DISCOUNTING FOREIGN IMPORTS: FOREIGN AUTHORITY IN CONSTITUTIONAL INTERPRETATION & THE CURB OF POPULAR SOVEREIGNTY

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I. INTRODUCTION

The U.S. Supreme Court's resort to foreign and international sources of authority, although not of recent vintage,[1] has been a cause of alarm for some in the American public and legal academia in recent years,[2] as decisions such as *Lawrence v. Texas*[3] and *Roper v. Simmons*[4] have invoked the value judgments of other nations to provide content to constitutional rights in exercising the Court's counter-majoritarian power. The contemporaneous declarations of Supreme Court Justices haling the dawn of a new "global legal enterprise"[5] ensures that the practice will not be short-lived but is instead quickly becoming firmly rooted in the Court's jurisprudence.[6]

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1. Historically, the Supreme Court has resorted to foreign and international law in certain circumstances. *See* Steven 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).

2. Daniel A. Farber, *The Supreme Court, The Law of Nations, and Citations to Foreign Law*, 95 CALIF. L. REV. 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.").

Moreover, the heavy speculation that Yale Law School Dean Harold Hongju Koh, a renowned champion of the Supreme Court's resort to international and foreign authority,[7] is among President Barack Obama's top choices for the estimated three vacancies that are likely to arise on the Supreme Court during the course of President Obama's first term[8] evinces a reasonable likelihood that the practice will only continue to grow in frequency.

Both the Court's decisions and the pledges of individual Justices to continue exploring the interpretive value of foreign and international law in construing our Constitution have stirred up a robust debate about the propriety of using such sources to interpret, supplement, or discover the meaning of the constitutional text. Some scholars—notably, Professors Steven Calebresi[9] and Roger Alford,[10] as well as Judges Frank Easterbrook[11] and Richard Posner[12]—have objected to the use of foreign law in constitutional interpretation in most circumstances. Their objections voice concerns regarding the nature of the Constitution as law, the problem of picking and choosing values from dissimilar systems, the irrelevance of these sources to the proper constitutional inquiry, and the undermining of

Pocatello Educ. Ass'n, 129 S. Ct. 1093, 1103 (2009) (citing opinions of courts in Canada, the European Union, South Africa, and Israel to assist his analysis by examining the approaches used by "[c]onstitutional courts in other nations . . . when facing *somewhat similar* problems") (emphasis supplied) (Breyer, J., concurring in part and dissenting in part).

7. *See* Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. I

arguments of several key objectors to the practice and demonstrates that all but one of the arguments rely upon originalist or positivist assumptions. Fourth, the paper explores the principle of popular sovereignty, extracting aspects of the constitutional design that support it, and proposing that this principle cuts across interpretive methods. Finally, the paper argues that, for the reason that it contravenes popular sovereignty, the practice of invoking foreign and international law in judicial review must [P 0.n and

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ratified everywhere but in the United States and Somalia.[36] The Court also took notice of several "[p]arallel prohibitions . . . contained in other significant international covenants," concluding that "the United States now stands alone in a world that has turned its face against the juvenile death penalty."[37] As it did in *Atkins*, the Court admitted that such international opinions were not controlling, but the Court nevertheless affirmed the role of "the laws of other countries [and] international authorities as instructive for . . . interpretation" of the Eighth Amendment.[38] Similar to the decision in *Atkins*, the discussion in *Roper* was veiled. The foreign authority was perhaps the greatest change between *Stanford* and *Roper*, during which period only a minor shift in state legislation had occurred—certainly not enough to justify overturning the precedent.[39] Even Justice O'Connor, who had herself been a proponent of utilizing foreign and international law in construing the Constitution, objected to the Court's categorization of a national consensus by stating that "[b]ecause I do not believe that a genuine *national* consensus against the juvenile death penalty has yet developed . . . I can assign no such *confirmatory* role to the international consensus described by the Court."[40]

In the aftermath of *Atkins*, *Lawrence*, and *Roper*, there has been a rigorous debate over the relevance of foreign and international law to the U.S. Constitution. It is unclear why the practice has come under scrutiny at this particular time when it was so quietly and tacitly accepted in years prior as the Court decided *Trop*,[41] *Coker*,[42] *Thompson*[43] and other cases utilizing similar methods. R i5ndeWh-6(dt tis de)3r the practb(Cok-6(

statute.[48]

The first category is widely misconstrued to be equivalent to the practice involved in *Atkins*, *Lawrence* or *Roper*, as foreign or international law is invoked authoritatively. In reality, this method shares very little with the contemporary employment of foreign and international sources in interpreting clauses of the Constitution during judicial review, despite what some scholars may claim. For instance, while alleging that "[e]arly opinions of the Supreme Court . . . reflected this broad acceptance of the law of nations,"[49] Professor Daniel Farber cites to the cases of *Murray v. The Schooner Charming Betsy*[50] and *The Paquete Habana*[51] for support. Both of these decisions are important and influential; however, neither has much in common with the practice engaged in by the Justices in *Atkins*, *Lawrence*, and *Roper*. Instead, each case expounds rules on conflict of law questions about the relative authority of international law domestically.

For instance, in *Charming Betsy*, Chief Justice Marshall held that federal laws "ought never to be construed to violate the law of nations if any other possible construction remains."[52] While certainly giving deference to international law in the domestic context, *Charming Betsy* did not address its relationship to the Constitution. Similarly, *Paquete Habana* famously held:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction . . . . For this reason, *where there is no treaty, and no controlling executive or legislative act or judicial decision*, resort must be had to the customs and usages of civilized nations . . . .[53]

Paquete Habana thus recognized the authority of what is known as customary international law in cases where no other relevant domestic authority existed on the subject. In no respect did it foreshadow the invocation in the recent cases of international law as an authority on level with the text of the Constitution. In addressing

48. *See, e.g.*, Sarah H. Cleveland,

Commander In Chief Clause to define presidential powers.[59] Accordingly, this method is incongruous with the one that has been the subject of recent controversy.

The last category involves the contemporary practice of interpreting provisions of the Constitution using international and foreign law to provide substantive content for constitutional rights while engaging in judicial review. This practice is distinct from mere "citation" to foreign authority as it invokes foreign law for guidance regarding the meaning or content of constitutional values while applying those values during judicial review. As has been discussed, this practice first became prevalent with *Trop v. Dulles*,[60] the rationale for which included consideration of both foreign and international law. Moreover, this tradition includes the more recent *Atkins* and *Roper*

than the global legal enterprise that is now upon us?"[64] Despite the enthusiasm of Breyer and others, the legitimacy of this last category of use is hotly debated.

IV. SOME CONSERVATIVE SKEPTICISM: EASTERBROOK, POSNER, CALABRESI, AND ALFORD

The practice of interpreting the Constitution using foreign law has drawn a lot of criticism, including prompting legislative attempts aimed at restricting its use.[65] Skeptics come primarily from the same end of the interpretive spectrum, arguing from an originalist point of view or otherwise reflecting positivist assumptions on the nature of an unchangeable constitution. A few of the most articulate objectors[66] will be discussed to determine the strengths and inadequacies of the arguments that have been raised.

A. Judge Easterbrook: Constitution as Law

Judge Frank Easterbrook's opinion on citations to foreign and international law is poignantly simple. Judge Easterbrook contends that "these references are just window dressings" without any authoritative role for decisions, just as "[m]ost citations are just filler, added by law clerks or by the Justices themselves when engaged in belt-and-suspenders reasoning."[67] This does not make Judge Easterbrook particularly comfortable with such references. But according to him, the issue is not foreign law. Instead, the "disease lies in the claim of power; foreign citations are just a symptom."[68] Referencing the British study known as the "Wolfenden Report" that was cited in *Lawrence v. Texas*,[69] Easterbrook notes that "what *really*

64. Breyer, *supra* note 5, at 268.

65. Resolutions were introduced after *Lawrence* and *Atkins* and again after *Roper*. *See* H.R. Res. 568, 108th Cong. (2004) (proposed bill that would have made citation to foreign

swayed the Justices in *Lawrence*" was not foreign law but "John Stuart Mill's *On Liberty* (1859): Government should not interfere with acts that do not harm third parties."[70] He argues that the disease of which foreign citations are symptomatic is the larger evil of not viewing the Constitution as law, and instructs that "the reason why judges are entitled to make constitutional decisions is that the Constitution is *real law*[;] that's *Marbury*'s central point."[71] For Easterbrook, it is *because* the Constitution is "higher law" that it "constrains the democratic process."[72]

the many non-originalist scholars who believe the Constitution is legal will nonetheless question whether its legal status automatically forecloses the judicial power to expand upon or revise its content as Easterbrook contends.[77] To convince a broader audience, therefore, a different reasoning must be proffered.

B. Judge Posner: Unprecedented Opportunity

Like Judge Easterbrook, Judge Richard Posner objects to what he views as the "limited efforts" by the Supreme Court in decisions like *Lawrence* and

Posner makes assumptions that he does not make explicit. For instance, no judge or academic who accepts the idea of a living Constitution[83] would turn up their nose at the idea of making decisions on the basis of authority that they find persuasive simply because the authority is not seen as "conventional legal material," as most evolutive theorists do not attempt to confine the list of available material for interpretation.[84] Again, to come to a common understanding on the inappropriateness of the practice, a broader reason must be given.

C. Professor Calabresi: By Invitation Only

Having written extensively on the history and possible applications of invoking foreign and international law in adjudication and politics, Professor Steven Calabresi has identified four purposes to which such invocations might possibly be put to use.[85] One of those purposes—using foreign and international law as persuasive wisdom during the law-making process—does not concern the propriety of judicial reliance upon foreign law.[86] Another purpose,

requires a "reasonableness" determination, Calabresi does not satisfactorily answer why it is that defining the "cruel and unusual punishment" provision in the Eighth Amendment or the Due Process provision of the Fourteenth Amendment is more of a reasonableness determination than defining a "public purpose" in the Fifth Amendment or "speech" in the First Amendment. In response to Calabresi, a more consistent and non-originalist rationale for why foreign and international law ought to be rejected in constitutional interpretation needs articulation.

D. Professor Alford: The International Counter-Majoritarian Difficulty

The opinions of Professor Alford are of particular relevance to this paper as he locates his concern with the practice of relying on foreign and international judgments at the heart of the issue of judicial review. Delineating misuses of international law in constitutional interpretation, Alford first criticizes the infusion of international opinion into the Constitution's provisions by stating that "in the hierarchical ranking of relative values domestic majoritarian judgments should hold sway over international majoritarian values."[95] The reason is simple: using foreign sources "dramatically undermines sovereignty by utilizing the one vehicle—constitutional supremacy—that can trump the democratic will reflected in state and federal legislative and executive pronouncements."[96] Alford further expounds that "to the extent that constitutional guarantees *are* responsive to democratic popular will, those guarantees are not to be interpreted to give expression to international majoritarian values to protect the individual from democratic governance."[97] In other words, whereas striking down a statute via judicial review ordinarily has some trace of democratic legitimacy, using foreign and international law in the process causes it to lose that legitimacy altogether.

While at first glance Professor Alford's criticism may be brushed aside as being, like the previous objections, draped in an ideology that is inaccessible to those who do not subscribe to a particular constitutional interpretive method, on a closer examination his point is fundamentally sound regardless of ideology. It is difficult for

approach . . . ").

95. Alford, *Misusing International Sources*, *supra* note 10, at 58.

96. *Id.*

97. *Id.* at 59.

anyone to deny that the American sovereign is neither King George nor the European Court of Human Rights but the people themselves, and that the Constitution clearly establishes this role. Popular sovereignty is the value invoked by originalist theorists and non-originalist theorists alike.[98] As both sides agree on a common value, a detailed look at what popular sovereignty is and what it means for the

regardless of one's approach to questions of interpretation, all who acknowledge the essential role of the American people as the American sovereign can agree that the invocation of foreign authority in judicial review is improper.

A. Describing Popular Sovereignty

The idea of popular sovereignty is so basic that it needs little description or definition; nonetheless, I will describe it here only to make it abundantly clear that the use of foreign authority in judicial review offends popular sovereignty, and also that, as an argument against invoking foreign authority, popular sovereignty transcends interpretive approaches to the Constitution. Popular sovereignty is the concept of government by the people governed.[102] There is little doubt that the Constitution embodies the purpose of establishing popular sovereignty and has increasingly done so with the passage of multiple amendments either broadening the right to vote or tying the representative government more closely to the popular will.[103] The Constitution prescribed that the government was to be established as one responsive to its constituents from the moment of its inception, forming the government with the words "We the People . . . ."[104] Additionally, historical evidence demonstrates that popular sovereignty was a core concern to the framers, as the Declaration of Independence listed among the grievances against King George that he had "subject[ed] us to a jurisdiction foreign to our constitution."[105] As the Supreme Court has commented, in America "sovereignty itself

102. Robert Post, *Democracy, Popular Sovereignty, and Judicial Review*, 86 CALIF. st581donevR/TT0 1 T4 0 8.52 460.6oT.79149.71done

remains with the people, by whom and for whom all government exists and acts."[106] At least four pillars of the constitutional structure evince that the Constitution created a government where the people are sovereign: general suffrage, federalism, ordinary majoritarian rule,

causing government to remain closely accountable to the people. Although there has certainly been a wide expansion of the federal government's powers since the time of the founding through constitutional amendment and the Supreme Court's various Commerce Clause decisions,[120] the principle of federalism is nonetheless innate in the constitutional design. Moreover, that principle today still protects, supports, and fosters popular sovereignty.[121]

E. Constitutional Revision: The Right to Change Our Minds

Finally, the Constitution grants the people the power to redefine the existing structure of government or the presently protected realm from which government intrusion is barred by the Constitution.[122] Under Article V, the Constitution may be amended by a two-thirds vote of both houses of Congress together with ratification by three-fourths of all state legislatures. As Professor Nicholas Quinn

seventeen amendments since the Bill of Rights demonstrates the wisdom of the mechanism that was designed to "guard equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults."[125]

This mechanism supports popular sovereignty in a way that is complementary to ordinary majoritarian rule by acknowledging that, while mere majorities may be denied their preference, the will of the people may not be denied. If the popular will is so strong as to be able to muster a two-thirds majority vote in both houses and ratification by three-fourths of the states, then the people may add or detract from either the powers possessed by the government or their rights as individuals against the government as they desire, thereby revising their charter of government and redefining their nation's character. The scope of this power is so large as to even include the potential for the people to "abdicate" rule by establishing a monarchy or revising the qualifications for voting in elections or holding office.[126] Since no one but a sovereign could possibly act so authoritatively as to be capable of restructuring the government, overturning the present order and even abdicating power,[127] constitutional revision affirms that the power of sovereignty lies with the people.

F. Agreement on Popular Sovereignty in Justifying Decisions Amongst Both Originalist and Non-Originalist Theorists

In denying the permissibility of invoking foreign and international law in judicial review, the argument of popular sovereignty stands apart from other justifications that necessitate an

Governed: Constitutional Amendment Outside Article V, 94 COLUM.

would be to "render democratically adopted texts mere springboards for judicial lawmaking,"[135] thereby undermining the democratic objectives of the Constitution.[136] Scalia's complaint is that the judicial

course.[145] Sunstein argues that minimalist judging is democracy-promoting and "tr[ies] to trigger or improve the processes of democratic deliberation" by "provid[ing] spurs and prods to promote democratic deliberation."[146] Similar to Ely, Sunstein also emphasizes participation that gives a voice to all, a value that resounds with general suffrage and underlies popular sovereignty.

While Ely and Sunstein do not by any means comprehensively represent non-originalist theory, the appeal to democracy and representation, which is synonymous with popular sovereignty—although particular outcomes may change based upon how that value is described—is widely shared among non-originalist theorists.[147] The democratic rule of the people is also often invoked as a central justification for originalism. It is proper to conclude, therefore, that the value, demonstrably held by originalists and non-originalists alike, cuts across interpretive methodology.

VI. POPULAR SOVEREIGNTY AND THE PROBLEM OF THE ROAMING HAND: THE DEAD HAND REVISITED

For the reason just proffered—popular sovereignty—the practice of using foreign authority in constitutional interpretation ought to be rejected. Although it may at first seem harsh to propose that popular sovereignty does not tolerate foreign authority in judicial review, the explanation for why this must be is one that is remarkably familiar to constitutional theorists. A frequent evolutive or non-originalist argument advanced against the originalist theory of interpretation also invokes the principle of popular sovereignty. The argument, known as the "dead hand," is one that appeals to the power of present majorities to make decisions, often specifically moral decisions, and criticizes the power of past generations to bind the present. The argument of the dead hand may be applied with equal force to the issue of invoking foreign and international laws and decisions in construing the Constitution. For the reasons advanced in the dead hand argument, the problem that I have identified as the "roaming hand"—allowing the

145. *Id.* at 40.
146. *Id.* at 27.
147

by a writing from authors long dead who have little in common with those now living?[153] In other words, "the question of why, to put it bluntly, we ought to care what a bunch of dead people thought about how we ought to live our lives today . . . ."[154] For many non-originalist scholars, the dead hand argument offered a valid justification for departing from the original understanding in favor of embracing evolving standards on the grounds that they more fully

society to a compact to which no American electorate ever assented. Ordinary majoritarian rule is forsaken and no adequate answer can be given for why this is acceptable.

The practice of deference to the roaming hand also invites great offenses against federalism.[163] Not only is a debatable issue removed from the realm of the states' powers to regulate and, hence, the people's power to decide, but it is removed on some supposed need for consistency among, or agreement with, the international community. It is as though the Court has invoked a super-national, super-federal governmental authority, thus relegating the power of the states to an even less significant position and taking the power to decide issues even further away from the American people. The roles assigned for participatory self-government and constitutional revision are usurped. The American people are "subject[ed] . . . to a jurisdiction foreign to [their] constitution," a repetition of one of the instigating offenses of the revolution.[164] In sum, the rule of the people is denied.

The remarkable congruity between the dead hand problem and the roaming hand demonstrates that the popular sovereignty argument cuts across interpretive approaches. Since the reliance upon foreign sources of law in constitutional interpretation presents a problem so closely related to the issue of the dead hand, it is surprising that many of the same scholars who eschew originalism for the reason that it holds those now living to the standards of those long dead are comfortable with the practice.[165] While there is room for debate over the merits of the approaches to constitutional interpretation, there is no room for debate over the proposition that the American Constitution establishes a government "of the People, by the People, and for the People,"[166] and, consequently, one where subjecting an ordinary American majority to standards that they have never adopted

163. *See Atkins*, 536 U.S. at 322 (stating that "[t]he Court's suggestion that these sources are relevant to the constitutional question finds little support in our precedents and . . . is antithetical to considerations of federalism, which instruct that any 'permanent prohibition upon all units of democratic government must [be apparent] in the operative acts (laws and the application of laws) that the people have approved'") (Rehnquist, C.J., dissenting).

164. DECLARATION OF INDEPENDENCE, *supra* note 105, at para. 15; *see also* John O. McGinnis, *Contemporary Foreign and International Law in Constitutional Construction*, 69 ALB. L. REV. 801 (2006).

165. *See, e.g.*, Eric A. Posner and Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131 (2006).

166. Abraham Lincoln, Address at Gettysburg (Nov. 19, 1863), *in* 2 William E. Barton, THE LIFE OF ABRAHAM LINCOLN 486 (1925).

is impermissible. Recognizing that the American people have the final say is necessarily to renounce the kind of counter-majoritarian action taken in *Lawrence*, *Atkins*, and *Roper*, which relies upon foreign norms and values to deny the majority its prerogative.

VI. CONCLUSION

Popular sovereignty is the answer for why American standards [illegible],