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Melissa A. Waters

JUSTICE SCALIA ON THE USE OF FOREIGN LAW IN CONSTITUTIONAL INTERPRETATION: UNIDIRECTIONAL MONOLOGUE OR CO-CONSTITUTIVE DIALOGUE?

Melissa A. Waters[†]

Perhaps the most intriguing aspect of the Supreme Court's 2003-2004 Term was the relative absence of debate among the Justices on what has become, over the past few years, a perennial hot topic on the Court's calendar: the relevance of foreign legal materials in interpreting the rights granted to Americans under the United States Constitution. In the past few years, several members of the Court have shown increased interest in considering foreign sources of law in constitutional analysis.[1] This Term in *Roper v. Simmons*,[2] the Court will again have an opportunity to debate the appropriateness of foreign precedent in constitutional analysis, when it revisits the issue whether the juvenile death penalty amounts to cruel and unusual punishment.

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1. *See* Atkins v. Virginia, 536 U.S. 304, 312 (2002) (striking down state laws permitting execution of the mentally retarded, holding that these executions no longer comported with "evolving standards of decency" and thus violated the Eighth Amendment's prohibition on cruel and unusual punishment. In its discussion of "evolving standards of decency," the Court noted the overwhelming world-wide consensus among courts and foreign legislatures prohibiting execution of mentally retarded individuals.) *See also* Lawrence v. Texas, 539 U.S. 558 (2003) (expanding the Court's consideration of foreign legal precedent beyond the context of the Eighth Amendment. In striking down state laws prohibiting homosexual intimate conduct, the Court discussed at length both European Court of Human Rights decisions and foreign legislation permitting the conduct in question.).

2. 124 S. Ct. 2198 (2004) (mem.) (pending a decision after oral arguments were heard by the Supreme Court on Oct. 13, 2004).

What is the impetus behind the Court's recent interest in the use of foreign law in interpreting the U.S. Constitution? In my view, it is in large part the Justices' response to the development of what I call transnational judicial dialogue:[3] national, supranational, and international courts from Australia to Zimbabwe are increasingly citing and discussing at length foreign legal precedent on a wide range of legal issues, particularly constitutional law issues. Over time, these interactions among the world's courts have developed into a kind of transnational judicial dialogue, in which courts are using comparative legal analysis to engage in intellectual cross-fertilization of ideas – or, as Anne-Marie Slaughter has described it, a "process of collective judicial deliberation on a set of common problems."[4]

The increased interest in foreign sources of law on the part of several U.S. Supreme Court Justices seems to reflect a desire to participate in this emerging transnational judicial dialogue – in short, to become active participants in a kind of judicial conversation with their foreign counterparts. Importantly, the trend seems to have attracted the interest of both liberals and moderates on the Court. Justice O'Connor, for example, has long been one of the most outspoken proponents of the relevance of foreign court decisions in the Court's jurisprudence. In *Lawrence v. Texas*,[5] Justice Kennedy discussed foreign precedent and practice in his majority opinion, striking down U.S. homosexual sodomy laws.[6]

Of course, this growing interest on the Court in transnational judicial dialogue has not been without its detractors. Some conservative members of the Court have repeatedly cried foul over the use of foreign sources of law in the Court's constitutional jurisprudence.[7] In addition, recently the debate has moved from judicial and academic circles to the halls of Congress. The House of Representatives is considering a resolution that would express the sense of the Congress that judicial determinations by

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3. *See generally* Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 2 (2005) (discussing the development of transnational judicial dialogue and its role in shaping international legal norms) [hereinafter *Mediating Norms*].

4. Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 119 (1994).

5. 539 U.S. 558 (2003).

6. *Id.* at 573, 576-77.

7. Justice Scalia in his dissenting opinion wrote, "Constitutional entitlements do not spring into existence . . . because *foreign nations* decriminalize conduct." Chief Justice Rehnquist and Justice Thomas joined Justice Scalia's dissent. *Id.* at 598.

U.S. courts regarding the meaning of U.S. laws should not be based in any way on foreign legal sources.[8]

In its 2003-2004 Term, however, the Court was virtually silent on this important and growing debate over its own participation in transnational judicial dialogue. As this Symposium makes clear, last Term was certainly unprecedented in the Supreme Court's consideration of important foreign relations and international law issues. But there was no major case last Term in which the Court debated the appropriateness of considering foreign legal materials in constitutional analysis.

Justice Scalia appears to have developed such a keen interest in this debate that he sought out opportunities last Term to keep the issue alive, both in the Court's case law and at the forefront of scholarly debate. On at least three occasions last Term, Justice Scalia seized the opportunity to declare his unequivocal opposition to any use of foreign sources of law in interpreting the rights granted to Americans under the U.S. Constitution.[9] But perhaps more surprisingly, Justice Scalia also urged the Court to take foreign judicial decisions much more seriously than the other Justices seemed to believe was warranted in the area of treaty interpretation.[10] I will discuss each of these instances in turn.

Justice Scalia denounced the use of foreign sources of law in constitutional analysis in his concurring opinion last Term in *Sosa v. Alvarez-Machain*.[11] At issue in *Sosa* was whether the Alien Tort Claims Act granted a private right of action to individuals for torts in violation of the law of nations.[12] Justice Scalia devoted a portion of his concurring

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8. H.R. 568, 108th Cong. (2d Sess. 2004):

> *Resolved*, That it is the sense of the House of Representatives that judicial determinations regarding the meaning of the laws of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements are incorporated into the legislative history of laws passed by the elected legislative branches of the United States or otherwise inform an understanding of the original meaning of the laws of the United States.

9. *See, e.g.*, Antonin Scalia, Foreign Legal Authority in the Federal Courts, Keynote address to the annual meeting of the American Society of International Law (March 31-April 3, 2004), *in* 98 AM. SOC'Y INT'L L. PROC. 305 (2004) [hereinafter Foreign Legal Authority]; *see also* Olympic Airways v. Husain, 124 S. Ct. 1221, 1230 (2004) (Scalia, J., dissenting); Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004) (Scalia, J., concurring in part and concurring in judgment).

10. *See Olympic Airways v. Husain*, 124 S. Ct. 2065, 1231 (2004).

11. 124 S. Ct. 2739 (2004) (Scalia, J., concurring in part and concurring in judgment).

12. Gary Clyde Hufbauer, *The Supreme Court Meets International Law: What's the Sequel to Sosa v. Alvarez-Machain?*, 12 TULSA J. COMP. & INT'L L. 77 (2004) (remarks in this

opinion to decrying the judicial and scholarly trend toward using evidence of foreign practice (in the guise of customary international law) in interpreting constitutional rights. He commented, "[t]he notion that a law of nations, redefined to mean the consensus of states on *any* subject, can be used by a private citizen to control a sovereign's treatment of *its own citizens* within *its own territory* is a 20th-century invention of internationalist law professors and human-rights advocates."[13] Justice Scalia continued, "[t]he Framers would, I am confident, be appalled by the proposition that, for example, the American peoples' democratic adoption of the death penalty . . . could be judicially nullified because of the disapproving views of foreigners."[14] He concluded, "American law—the law made by the people's democratically elected representatives—does not recognize a category of activity that is so universally disapproved by other nations that it is automatically unlawful here."[15]

In his remarks at the American Society of International Law Conference (ASIL) in March 2004, Justice Scalia elaborated his position opposing U.S. court participation in transnational judicial dialogue on constitutional issues.[16] In his keynote address, Justice Scalia offered sharp criticism of what he clearly sees as a dangerous trend toward importing foreign legal norms into U.S. constitutional analysis. Justice Scalia acknowledged that he is, in fact, one of the Court's strongest proponents of the use of some foreign legal sources. He noted, "I probably use more foreign legal materials than anyone else on the Court . . . . Of course they are all fairly *old* foreign legal materials, and they are all English."[17] But as for the use of contemporary foreign legal materials—for example, recent foreign judicial decisions or legislation—Justice Scalia again took the firm position that such materials, in his words, "can *never* be relevant to an interpretation of—to the *meaning* of—the U.S. Constitution."[18] He complained:

> If there was any thought absolutely foreign to the founders of our country, surely it was the notion that we Americans should be governed the way Europeans are. . . . What reason is there to believe that other

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issue); William S. Dodge, *Bridging Erie: Customary International Law in the U.S. Legal System After Sosa v. Alvarez-Machain*, 12 TULSA J. COMP. & INT'L L. 87 (2004) (remarks in this issue).

13. *Sosa*, 124 S. Ct. at 2776.

14. *Id.*

15. *Id.*

16. *See* Foreign Legal Authority, *supra* note 9, at 305.

17. *Id.* at 306.

18. *Id.* at 307.

> dispositions of a foreign country are so obviously suitable to the morals and manners of our people that they can be judicially imposed through constitutional adjudication? Is it really an appropriate function of judges to say which are and which are not?[19]

Justice Scalia concluded, "[c]omparative study is useful . . . not as a convenient means of facilitating judicial updating of the U.S. Constitution, but as a source of example and experience that we may use, democratically, to change our laws—or even, if it is appropriate, democratically to change our Constitution."[20]

When, if ever, does Justice Scalia consider it appropriate for U.S. courts to consult foreign sources of law? His answer: when they are interpreting a treaty to which the United States is a party. Justice Scalia emphasized this point last Term in his dissent in *Olympic Airways v. Husain*.[21] In *Olympic Airways*, a passenger died of an asthma attack on a flight between Cairo and New York, after a flight attendant refused his request to be moved away from the smoking section. His widow sued the airline for wrongful death under the Warsaw Convention, to which the United States is a signatory.[22] The question before the Supreme Court was whether the flight attendant's refusal to move the passenger, and his subsequent death, constituted an "accident" within the meaning of Article 17 of the Warsaw Convention.[23]

The Court, in an opinion by Justice Thomas, held that the flight attendant's conduct constituted an accident under Article 17. Two courts from other signatories to the Warsaw Convention (Australia and the United Kingdom) had held that factually similar cases did not constitute accidents within the meaning of Article 17. These cases appeared to be directly at odds with the Court's interpretation of the treaty provision. But the Court dismissed these foreign court judgments in a brief footnote, in part on the ground that these were decisions of foreign intermediate appellate courts, and that the courts of last resort in Australia and the UK had not yet addressed the issue.[24]

In his dissent in *Olympic Airways*, Justice Scalia took the majority to task for failing to give sufficient consideration to foreign court decisions in

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19. *Id.* at 310.

20. *Id.*

21. 124 S. Ct. 1221 (Scalia, J., dissenting).

22. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 [hereinafter Warsaw Convention].

23. 124 S. Ct. at 1221.

24. *Id.* at 1229.

interpreting the meaning of the Warsaw Convention. He complained, "[t]oday's decision stands out for its failure to give any serious consideration to how the courts of our treaty partners have resolved the legal issues before us."[25] He again criticized those who would use foreign law in interpreting the U.S. Constitution, commenting:

> This sudden insularity is striking, since the Court in recent years has canvassed the prevailing law in other nations (at least Western European nations) to determine the meaning of an American Constitution that those nations had no part in framing and that those nations' courts have no role in enforcing. One would have thought that foreign courts' interpretations of a treaty that their governments adopted jointly with ours, and that they have an actual role in applying, would be (to put it mildly) all the more relevant.[26]

Justice Scalia emphasized the important role that comparative analysis should play in ensuring consistent interpretation and development of international treaties. He noted:

> We can, and should, look to decisions of other signatories when we interpret treaty provisions. . . . [I]t is reasonable to impute to the parties an intent that their respective courts strive to interpret the treaty consistently. . . . Finally, even if we disagree, we surely owe the conclusions reached by appellate courts of other signatories the courtesy of respectful consideration.[27]

What is surprising about Justice Scalia's dissenting opinion in *Olympic Airways* is the great weight that he suggested U.S. courts should give to the judgments of other signatories' courts. Justice Scalia complained that the Court was adopting an interpretation of the Warsaw Convention that stood squarely at odds with the earlier interpretation of the UK and Australian courts.[28] He argued, "[w]ere we confronting the issue in the first instance, perhaps the Court could persuade me to its view. But courts in two other countries have already rejected it, and their reasoning is no less compelling than the Court's."[29] In these circumstances, Justice Scalia explained, "I would follow the holdings of . . . [the Australian and UK courts], since the Court's analysis today is no more convincing than theirs."[30]

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25. *Id.* at 1230 (Scalia, J., dissenting).
26. *Id.* (citations omitted).
27. *Id.* at 1232.
28. *Id.* at 1231.
29. *Olympic Airways*, 124 S. Ct. at 1234.
30. *Id.* at 1233.

In *Olympic Airways*, Justice Scalia thus appears to propose a rebuttable presumption in favor of the validity of foreign court judgments in matters of treaty interpretation. Thus, if a court of another signatory country has already addressed an issue of treaty interpretation, U.S. courts should defer to that judgment so long as it is a reasonable interpretation of the treaty—even if there are other, equally reasonable alternative interpretations. The foreign court's interpretation should control unless the U.S. court can offer, in Justice Scalia's words, a "convincing explanation" [31] for its decision to depart from the foreign court's prior judgment. In this particular case, however, it seems somewhat odd that Justice Scalia insisted that the Court should have deferred to the foreign courts' prior decisions in interpreting the Warsaw Convention. As the majority pointed out, the foreign decisions were merely the views expressed by intermediate appellate courts in the UK and in Australia, and the highest courts in those countries had not yet addressed the proper interpretation of the treaty.[32]

Justice Scalia's dissenting opinion in *Olympic Airways* was an important step in promoting his broader agenda. In my view, Justice Scalia used *Olympic Airways*, along with his opinion in *Alvarez-Machain*[33] and his comments at the ASIL Conference, as vehicles to call attention to what he clearly sees as a singularly disturbing trend. In his comments last Term, Justice Scalia was decrying the agenda of those whom he describes as "Platonic living constitutionalists":[34] scholars and judges who would use comparative legal analysis as a means to import foreign legal norms into the American Constitution, and who would, in Justice Scalia's view, make over the American people in the image of the Europeans. Just as importantly, in his dissent in *Olympic Airways*, Justice Scalia seized the opportunity to criticize (rightly, in my opinion) the Court's decidedly casual, ad hoc approach thus far to the use of foreign legal sources in its decision-making.

Justice Scalia's comments last Term also suggest that he sees great urgency in sounding the alarm on this issue. Indeed, he suggests that the battle might already be lost. In his keynote address at the ASIL conference, for example, he acknowledged that the Court's use of foreign law in the interpretation of the Constitution would likely continue "at an accelerating pace."[35] In fact, he described the use of foreign law in the

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31. *Id.* at 1231.
32. *Id.* at 1229.
33. *Sosa*, 124 S. Ct. 2739.
34. Foreign Legal Authority, *supra* note 9, at 308.
35. *Id.*

Court's constitutional jurisprudence as "the wave of the future."[36] But Justice Scalia's apparent "last stand" on this issue seems premature at best. In comparison with other constitutional courts around the world, the U.S. Supreme Court, thus far, has taken extremely modest steps toward using foreign legal materials in any of its decision-making, much less in its constitutional decisions. There is no question, however, that Justice Scalia's comments last Term have been very effective in raising the visibility of this issue and in rallying conservative scholars, judges, and lawmakers to the cause.

Apart from their rhetorical value, Justice Scalia's remarks last Term also raise intriguing questions regarding the nascent debate over the U.S. Supreme Court's participation in the emerging transnational judicial dialogue among the world's courts. For example, was Justice Scalia attempting to develop a conservative alternative approach to transnational judicial dialogue? Drawing on remarks, the conservative alternative approach appears to consist of the following maxims. First, foreign sources of law "can *never* be relevant to an interpretation of—to the *meaning* of—the U.S. Constitution."[37] Thus, under a conservative alternative approach, U.S. courts cannot participate at all in transnational judicial dialogue on any matter of constitutional law. On the other hand, when the United States is a signatory to a treaty, the decisions of other signatory courts deserve a strong presumption of validity. Indeed, U.S. courts should defer to foreign judicial interpretations in such instances, so long as those interpretations seem reasonable.[38] Thus, the conservative alternative approach envisions a very active role for U.S. courts in transnational judicial dialogue in the context of treaty interpretation.

In short, Justice Scalia's conservative alternative approach would not reject all forms of participation in transnational judicial dialogue, but it would severely restrict that participation. Indeed, his approach would eliminate it entirely in matters of constitutional law; an area that is fast becoming one of the most important and active areas of dialogue among the world's courts.

Justice Scalia's remarks raise a second intriguing question. In what is clearly becoming an increasingly politically charged debate, would a conservative alternative approach to transnational judicial dialogue win support from the other Justices on the Court? Given the political backlash that may be building against the Court's relatively modest attempts to

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36. *Id.* at 309.

37. *Id.* at 307.

38. *See supra* note 27-31 and accompanying text (discussing Justice Scalia's dissent in *Olympic Airways*).

consider foreign sources of law, is it likely that Justice Scalia's limited approach to dialogue will win back the moderates on the Court—Justice Kennedy, and perhaps even Justice O'Connor?

It remains to be seen whether Justice Scalia will continue to elaborate a conservative approach to U.S. court participation in transnational judicial dialogue and what impact such an approach would have on the Court's jurisprudence, but we can begin to evaluate both the practicality and the wisdom of Justice Scalia's suggested approach. First, in my view, Justice Scalia and other conservative judges and scholars raise important concerns regarding U.S. court participation in transnational judicial dialogue on constitutional issues. For example, they correctly criticize the somewhat ad hoc approach to comparative constitutional analysis adopted by the Supreme Court thus far.[39] In *Lawrence v. Texas*,[40] for example, the Court's discussion of foreign precedent and practice could have benefited from a more rigorous analytical approach. The majority cited decisions from the European Court of Human Rights, as well as legislation from several countries that supported its view that homosexual sodomy laws were unconstitutional.[41] But it did not elaborate upon the reasoning of the European Court of Human Rights in striking down these laws. Nor did it explain why the practices of certain countries were more relevant to the U.S. experience than the many countries around the world who continue to have laws in place prohibiting homosexual sodomy. The majority's approach in *Lawrence* made it vulnerable to the dissent's criticism that it was merely imposing "foreign moods, fads, or fashions on Americans."[42]

Moreover, there may be a problem of selection bias in the Court's approach to transnational judicial dialogue on constitutional issues. While it is too early to draw any firm conclusions, recent cases indicate that the Court may exhibit a tendency to pick and choose certain categories of cases in which it wishes to discuss foreign sources of law at length, while ignoring foreign sources of law altogether in certain other categories. For example, one could argue that the Court has cited foreign courts' decisions on the death penalty simply because those decisions happen to comport with the desired outcome of the majority of the Justices.[43] On the other hand, it seems likely that at least some members of the Court will show

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39. *See generally Mediating Norms, supra* note 3 (analyzing the Supreme Court's approach to comparative constitutional analysis in detail).

40. 539 U.S. 558.

41. *See id.* at 572-73.

42. *Id.* at 598 (quoting Foster v. Florida, 539 U.S. 990, n.* (2002) (mem.) (Thomas, J., concurring in denial of certiorari)).

43. *See Atkins*, 536 U.S. 304.

much less interest in considering European views on hate speech, given that European courts have interpreted speech rights much more narrowly than U.S. First Amendment jurisprudence seems to permit.

In addition, proponents of transnational judicial dialogue on constitutional issues must grapple with the popular conception of the American Constitution, embodied in Justice Scalia's comment, "[w]e must never forget that it is a Constitution for the United States of America that we are expounding."[44] The American Constitution holds a unique place in the American psyche: in the popular consciousness, it is the embodiment of a uniquely American approach to liberty, justice, and the democratic experience. Some scholars may scoff at this popular view of the Constitution, but U.S. judges do so at their peril. Accordingly, in advocating the use of foreign legal sources in constitutional analysis, scholars and judges should devote considerable attention to ensuring that their work is not viewed simply as *replacing* American constitutional values with foreign norms.

Justice Scalia raises important concerns regarding the potential pitfalls of U.S. court participation in transnational judicial dialogue, and he offers a simple, straightforward solution to avoiding these problems. He argues that U.S. courts simply should not participate at all in transnational judicial dialogue on constitutional issues. They should not consult foreign legal sources in their decision making, nor should they allow foreign judicial reasoning or foreign legal norms to influence their thinking.

My view, total non-participation by U.S. courts in dialogue on constitutional issues is impractical, unnecessary, and unwise. Justice Scalia's conservative alternative approach misunderstands the nature of transnational judicial dialogue. Justice Scalia fears U.S. court participation in dialogue on constitutional issues in part because he does not see it as a true dialogue at all. Rather, he views it as a sort of unidirectional monologue in which foreign courts talk *to* U.S. courts and elaborate foreign views on matters of constitutional law. The role of U.S. courts is passive: they simply receive those foreign views and import foreign legal norms into U.S. constitutional analysis. To date, the Court's approach to foreign sources of law (in cases such as *Lawrence* and *Atkins*) may have reinforced this conception of transnational judicial communication as a unidirectional process of reception and importation of foreign legal norms into the U.S. Constitution.[45]

U.S. court participation in transnational judicial dialogue need not be a unidirectional process in which courts simply receive foreign legal norms.

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44. Thompson v. Oklahoma, 487 U.S. 815, 869 n.4 (1988) (Scalia, J., dissenting).

45. *See Lawrence*, 539 U.S. at 558; *Atkins*, 536 U.S. at 304.

Instead, courts should approach these issues with an understanding that transnational judicial dialogue is *co-constitutive* in nature. As a co-constitutive process, foreign and international law may influence and shape domestic law; but at the same time, through participation in dialogue, U.S. courts can ensure that American legal norms inform and shape the development of foreign and international law as well. Thus, from a co-constitutive perspective, consideration of foreign sources of law need not entail automatic deference to foreign decisions.[46]

Indeed, in my view, U.S. courts should become active participants in transnational judicial dialogue on a broader range of issues, and they should be particularly willing to engage their foreign counterparts on issues where American legal norms differ from foreign norms. For example, we are seeing a growing debate among the world's courts on the regulation of transnational speech (for example, speech on the Internet). At the heart of this debate is which countries' legal norms will govern transnational speech: those with the most restrictive speech regimes, or those who offer broad protections for speech? Rather than refusing to participate in the emerging transnational judicial dialogue on speech, U.S. courts should be engaging their foreign counterparts by citing and discussing foreign judicial decisions, where appropriate, in their own decisions. By considering and rejecting the very restrictive approach to speech of many Western European courts, U.S. courts can champion at the transnational level the American approach to broad speech protection. In so doing, U.S. courts can ensure that American First Amendment conceptions of speech influence the development of foreign and international norms on transnational speech.

At this Symposium, Dean Koh and Professor Posner have highlighted the emergence on the Supreme Court of two distinct approaches to foreign and international sources of law – the "transnationalist" and "nationalist" (or, in Professor Posner's view, "standard") approaches – and they have debated which view is predominant on the Court.[47] It is important to recognize, however, that this is not simply a debate over the relevance of foreign legal materials in the work of the U.S. courts. In a larger sense, it is a debate over what role U.S. courts will play in the emerging

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46. *See generally Mediating Norms*, *supra* note 3 (discussing the co-constitutive nature of transnational judicial dialogue).

47. Eric Posner, *Transnational Legal Process and the Supreme Court's 2003-2004 Term: Some Skeptical Observations*, 12 TULSA J. COMP. & INT'L L. 23 (2004) (remarks in this issue); Harold Hongju Koh, *The Ninth Annual John W. Hager Lecture, the 2004 Term: The Supreme Court Meets International Law*, 12 TULSA COMP. & INT'L L. J. 1 (2004) (remarks in this issue).

transnational judicial dialogue among the world's courts. Moreover, the outcome of this debate will have important implications not only for the Court's jurisprudential approach to domestic constitutional analysis; it will also have a tremendous impact on the ability of the Supreme Court and other U.S. courts to influence the emerging transnational judicial dialogue, and through that dialogue, the development of international legal norms on a wide range of legal issues.

So-called "nationalists," like Justice Scalia and Professor Posner, raise legitimate concerns that judges and scholars should take seriously. In this emerging trend toward U.S. court participation in transnational judicial dialogue, what about issues of judicial authority and legitimacy? How do we preserve what is unique about the American constitutional experience, while also recognizing that we can, and should, learn from the experience of our neighbors?

I am confident that American judges can develop a principled approach to participation in dialogue that takes into account these concerns and strikes the right balance between these sometimes competing values. The key in developing such an approach is to understand the nature of transnational judicial dialogue. First, dialogue among the world's court will proceed whether or not U.S. courts choose to participate in it. Justice Scalia's response—total non-participation in dialogue on constitutional issues—is certainly a viable alternative, but it imposes significant costs in terms of U.S. courts' prestige and ability to influence the development of constitutional thought and legal norms in other parts of the world. A better choice is for U.S. courts to encourage *more* dialogue among the world's courts on a broader range of issues, and to promote the development of a true co-constitutive dialogue. By so doing, U.S. courts can engage their foreign counterparts not merely to consider the relevance of foreign legal norms to U.S. law, but to articulate and champion American norms at the transnational level.

Several years ago, Justice Claire L'Heureux-Dubé, a former Justice on the Canadian Supreme Court, was asked to deliver an address here at the University of Tulsa College of Law on "The International Impact of the Rehnquist Court."[48] Instead, she addressed the Rehnquist Court's *declining* influence over the world's constitutional courts. She commented:

> In my opinion, the failure of the United States Supreme Court to take part in the international dialogue among the courts of the world, particularly on human rights issues, is contributing to a growing isolation and diminished influence. The U.S. Supreme Court has failed

48. *See* Claire L-Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15 (1998).

> to look with any regularity outside the borders of the United States for sources of inspiration.... [T]his tendency to look inward may well make the judgments of U.S. courts increasingly less relevant internationally.[49]

In my view, this decline in the influence of the U.S. Supreme Court is unfortunate and unnecessary. The solution is for U.S. courts to adopt a co-constitutive approach to transnational judicial dialogue. They should recognize that domestic law can sometimes be influenced by our neighbors' experience, but by the same token, U.S. courts, through participation in dialogue, can have a dramatic influence on other countries' approaches to constitutional rights. By adopting a co-constitutive approach to transnational judicial dialogue, the U.S. Supreme Court can regain its standing as the world's preeminent constitutional court, and it can ensure that American norms of constitutional law and constitutional rights remain influential on the world scene.

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49. *Id.* at 37 (discussing Rehnquist Court's "failure ... to take part in the international dialogue" as "playing one of the most important roles in the Rehnquist Court's diminished influence, one which is entirely within the control of the Justices").