Testimony of David Fontana

Associate Professor, George Washington University Law School

United States House of Representatives Committee on the Judiciary

Subcommittee on the Constitution

"Judicial Reliance on Foreign Law"

Wednesday, December 14, 2011 at 10 a.m.

2141 Rayburn House Office Building

Thank you for your very kind invitation to appear before your Subcommittee today to testify on this very important issue.

I am an Associate Professor of Law at George Washington University Law School, where I teach primarily in the areas of constitutional law and comparative constitutional law. I have published articles in scholarly journals as well as in general interest publications on the use of foreign law in our federal courts, and these writings form the basis for my testimony before you today. Once a year, I convene a discussion group of scholars interested in American and comparative constitutional law.

There are several concerns I have with the proposed legislation, but in my testimony I will focus on what the legislation means for federal courts deciding constitutional issues. Foreign law can be helpful to courts as they decide the issues they must decide to resolve constitutional cases, and so using foreign law has been accepted across the ideological spectrum and throughout the history of the Supreme Court. My statement is not meant to argue that foreign law is an emerging and controversial part of deciding constitutional cases. Instead, my statement is meant to demonstrate that

considering foreign law has been and largely remains an accepted practice, and this legislation could dangerously interfere with that practice by banning it entirely.

I. Preliminary Questions about the Meaning and Breadth of the Statute

Before I address my concerns about how this legislation would prevent federal courts from deciding constitutional issues, I want to address two issues related to the meaning (what does the legislation apply to?) and breadth (how far does it extend?) of the legislation. It is important to clarify what I take this legislation to mean before I express my apprehensions about it.

First, let me address some ambiguities with the legislation. The legislation prevents courts from looking to foreign law "in whole or in part" as a form of "authority." Does the legislation simply prevent courts from looking to foreign law as a *binding* legal precedent—in other words, does it prevent courts from considering foreign law in the same sort of obligatory way courts might treat their own earlier decisions or any decision by a higher court? If the legislation simply prevents courts from looking to foreign law as a binding legal precedent, it would have very little or no effect. This is because most would agree that courts hardly ever—if ever at all—look to foreign law in that fashion.[1]

[1] There appears to be broad agreement with this proposition. During the hearings this Subcommittee held on March 25, 2004 about a previous, related resolution, Representative Nadler stated that of the decisions by the Supreme Court being discussed in that hearing, "none of these decisions have turned on a foreign citation, nor have any been treated as binding." *See Appropriate Role of Foreign Judgments in the Interpretation of American Law*: *Hearing On H.Res. 568*, *Before the Subcommittee on the Constitution, House Judiciary Committee*, 108th Cong. 44-45 (2004), *available at* http://judiciary.house.gov/legacy/92673.PDF [hereinafter 2004 Hearing]. There have been more Court decisions citing foreign law since then, but they are structured similarly to the decisions Representative Nadler and others were discussing during that hearing. One of the witnesses more negative about the use of foreign law, Professor Michael Ramsey of the University of San Diego School of Law, made similar remarks later in the same hearing. *See id*. at 45 ("I think it's probably correct so far to say that these

The legislation would be preventing a practice that does not exist, and I imagine Congress wants to target its legislation at a range of practices that do exist.

Alternatively, does this legislation prevent federal courts from looking to foreign law as *any* part of their process of deciding constitutional cases? If the legislation is meant to prohibit federal courts from looking to foreign law even as persuasive authority—as authority that does not bind courts in a formal sense but only affects courts in so far as it convinces them[2]—then the legislation would prevent courts from looking to foreign law in important ways. I will therefore address that understanding of the legislation in my statement.

A final relevant ambiguity in the legislation relates to its use of the phrase "foreign law." Based on remarks made by those on this Subcommittee in previous, related hearings—and the cases that most troubled members of this Subcommittee and have lead to proposed resolutions and now legislation—I will assume that "foreign law" is referencing the full range of foreign legal materials. This means that the proposed legislation would even prohibit the use of foreign legal *experience* as this experience is utilized in a foreign legal case and in other discussions in foreign countries. As I will highlight below, I think this usage of foreign legal experience is quite common and accepted in American federal courts. Because this usage appears to be what the legislation is designed to address, and because this is how foreign law is often utilized, it is this usage of foreign law I will address in my remarks.

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citations of foreign authority haven't had a substantial role in decisions that have been made."). Professor Ramsey still believed this issue to be an emerging issue, however. Of course, there is still some disagreement about whether or not foreign law is being used in a more binding fashion in these cases. For an illustrative example, see Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005).

[2] For my discussion of the use of foreign law as persuasive authority, see David Fontana, *Refined Comparativism in Foreign Law*, 49 UCLA L. REV. 539, 557-59 (2001).

Second, because I am focusing exclusively on how this would affect constitutional decisions, I will bracket entirely the disruptive effects this legislation could have on international business transactions. The legislation could be read to apply quite broadly in ways that would stifle not just federal judicial decisions in the area I will discuss (constitutional law) but also in a range of other areas, most notably international business transactions. American companies participating in the global economy often make contracts with foreign companies that require American courts to apply foreign law to decide a commercial dispute. The requirement in this legislation that all (including commercial) disputes in federal courts be resolved only by looking to American law could significantly deter foreign companies from engaging in commercial transactions with American companies. It is for this reason that several pieces of state legislation similar to the legislation you have before you today have specified exceptions for business transactions.[3]

With these questions about what the statute covers aside, let me turn to the principal focus of my remarks: how this legislation threatens to undermine the ability of federal courts to decide constitutional cases.

II. Foreign Law Can Be Helpful for Courts Deciding Constitutional Issues

Foreign law can be an important part of deciding the constitutional issues that federal courts must address, and excluding foreign law entirely threatens to exclude legal materials that are both helpful and probative in deciding constitutional cases. There are

[3] *See, e.g.*, S. 97, 88th Gen. Assemb., Reg. Sess. (Ark. 2011) ("This section shall not apply to a corporation, partnership, or other form of business association.").

certain questions courts must answer in deciding constitutional cases—questions that liberals and conservatives almost all agree are important questions—that call for the kinds of insights that foreign law can provide. For instance, in deciding whether or not a race-conscious governmental program violates the Equal Protection Clause, courts must address whether or not these programs are "narrowly tailored measures that further compelling governmental measures."[4] In other words, as part of assessing whether or not the program was "narrowly tailored," courts must address whether there are other policy alternatives that would pursue the same goals but treat groups more equally. Foreign law can be helpful here: in surveying the practices of not just governments in the United States, but governments elsewhere, are there other ways to pursue these goals without having to make distinctions based on race?

Another part of this question the Court has to answer in these cases is whether race-conscious programs serve "compelling governmental measures." Do these programs actually further important goals? Again, this is a factual question that calls for all relevant information. It might be that foreign law shows that race-based programs work very poorly, or work very well. Either way, that answer is relevant to answering the factual question of whether or not these programs further important goals.

There would be no reason to instruct federal courts as a matter of federal law that they cannot consider at all the "percent plans" adopted by states like Texas that guarantee the top percentage of graduating classes admissions to certain public institutions. These plans could illustrate other means of achieving what race-conscious plans try to achieve. There would be no reason to instruct federal courts as a matter of federal law that they

[4] Parents Involved v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 783 (plurality opinion) (citations to other cases omitted).

cannot consider race-conscious programs in the military. These plans could show that race-conscious plans do or do not achieve the ends they are trying to achieve.

Likewise, there would be no reason to instruct federal courts as a matter of federal law that they cannot consider foreign law that might answer the questions before these courts. It is not because foreign law is *foreign* law that makes it relevant in these cases; it is because foreign law is directly relevant to the questions everyone agrees courts must answer to decide these cases.

As Justice Scalia has noted, foreign law can be relevant in this way,[5] even though this does not mean that foreign law defines the ultimate *meaning* of the Constitution.[6] Our cherished protections are still the same cherished protections as they always have been and hopefully will always be. Free speech remains First Amendment American free speech, and freedom from unreasonable searches and seizures remains Fourth Amendment American freedom from unreasonable searches and seizures. Foreign law plays a role not in telling us to protect speech or in protecting us from searches or seizures, but instead in answering the discrete questions posed by applying those freedoms in specific situations.

Indeed, rather than ignoring or merely implementing the commands of the Constitution, sometimes the commands of the Constitution seem to call for foreign law. The Eighth Amendment, for instance, prohibits "cruel and unusual punishments." It has long been understood that part of determining what is "unusual" involves examining not

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[5] Justice Antonin Scalia, *Foreign Legal Authority in the Federal Courts, Keynote Address to the American Society of International Law* (Apr. 2, 2004) in 98 AM. SOC. INT'L L. PROC. 304, 305, 307 (2004) ("It is impossible to say that such materials are never relevant . . . What about modern foreign legal materials? Do I ever consider them relevant to constitutional adjudication? . . . . the argument is sometimes made that a particular holding will be disastrous . . . I think it entirely proper to point out that other countries have long applied the same rule without disastrous consequences.")

[6] *See id*. ("It is my view that modern foreign legal materials can never be relevant to an interpretation of—to the meaning of—the U.S. Constitution.") (italics omitted).

just American punishment practices, but foreign punishment practices.[7] Just as we would not want to prevent courts from considering the practices of the fifty states or the practices over American history, so too we would not want to prevent courts from assessing practices around the world to see whether a punishment is truly "unusual."

III. There Is Broad Support for Using Foreign Law Across the Ideological Spectrum and Across History

Given this role that foreign law can play in helping federal courts decide constitutional issues, it should not be surprising that there has been broad support for using foreign law in constitutional interpretation. This broad support transcends ideological lines among Justices and others, and is also reflected in the range of cases the Supreme Court has decided over its history using foreign law. The issues raised by this practice are important, but we should be cautious about disregarding the wide and long-standing support for this practice.

The current debate about the role of foreign law in constitutional interpretation on the Supreme Court seems to assume that only some of the current and recent Justices engage with foreign law—perhaps Justices Breyer, Ginsburg, Kagan, Kennedy, and Sotomayor on the current Court, and before they retired Justices O'Connor and Stevens.[8]

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[7] The Supreme Court case that appeared to influence many of the modern Supreme Court cases using foreign law in the Eighth Amendment context was *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (discussing practices of "the civilized nations").

[8] Both sides seem to assume that the use of foreign law is more limited on the Court than is actually the case. At the time of the July 19, 2005 hearing before this Subcommittee about a previous, related resolution, all sitting Justices had at one point or another cited foreign law in their opinions. Sarah Cleveland testified against the resolution, but noted that "[a]t least seven members of the current Supreme Court have embraced the use of foreign authorities." *Appropriate Role of Foreign Judgments in the Interpretation of the Constitution of the United States: Hearing On H.Res. 97, Before the Subcommittee on*

Justice Scalia is often cited for his speeches and opinions expressing doubts about using foreign law.[9]

But Justice Scalia has written off the bench and in his opinions that foreign law can be useful. In a speech in 2004, as mentioned above, he argued that foreign law could be relevant in deciding constitutional cases. As he wrote in *Thompson v. Oklahoma*,[10] "The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather . . . occupies a place not merely in our mores but, text permitting, in our Constitution as well."[11] Justice Scalia referenced foreign law in *Lawrence v. Texas*[12] to argue about the potential consequences of that decision based on a similar Canadian experience,[13] and has referenced foreign law in many of his other decisions, including some since the controversy about the use of foreign law first erupted.[14]

Justice Thomas has also cited foreign law.[15] Among past Justices, the late Chief Justice William Rehnquist[16] and the late Chief Justice Warren Burger[17] wrote notable opinions citing foreign law. And this is just a partial list of Justices who have used

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the Constitution, House Judiciary Committee, 109th Cong. 39 (2005), *available at* http://commdocs.house.gov/committees/judiciary/hju22494.000/hju22494_0.HTM. Professor Cleveland was appropriately cautious by using the word "embraced" and "at least." Whether or not they had "embraced" foreign law, though, all nine Justices in the Court at that time had employed it. Representative Feeney stated at those same hearings that there were "three Justices that are remaining fixed on the Constitution without reference foreign law." *See id*. at 62. *See also id*. at 13 ("Six Supreme Court U.S. justices have approvingly been described by Professor—actually Yale Law Dean Harold Koh—as transnationalists.").

[9] *See, e.g.*, Scalia, *supra* note 5, at 307 (stating that "modern foreign legal materials" are "hardly ever" relevant) (italics omitted).

[10] 487 U.S. 815 (1988).

[11] Id. at 868 n.4 (Scalia, J., dissenting).

[12] 539 U.S. 558 (2003).

[13] *See id*. at 604 (Scalia, J., dissenting).

[14] *See* McCreary County v. ACLU of Kentucky, 545 U.S. 844, 886 (2005) (Scalia, J., dissenting); Schiro v. Summerlin, 542 U.S. 348, 356 (2004).

[15] *See* Holder v. Hall, 512 U.S. 874, 906 n.14 (1994) (Thomas, J., concurring in the judgment).

[16] *See* Washington v. Glucksberg, 521 U.S. 702, 718 n. 16, 730, 734 (1997).

[17] *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (Burger, J., concurring).

foreign law in their opinions. Indeed, over the history of the Supreme Court, these references to foreign law have been frequent. As Steven Calabresi, one of the founders of the Federalist Society, wrote in a recent article:

> The Supreme Court's practice of citing and relying on foreign law goes back two centuries . . . . If precedent and caselaw count for anything in constitutional law, then the legitimacy of Supreme Court citation of foreign law is a long settled issue.[18]

The Federalist Papers are replete with references to the constitutional practices of several dozen different countries. Indeed, *Federalist* 63 states that "[a]n attention to the judgment of other nations is important to every government."[19] Chief Justice John Marshall cited foreign law in some of his important early constitutional law opinions. In *Marbury v. Madison*[20]—the 1803 Supreme Court case taught to so many of us as announcing the cherished institution of judicial review—Chief Justice Marshall looked to foreign law as part of his decision about whether judicial review was necessary for constitutionalism.[21]

And at a time when attention has been focused on Court decisions using foreign law to reach "liberal" outcomes, it is important to note that foreign law has been used to reach outcomes not favored by liberals. For instance, foreign law was used in *Bowers v. Hardwick*[22] to deny a claim that an anti-sodomy law was constitutionally problematic, for instance. Chief Justice Rehnquist cited to foreign law in *Planned Parenthood v. Casey*[23] in arguing for the constitutionality of restrictions on abortion.[24] As Justice Scalia has

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[18] Steven G. Calabresi, *"A Shining City On A Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1341 (2006).
[19] THE FEDERALIST No. 63, at 423 (James Madison) (Jacob E. Cooke ed., 1961).
[20] 5 U.S. (1 Cranch) 137 (1803)
[21] *See id*. at 163, 177-78.
[22] 478 U.S. 186, 196 (1986).
[23] 505 U.S. 833 (1992).
[24] *See id*. at 945 n.1 (Rehnquist, C.J., concurring in part and dissenting in part).

written, there are many ways in which foreign law can lead to more conservative as well as more liberal outcomes.[25]

The range of those who believe that foreign law can sometimes be helpful was reflected in a previous hearing this Subcommittee held on this issue in 2004. Several witnesses called by *sponsors* of a resolution similar to the current proposed legislation supported the occasional use of foreign law. One witness testified that "foreign law could be relevant to prove a fact about the world which is relevant to the law . . . . I would thus modify the resolution to make clear that these uses of foreign or international law are legitimate."[26] Another witness made a similar point.[27]

To be sure, there are those Justices on the court now and before—and those commentators writing about the use of foreign law now and before—who might be more or less inclined to use foreign law more or less often. But there are very few Justices or other experts who believe that foreign law is always completely irrelevant, as the legislation seems to mandate.

In other words, because this legislation can be read to prohibit any use of foreign law, this legislation would be telling the large majority of those working on these issues now and over history that they are wrong. This legislation would be telling John Marshall, Antonin Scalia and Stephen Breyer that their opinions are deciding issues in a way that has been prohibited as a matter of federal law. I would be hesitant to take such steps given the widespread and long-standing agreement on this issue.

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[25] *See* Roper v. Simmons, 543 U.S. 551, 624-26 (2005) (Scalia, J., dissenting).
[26] *See* Statement of John O. McGinnis, 2004 Hearing, *supra* note 1, at 31.
[27] *See* Statement of Michael D. Ramsey, 2004 Hearing, *supra* note 1, at 22 ("A . . . category of references to foreign materials is more controversial, but, in my view, usually appropriate if done cautiously. These references arise when the constitutionality of a U.S. law can be informed by facts existing in a foreign country.").

IV. A Brief Response to Concerns about Foreign Law

I will leave it to the excellent panelists and to the questions that members of the Subcommittee might have to address in greater detail the concerns with looking to foreign law. I take the major concerns to be that looking to foreign law is undemocratic and unprincipled. Let me take each point in turn.

One criticism of using foreign law is that it is undemocratic—after all, citizens of the United States did not vote for foreign judges, so why should their decisions affect our American law? Simply put, courts do not decide constitutional cases based solely on materials that the American people have voted for or ratified. The language of the Constitution, the original understanding of that language, and information how about those understandings work in practice (are they "narrowly tailored," for instance) are all relevant in deciding cases—and none of these have been democratically authorized by the American people.

Considering foreign law also poses no democratic concerns because considering foreign law does not mean *adopting* foreign law. Sources can be used negatively, as role models of precisely what a court wants to avoid. This is true of domestic legal sources and foreign legal sources. Just as we do not want another *Dred Scott*, and courts might disavow that decision to help them reach a current decision, so too foreign law has been used to highlight a foreign practice that our courts especially want to avoid.[28]

If Americans are troubled by judges considering foreign law, they have the same options they have if Americans are troubled by anything else federal judges might do.

[28] For a good example, see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650-52 (1952) (Jackson, J., concurring).

Federal judges deciding any constitutional case are accountable to us because federal judges are appointed by the President, confirmed by the Senate, and subject to impeachment based on their conduct. If a judge puts forward a strained interpretation of the First Amendment, for instance, the President might decide not to nominate that judge for another position, the Senate might refuse to confirm that judge, and/or that judge might be impeached and removed from office if his or her conduct is deemed sufficiently problematic. The same is true here: if a judge uses foreign law when it is not needed or unwise, he or she can be denied further appointment or confirmation, and/or impeached and removed from office if his or her conduct is deemed sufficiently problematic.

Another concern is that judges applying foreign law have been and inevitably will be unprincipled—how do they know in what cases foreign law is relevant, and in those cases what foreign law to examine? These are difficult questions, but judges should evaluate the relevance of foreign law in the same fashion as they evaluate the relevance of other law. Judges define the constitutional questions they must answer and look for the most relevant law to help them answer those questions. If a federal court has to decide a free speech case, it knows to look for free speech cases. Likewise, if a federal court has to decide an affirmative action case, it can look for foreign jurisdictions that have decided cases about affirmative action. As Justice Breyer has written, our courts have "long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances."[29]

Sometimes the task is even less complicated. In Eighth Amendment cases, to determine if a practice is "unusual," the Court looks to materials from all countries to see

[29] Knight v. Florida, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting from denial of certiorari).

if they permit a particular practice. Rather than having to select more or less relevant foreign jurisdictions, all foreign jurisdictions are relevant.[30]

I must freely admit that in practice our federal courts have been too selective in considering foreign law, and that this does concern me. There is no reason why the Supreme Court should look at foreign law in some Eighth Amendment cases and not others, as has been the case recently. There is no reason why the Supreme Court should look to foreign law in gay rights cases and not in abortion cases, as has been the case recently. I do not think the proper response is to prevent the federal courts from looking to foreign law entirely, but instead to find ways to have them look to foreign law more consistently and more fairly. Developing a set of best practices will help courts use foreign law better, and will help them understand foreign law better. This is how our courts have thrived over several hundred years, and how they have mastered complicated issues as these issues have come through the courthouse doors. Foreign law is no different.

Thank you again for the opportunity to address this Subcommittee, and I look forward to answering any questions you might have.

[30] *See* Roper v. Simmons, 543 U.S. 551, 578 (2005) ("It is proper that we acknowledge the overwhelming weight of international opinion.").