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## Remarks at the University of Chicago Law School

Alberto R. Gonzales\*

Chicago, IL

November 9, 2005

Thank you and good afternoon. I appreciate the invitation to be with you today at this great institution.

Last week, when the President announced his nomination of Judge Sam Alito to be Associate Justice on the Supreme Court, Judge Alito said that he holds the Supreme Court “in reverence”<sup>1</sup>; it represents to him “our dedication as a free and open society to liberty and opportunity, and, as it says above the entrance to the Supreme Court, ‘equal justice under law.’”<sup>2</sup>

Judge Alito’s comment reminds me of a statement by President Abraham Lincoln. Lincoln said that, while Americans come from many walks of life, a “reverence for the laws”<sup>3</sup> is our unifying heritage. He urged Americans to make reverence for the laws a “*political religion*,”<sup>4</sup> a civic duty taught in every home, school, and place of worship, “proclaimed in legislative halls, and enforced in courts of justice.”<sup>5</sup>

I want to discuss with you today a trend I see in our courts, led most prominently by certain members of the Supreme Court, that I fear may undermine the long tradition of reverence that Americans have for the supreme law of the land—the Constitution of the United States.

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\* Attorney General of the United States. For the purposes of publication and identifying sources, the *Chicago Journal of International Law* has footnoted these remarks.

<sup>1</sup> *President Nominates Judge Samuel A. Alito as Supreme Court Justice*, Office of the Press Secretary (Oct 31, 2005), available online at <<http://www.whitehouse.gov/news/releases/2005/10/20051031.html>> (visited Apr 22, 2006).

<sup>2</sup> Id.

<sup>3</sup> Abraham Lincoln, *The Perpetuation of Our Political Institutions*, Address to the Young Men’s Lyceum of Springfield, Illinois (Jan 27, 1838), available online at <<http://teachingamericanhistory.org/library/index.asp?document=157>> (visited Apr 22, 2006).

<sup>4</sup> Id.

<sup>5</sup> Id.

I am referring to the growing tendency by some judges to interpret the Constitution by reference to the laws and judicial decisions of foreign nations and to strike down American laws enacted through the democratic process.

Before I proceed further, let me be clear: I hold the Judiciary in the highest regard, and nothing I say today diminishes the respect and admiration I have for judges and, in particular, the Justices of the Supreme Court. Nor do I mean to disparage any other nation's laws or the important role of international law. Far from it.

Judges and lawyers routinely use international law in other contexts. For instance, judges and lawyers seeking to interpret our treaty obligations routinely consider the interpretations of our treaty partners. Sometimes our statutes direct us to consider international law, as when the Foreign Sovereign Immunities Act<sup>6</sup> creates jurisdiction over cases involving property "taken in violation of international law,"<sup>7</sup> and foreign law will often be relevant in the litigation of public and private contract disputes involving foreign parties. All this is as it should be, and US government attorneys and the Judiciary are on solid ground in paying attention to developments abroad in these instances.

It is also entirely appropriate for our elected representatives in the Congress or the State legislatures to consider how lawmakers in other countries have approached problems when our representatives write the laws of the United States, as I'll discuss later.

And of course, international obligations play a vital, powerful, and positive force in the conduct of our foreign policy. As Secretary of State Rice has said, and I want to underscore today:

America is a country of laws. When we observe our treaty and other international commitments... other countries are more willing... to cooperate with us and we have a better chance of persuading them to live up to their own commitments. And so when we respect our international legal obligations and support an international system based on the rule of law, we do the work of making the world a better place, but also a safer and more secure place for America.<sup>8</sup>

This is not just the view of the Secretary of State. President Bush expects other countries to observe their treaty and other international commitments to us, and has stated that in all cases our own international obligations are also to be taken seriously. At the Department of Justice, we rely on treaties every day.

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<sup>6</sup> Pub L No 94-583, 90 Stat 2891 (1976), codified at 28 USC §§ 1330, 1332(a), 1391(f), 1601-1611 (2000).

<sup>7</sup> 28 USC § 1605(a)(3).

<sup>8</sup> US Secretary of State Condoleezza Rice, Remarks at Annual Meeting of the American Society of International Law, US Department of State (Apr 1, 2005), available online at <<http://www.state.gov/secretary/rm/2005/44159.htm>> (visited Apr 22, 2006).

For example, the many extradition treaties we have in place ensure that criminals are brought to trial and justice.

The globalization of terrorism makes international cooperation between domestic and foreign law enforcement and intelligence agencies essential. I work and visit regularly with my counterparts around the world as we fight common threats that do not recognize political boundaries.

Finally, I agree that foreign law has a role to play in the interpretation of the Constitution, but I think it is a limited one. The roots of our legal system are in England, and so we naturally look to English common law of the Founding era to help us understand the Constitution. Justice Scalia—no stranger to this law school, of course—once remarked that he “probably use[d] more foreign legal materials than anyone else on the Court, with the possible exception of Justice Thomas”—but noted that “they are all fairly *old* foreign legal materials, and they are all English.”<sup>9</sup>

The Framers also imported into the Constitution certain terms and concepts from international law—such as “Offences against the Law of Nations,”<sup>10</sup> “Letters of Marque and Reprisal,”<sup>11</sup> “Consuls,”<sup>12</sup> and “Treaties.”<sup>13</sup> To understand these terms fully, it is appropriate to consult the law of nations, as understood during the Founding era, and American lawyers and judges have long done so.

The premise for relying on these historical sources is that the Framers borrowed from those sources in designing the Constitution. In consulting these same sources today, judges are carrying out the original political will reflected in the Constitution. Although the Constitution does not tell us, in so many words, how it should be interpreted, judges who adhere to this approach are being faithful to James Madison’s observation that “the sense in which the Constitution was accepted and ratified by the nation” is the only proper “guide in expounding it.”<sup>14</sup>

Certain members of the Supreme Court appear today to be doing something very different, however. The gist of the present trend is to consider evolving, contemporary legal judgments and policy preferences of other nations. It appears to reflect a view that such foreign legal judgments and policy

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<sup>9</sup> Antonin Scalia, *Keynote Address: Foreign Legal Authority in the Federal Courts*, 98 Am Socy Intl L Proceedings 305, 306 (2004).

<sup>10</sup> US Const, art I, § 8, cl 10.

<sup>11</sup> US Const, art I, § 8, cl 11; art I, § 10, cl 1.

<sup>12</sup> US Const, art II, § 2, cl 2; art III, § 2, cl 1; art III, § 2, cl 2.

<sup>13</sup> US Const, art II, § 2, cl 2; art III, § 2, cl 1; art VI, cl 2.

<sup>14</sup> James Madison, Letter to Henry Lee (June 25, 1824), available online at <[http://www.constitution.org/jm/18240625\\_lee.txt](http://www.constitution.org/jm/18240625_lee.txt)> (visited Apr 22, 2006).

preferences are somehow relevant in defining the terms and limits of our Constitution. It is the use of foreign law in this way that concerns me, both as an American and as the Attorney General of the United States.

Some have suggested that there is no reason for concern because the justices have referred to foreign law and international law in just a few instances and then only after considering domestic precedent. The increasing frequency of such references, and length to which they are discussed in opinions, suggest to me that the incidents are not isolated and that such references are not added as a mere curiosity, but as an extra weight on the scale. I think it trivializes constitutional inquiry if we cite foreign sources to provide additional support for a conclusion that we already were going to reach based on more traditional sources. And I think it sends the wrong message to lower courts and others engaged in constitutional interpretation that they are free to look to those foreign sources.

Like Attorneys General before me, I have sworn an oath to “support and defend the Constitution” and “to bear true faith and allegiance to the same.” The Attorney General has long had the critical duties of enforcing federal law, conducting litigation on behalf of the United States, and providing legal advice to the President and the heads of Departments.

Each of these duties requires the Department of Justice daily to interpret and apply the Constitution on behalf of the Executive Branch, and to represent the interests of the United States before the courts. As Attorney General Edwin Meese noted, “constitutional interpretation is not the business of the Court only, but also properly the business of all branches of government.”<sup>15</sup>

As we discuss today the use of foreign law in constitutional interpretation, I want to ask you to think about two questions—questions that I face as the Attorney General: First, how, if at all, should the Department’s lawyers use foreign law in interpreting the Constitution when they provide advice to the Executive Branch? And second, how, if at all, should the Department’s lawyers use foreign law in litigating cases that involve constitutional questions?

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This issue of judicial reliance on foreign law isn’t entirely new; it’s been with us for some time. Consider an example from the early nineties: The Supreme Court faced the question whether the Constitution permits a citizen of one State to sue another State in federal court.<sup>16</sup>

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<sup>15</sup> Edwin Meese III, *The Law of the Constitution*, 61 Tulane L Rev 979, 985 (1987).

<sup>16</sup> *Chisholm v Georgia*, 2 US (2 Dall) 419, 450 (1793).

There was no single majority opinion for the Court. Two justices in the majority analyzed the question with reference to the sovereign rights of governments in Europe, including Greece, Spain, and France.<sup>17</sup>

Another justice dismissed the laws of the “European confederations” because, he wrote, “their likeness to our own is not sufficiently close” and “they are utterly destitute of any binding authority here.”<sup>18</sup> He proclaimed that “[t]he Constitution of the *United States* is the only fountain from which I shall draw; the only authority to which I shall appeal.”<sup>19</sup> The one dissenting justice agreed on this point; he argued that if “upon a fair construction of the Constitution” a power “does not exist,” then “ten thousand examples of similar powers would not warrant its assumption.”<sup>20</sup>

These opinions were not written in the 1990s; the year was 1793. And the case was not about the Eleventh Amendment; it was the case the Eleventh Amendment overturned, *Chisholm v Georgia*. So the debate about reliance upon foreign law is not unique to our time.

However, I believe that the current trend by some members of the Court to rely on foreign precedents poses two distinct risks for the rule of law. First, the sheer difficulty of choosing potentially relevant precedents from the vast array of available foreign-law sources means, I believe, that any use of foreign law will tend to undermine the clarity and certainty of our Constitution.

Second, and more fundamentally, the use of foreign law poses a direct threat to legitimacy, including the legitimacy of the Court itself. As I will explain, both of these risks are of central importance to my work as the Attorney General. So let me take a moment to address each in turn.

## I.

First of all, the exercise of surveying foreign law to interpret our Constitution creates a practical problem of selection.

Chief Justice Roberts made this point powerfully in his confirmation hearings, when he was asked about the Supreme Court’s use of foreign law. He said:

[R]elying on foreign precedent doesn’t confine judges. It doesn’t limit their discretion the way relying on domestic precedent does. Domestic precedent can confine and shape the discretion of the judges.

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<sup>17</sup> Id at 459–61 (Wilson), 471–72 (Jay).

<sup>18</sup> Id at 450 (Blair).

<sup>19</sup> Id.

<sup>20</sup> Id at 449 (Iredell dissenting).

In foreign law you can find anything you want. If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia or wherever. . . . And that actually expands the discretion of the judge. It allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent . . . , and use that to determine the meaning of the Constitution.<sup>21</sup>

Justice Breyer, on the other hand, reads the foreign-law opinions that are cited in briefs filed in the Supreme Court in an effort, he says, to see how judges in other countries have dealt with a similar issue.<sup>22</sup> And he may cite the opinions he finds persuasive.<sup>23</sup>

Respectfully, to me, this approach—which depends, in the first instance, on whatever foreign law happens to be cited by the litigants—presents a problem of selection and at least the appearance of capriciousness. I think again about the role of the Attorney General and the Department's lawyers in interpreting and applying the Constitution in advising the Executive Branch. I would not be comfortable if, in providing that advice or interpretation, the Department's lawyers were to use only the foreign law that they happened to stumble upon. If we accept that foreign law could properly be used in construing the meaning of the Constitution, at a minimum, surely we would only want to do so in a way that “comprehensively examines all ‘relevant’ international sources.”<sup>24</sup>

But any such approach is probably unachievable. It may be impossible for even the most conscientious judge or lawyer to avoid being selective, or at least arbitrary, in the use of foreign law.

There are 191 members of the United Nations. There are even more legal jurisdictions. Simply identifying and gathering the potentially “relevant” laws from each jurisdiction—or even a modest sampling—would be a daunting task.

As this University's own Judge Posner has observed: “The judicial systems of the United States are relatively uniform, and their product readily accessible,

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<sup>21</sup> Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, before the Senate Committee on the Judiciary, S Hrg 109-158, 109th Cong, 1st Sess 201 (2005).

<sup>22</sup> See Norman Dorsen, ed, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer*, 3 *Intl J Const L* 519, 523–24, 527–29 (2005). For a complete version of the exchange, see Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer—AU Washington College of Law (Jan 13, 2005), is available online at <<http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument>> (visited May 24, 2006).

<sup>23</sup> See Dorsen, ed, 3 *Intl J Const L* at 540–41 (cited in note 22).

<sup>24</sup> Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 *Am J Intl L* 57, 66 (2004).

while the judicial systems of the rest of the world are immensely varied and most of their decisions inaccessible, as a practical matter, to our monolingual judges . . . .”<sup>25</sup>

To be candid, although I have enormous confidence in the abilities of the Justice Department’s lawyers, I think that researching and understanding the judicial decisions of Comoros or Moldova would be a challenge, to say the least. It would be difficult to obtain a reliable translation—a translation trustworthy enough to stake the Constitution on.

Even assuming we could gather and translate the necessary sources of foreign law, it would be an even greater task to understand and evaluate fully this mountain of materials.

We would want to know each law and judicial decision on its own terms, reaching the same level of understanding that an American lawyer strives for in approaching our own legal sources.

To take just one example, it would be perilous to rely on the laws of a country without understanding the extent of freedom and democracy there. Justice Breyer, to his credit, has conceded that he made a “tactical error” in a capital punishment case by citing a decision from Zimbabwe, which he later admitted was “not the human rights capital of the world.”<sup>26</sup>

This illustrates the larger point that we also would need to understand the context behind a foreign law, decision, or legal authority. What is its purpose? Does it reflect the will of the people? What terms of art does it contain, and what do they mean? Is the law enforced consistently or only selectively?

Beyond the particulars of a cited provision, moreover, the legal systems of the world also vary considerably, each reflecting the unique history, traditions, and values of its own citizenry—as ours reflects the uniqueness of America.

In addition, it cannot be expected that the laws of all sovereign nations—or, perhaps, even all the courts of a single nation—will agree on a disputed point of constitutional law. The decisionmaker will then be left somehow to choose among them. And this, of course, may lead to the kind of judicial activism, or unrestrained judicial discretion, that Chief Justice Roberts identified.

I therefore think it is unrealistic—and potentially problematic—to expect a judge, or to ask a Justice Department lawyer, no matter how conscientious and impartial, to perform a thorough comparative law analysis in the process of constitutional interpretation.

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<sup>25</sup> Richard Posner, *No Thanks, We Already Have Our Own Laws*, *Legal Affairs* 40, 41 (July/Aug 2004).

<sup>26</sup> Dorsen, ed, 3 *Intl J Const L* at 528 (cited in note 22).

In short, as one scholar notes, “the risk of incomplete or inaccurate understanding of foreign legal materials may outweigh the benefits to be gained from studying foreign experience.”<sup>27</sup>

A somewhat different, but related, problem is faced by the lawyers who practice before the Supreme Court, including those in the Department of Justice. The Solicitor General and the lawyers in his office understand that foreign-law materials might influence the vote of one or more members of the Court, and we may feel obliged as dutiful advocates for our clients to cite such materials. Thus, the growing tendency by some members of the Court to look to precedents from overseas in construing the Constitution has a direct impact on our work.

Frankly, I don’t know how we begin to identify the relevant universe of foreign sources and precedents that might be deemed persuasive by one or more Justices. Given that the Solicitor General’s resources are limited—and the number of pages we are allowed in our briefs even more so—it seems clear that paying careful, scrupulous attention to foreign sources would inevitably sacrifice some attention to traditional sources. Will it become necessary for us to omit discussion of an older United States precedent in order to explore thoroughly the relevance of a more recent Chilean precedent to our Constitution? What of a slightly older, more tangential, but revered decision from France? These are real, practical concerns that we will face in our role as advocates, and will continue to face with increasing frequency if present trends continue.

I should add that the Solicitor General and the Department’s litigators face the problem of selection not only in deciding what nation’s law to cite in a given case, but in deciding whether to cite foreign law in the first place. The Supreme Court, to date anyway, has not referred to foreign law in all matters of constitutional interpretation, but has been highly selective.

For example, many countries view “the material and moral cooperation of church and state as conducive, and sometimes essential, to the achievement of religious liberty”;<sup>28</sup> they even allow prayer in schools. But the Supreme Court has yet to look abroad in its many religion cases.

The Court’s recent decision striking down a Texas law regarding homosexual conduct rested on the Due Process Clause, and the Court considered foreign law in that decision.<sup>29</sup> But the Court has yet to look abroad in

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<sup>27</sup> Joan L. Larsen, *Importing Constitutional Norms from a “Wider Civilization”*: Lawrence and the Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation, 65 Ohio St L J 1283, 1301 (2004).

<sup>28</sup> Alford, 98 Am J Intl L at 68 (cited in note 24), quoting John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 Notre Dame L Rev 371, 440 (1996).

<sup>29</sup> See *Lawrence v Texas*, 539 US 558, 576–77 (2003).

addressing other contentious issues under the Due Process Clause, even though some advocates have urged the Court to do the same thing in other cases.

Many nations also restrict speech, particularly hate speech, far more than the Supreme Court's First Amendment jurisprudence would allow.<sup>30</sup> But the Court has yet to consider these foreign laws to be a basis for reevaluating its own jurisprudence.

I am not suggesting how any of these contentious constitutional questions should be resolved. My point is simply that relying on foreign law to interpret our Constitution appears to create more problems than solutions.

One last practical concern: the judicial act of accepting some and rejecting other foreign laws in construing the Constitution has the potential to harm the United States in its relations with other countries. The conduct of America's foreign affairs has been entrusted to the Executive Branch, not the courts, precisely so that our Nation may speak with one voice in this delicate area. The Court itself has wisely recognized this principle many times over the history of the Republic.<sup>31</sup>

Yet, some justices seem to acknowledge that they refer to foreign law as an attempt at diplomacy. Justice Breyer, for example, has been quite frank in saying that he cites the opinions of foreign courts in part to, and I quote, "give them a leg up."<sup>32</sup> In his debate with Justice Scalia on this topic in January, Justice Breyer explained:

[F]or years people all over the world have cited the Supreme Court. Why don't we cite them occasionally? They will then go to some of their legislators and others and say, 'See, the Supreme Court of the United States cites us.' That might give them a leg up, even if we just say it's an interesting example. So, you see, it shows we read their opinions. That's important.<sup>33</sup>

Justice Kennedy seems to go one step further by suggesting that his use of foreign law is an effort to support the Administration's attempt "to bring freedom to oppressed peoples."<sup>34</sup> In a recent article in *The New Yorker* magazine, Justice Kennedy indicates that, if the United States is "asking the rest of the world to adopt our idea of freedom," it is appropriate for our courts to consider

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<sup>30</sup> Larsen, 65 Ohio St L J at 1320–21, 1324 (cited in note 27).

<sup>31</sup> See, for example, *United States v Curtis-Wright Export Corp*, 299 US 304, 320 (1936).

<sup>32</sup> Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer (cited in note 22).

<sup>33</sup> Id.

<sup>34</sup> Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, *New Yorker* 42, 51 (Sept 12, 2005).

how “other nations and other peoples . . . define and interpret freedom” in interpreting our laws.<sup>35</sup>

While I fully support Justice Kennedy’s goal—the expansion of freedom in the world—I respectfully disagree with his approach. That approach, admittedly shared by others, has the potential, at least, of having the Supreme Court interfere in foreign relations. Our friends abroad may consider it a slight if our Court cites one nation but not another, or rejects the view it holds. I am not predicting an international incident over this; but if, as Justice Breyer maintains, citing one country’s laws gives that country a “leg up,” there is the potential for the perception of giving another country a “leg down.” Respectfully, that is not the job of the Supreme Court.

The Court’s interest in foreign-law sources may also be based on a well-intended desire to make the Court look less isolationist. I am not certain that the isolated citation of a foreign decision, usually in the form of dicta, will have much of an effect. But in any event, the Judiciary is not supposed to have a foreign policy independent of the political branches. The political branches, as representatives of the people, are to decide the Nation’s foreign policy, and they can enact positive law based on foreign experiences or laws, which the Court can then interpret.

## II.

Now, let’s set aside these practical problems and drill deeper into the more fundamental question of constitutional legitimacy.

This, again, is a question that is central to my role as Attorney General.

Ever since the Judiciary Act of 1789, the Attorney General has been charged with the duty of rendering opinions for the Executive Branch on questions of law, including questions of constitutional interpretation.<sup>36</sup> In discharging that duty, I am acutely concerned with the legitimacy of the Supreme Court and its approach to construing the Constitution.

As I asked before, borrowing from Justice Iredell, the dissenter in the *Chisholm* case of 1793, how could even “ten thousand” examples of legal precedents from abroad ever provide legitimate authority for a court, in the name of the Constitution of the United States, to throw out a law enacted by the people of the United States?

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<sup>35</sup> Id.

<sup>36</sup> Application of the Davis-Bacon Act to Urban Development Projects that Receive Partial Federal Funding, 11 Op OLC 92, 97–98 (1987).

To answer this question, we must resort to first principles. We must consider the source of the judiciary's power to strike down laws as unconstitutional.

The Founding Fathers built our Constitution on the radical and profound principle that power has one legitimate source: the consent of the governed.

Madison put it this way in Federalist 49: "[T]he people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived."<sup>37</sup> The Preamble to our Constitution confirms Madison's point.

In light of this eternal American truth, judicial review posed a problem for some people.

Alexander Hamilton answered their concerns. He explained that the Constitution, once ratified, would be the ultimate expression of the will of the people.<sup>38</sup> Therefore, a judge who chose the Constitution over a particular law when the two conflicted would be enforcing the ultimate will of the people, even though their representatives had enacted the particular law in question.

Chief Justice John Marshall followed Hamilton's logic in resolving the now famous dispute between William Marbury and then-Secretary of State James Madison.

The Court, through Marshall, proclaimed that "[i]t is emphatically the province and duty of the judicial department to say what the law is."<sup>39</sup> But that was true only because—and to the extent that—the judicial department was enforcing the duly established will of the people.

Marshall reasoned that in holding a law unconstitutional, the Supreme Court was vindicating the "fundamental," "superior," and "permanent" will of a sovereign people embodied in their written Constitution, as against the temporary expression of popular will manifested in the particular actions of a legislature.<sup>40</sup>

Let's assume that the Supreme Court may properly consider contemporary societal standards to some extent in interpreting the Constitution. Even then, I question how the standards of anyone other than the people of the United States could legitimately be relevant to determining the will of the American people.

If we look abroad, whether at expressions of the popular will of foreign nations or the views of foreign jurists or diplomats, in what sense is it credible to say that, in doing so, we are ascertaining the will of the American people? To

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<sup>37</sup> Federalist 49 (Madison), in Clinton Rossiter, ed, *The Federalist Papers* 313–14 (Mentor 1961).

<sup>38</sup> Federalist 78 (Hamilton), in Clinton Rossiter, ed, *The Federalist Papers* 467 (Mentor 1961).

<sup>39</sup> *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (1803).

<sup>40</sup> *Id* at 176–78.

allow the views of foreign judges and legislators, who are under no oath to uphold the United States Constitution, to govern here is the antithesis of democratic accountability.

Even as some members of the Court have looked to foreign law for guidance, they have not answered this question. Instead, in its most recent reference to foreign law in striking down state laws—the case of *Roper v Simmons*,<sup>41</sup> regarding the death penalty—the Court invoked its “own judgment” on a disputed moral and psychological question and relied on a particular United Nations treaty that the United States has declined to ratify.<sup>42</sup>

In short, the Court in *Roper* reached a judgment that America’s political branches do not seem to share.

One can understand if Americans come to suspect that the Court is appealing to the will of foreign nations not as evidence of the will of the American people but as evidence against it. To adapt an expression recently employed by Justice Scalia and reiterated by Chief Justice Roberts during his confirmation hearings, the Court could be seen as looking over the heads of the crowd and picking out its friends—from another, more distant crowd.

Reliance on foreign law thus threatens to unmoor the Court from the proper source of its authority for judicial review and place in jeopardy the reverence Americans have for the laws and for the institution of the Supreme Court. That would be a tragedy—and not just for our legacy of free and popular government by law. Another casualty may well be the legitimacy of the Court itself, and the public’s willingness to accept its judgments.

The Supreme Court of the United States has not been perfect over the centuries. No institution can be. But the Court has earned the respect of the people. They expect that it will do its best to give a fair and impartial interpretation to our sacred text, the Constitution. The Court risks squandering that reserve of goodwill if it takes actions seen as inconsistent with that expectation.

### III.

I close by urging that my doubts about foreign law as a source for interpreting our Constitution not be mistaken as isolationism or an arrogant belief in American superiority. We have much to learn from nations and political systems around the globe.

Before the Constitutional Convention, Madison immersed himself in the history of confederacies ancient and modern. To avoid stagnation, we, like

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<sup>41</sup> 543 US 551 (2005).

<sup>42</sup> Id at 563 (quotation marks and citations omitted), 576.

Madison, must always be open to good new ideas, whatever their source. But we must use a reliable method for separating the good from the bad. I suggest we do it, as Madison did it, through the political process, not through the courts.

A useful example is found in the evolution of the American polling place—a matter of obvious import still today and obvious relevance yesterday, Election Day.

During the colonial period, the voting in most elections was conducted by a public showing of hands. As a result, intimidation and bribery were hard to avoid.

In the early 1800s, many States switched to paper ballots, which citizens could mark in the privacy of their homes. But this approach proved equally unsatisfactory and open to manipulation. In 1856, Australia developed a system of secret balloting in private booths. Word of this innovation reached the United States, where the Australian system won praise. American lawmakers responded by adopting the so-called “Australian Ballot” for use in American elections. It has since become a hallmark of American Election Day.<sup>43</sup>

Thus, a sensible idea from the other side of the world was weighed and ultimately embraced by our elected representatives, not imposed by the courts.

It is one thing for the people’s representatives to consider and adopt laws that draw on the experience of foreign nations. It is quite another for unelected judges, charged with determining the will of the people as they expressed it in the Constitution, to rely on foreign experience as a basis for rejecting the actions of those elected representatives.

Those who seek to enshrine foreign and international law in our Constitution through the courts therefore bear a heavy burden to justify their efforts. Unless and until that burden is met, the reliance on such law will put at risk the very reverence for the law on which this country, and the legitimacy of the Court itself, depends. A great deal is thus at stake, including for foreign and international law too. We do not increase the reverence for those laws by citing them casually in passing, usually in dicta, in connection with matters left by our law to the political branches. We should instead focus our legal advice, our advocacy, and our adjudication on ensuring compliance with our binding international legal obligations, and on promoting the respectful application of foreign laws when they prove relevant in our domestic litigation.

Our belief in justice is at the heart of our national identity. And it is the underpinning of the democratic system that provides the hope and opportunity that have become synonymous with the American dream.

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<sup>43</sup> For discussions of this history, see *Burson v Freeman*, 504 US 191, 200–205 (1992) (plurality); John C. Fortier and Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U Mich J L Ref 483, 486–92 (2003).

It's the promise of that dream, written into the fabric of our Nation through the Constitution, that we must protect at all costs. I know we will.  
Thank you.