Scalia's contention "that foreign and international law have no place in our Eighth Amendment jurisprudence. ... The Court looked to foreign sources of law to weigh the reasonableness of Texas's exercise of its police power, and without finding a fundamental right of gays or anyone else to engage in sodomy, the Court struck down Texas's exercise of its police power as being inherently unreasonable. ... Instead, the Court has usually looked to foreign sources of law mostly in order to learn from the experiences of other nations, as Justices Breyer and Ginsburg have both argued is proper. ... Nevertheless, we do think the pace of the Court's reliance on foreign sources of law has picked up in the last sixty-five years, especially since the issuance of the plurality opinion in *Trop v. Dulles*. Moreover, many of the cases in which the Court or individual justices have relied on foreign law are among the most problematic in the Court's history. ...

Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*. *The New Yorker* (September 12, 2005).

Profiles U.S. Supreme Court Justice Anthony Kennedy and considers how his passion for foreign law could change the Court. Family, educational and career background of Kennedy; Background the Court's practice of making references to foreign law; Views of Kennedy on death penalty for juvenile offenders.

Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer. Subject: Constitutional Relevance of Foreign Court Decisions. – AU Washington College of Law, Jan. 13, 2005.

<http://www.wcl.american.edu/secl/founders/2005/050113.cfm>

WCL was pleased to welcome Justices Scalia and Breyer to discuss "The Relevance of Foreign Law for American Constitutional Adjudication," which addressed such topics as using foreign court precedent in deciding U.S. constitutional cases and whether the U.S. should take into account shifting world standards on social and moral issues such as the death penalty.

Steven G. Calabresi, Lawrence, The Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal. 65 *Ohio State L.J.* 1097 (2004).

... In leading cases, such as *Bowers v. Hardwick*, in which the Court declined to recognize a right on the part of gays to engage in sodomy, and *Washington v. Glucksberg*, in which the Court declined to recognize a right to assisted suicide, the Court again staked out a moderate and restrained position for discovering new, constitutionally-protected, fundamental rights. ... Then, in Parts III, IV, and V, I consider whether foreign constitutional law is in fact relevant to Justice Kennedy's fundamental rights opinion (Part III), Justice O'Connor's equal protection opinion (Part IV), or an Eighth Amendment cruel and unusual punishment argument that was not actually made in the *Lawrence* case (Part V).

... Furthermore, if the Privileges or Immunities Clause of the Fourteenth Amendment can evolve over time, than perhaps it has evolved to the point at which the right to engage in private oral and anal sex has become a privilege or immunity. ... In sum, I think foreign constitutional law is relevant mainly to the issue of whether sexual orientation discrimination is a form of caste-discrimination outlawed by the Fourteenth Amendment, but for three reasons I think the foreign evidence ought not to carry the day. ... I think the fact that anti-sodomy laws are a relic of the past in the Western World, although not in the Islamic World, is perhaps one of many factors suggesting that jail time for sodomy in the United States would today be cruel and unusual punishment. ...

Law Review article summaries are from the LexisNexis summary field in the law review database. The New Yorker and New York Times article abstracts are from Academic Search Premier database. The FindLaw abstract is the one provided at the site.

Prepared: October 2008 by Patricia Kasting