

## Comparative Law as a Source of U.S. Constitutional Definition

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There has been relatively recent contention in United States Supreme Court and in political debate over the use of, or perhaps merely reference to, foreign law in constitutional adjudication. The best example in the Court may be in *Lawrence v. Texas*,<sup>1</sup> where the Supreme Court declared unconstitutional statutes criminalizing homosexual sodomy. The majority opinion responded to Chief Justice Burger's claim, in an earlier case, that recognizing a right of homosexual sodomy would be contrary to millennia of Judeo-Christian moral teaching and the history of Western civilization. The *Lawrence* Court, in contradiction to that historical view, noted that a committee appointed to advise the British Parliament had, in 1957, recommended the repeal of laws punishing homosexual conduct. The majority also pointed to the decision of the European Court of Human Rights, in *Dudgeon v. United Kingdom*,<sup>2</sup> holding that the criminalization of consensual homosexual sodomy was invalid under the European Convention on Human Rights. The Court went on to say: "Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct."<sup>3</sup>

A dissent, written by Justice Scalia and joined by the Chief Justice and Justice Thomas, took the majority to task for this use of foreign law and expressed a general disagreement over any use of changes in viewpoint since its earlier decision, in *Bowers v. Hardwick*,<sup>4</sup> upholding prohibitions against sodomy. The dissent said:

[A]n "emerging awareness" is by definition not "deeply rooted in this nation's history and tradition[s]," as we have said "fundamental right" status requires. Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because *foreign nations* decriminalize conduct. The *Bowers* majority opinion *never* relied on "values we share with a wider civilization," but rather rejected the claimed right to sodomy on the ground that such a right was not "'deeply rooted in *this Nation's* history and tradition."<sup>5</sup>

The contention arose again, two years later, in *Roper v. Simmons*,<sup>6</sup> which declared unconstitutional the execution of those who were minors at the time they committed murder. The majority there said "[o]ur determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in

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<sup>1</sup> 539 U.S. 558 (2003).

<sup>2</sup> (1981) 3 E.H.R.R. 40, at 45 Eur.Ct.H.R., 501, 502.

<sup>3</sup> 539 U.S. at 576

<sup>4</sup> 478 U.S. 186 (1986).

<sup>5</sup> 539 U.S. at 598 (Scalia, J., dissenting)(emphasis in original).

<sup>6</sup> 543 U.S. 551 (2005).

the world that continues to give official sanction to the juvenile death penalty."<sup>7</sup> The majority opinion recognized that that fact was not controlling and that it had the duty to define the constitutional parameters of cruel and unusual, but the majority thought it proper to refer to the laws of other countries and international agreements, such as the United Nations Convention on the Rights of the Child, for instructive purposes. With regard to foreign law and constitutional adjudication, the majority said that it "does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom."<sup>8</sup>

Justice Scalia was again in dissent, again joined by Chief Justice and Justice Thomas. Justice Scalia did not believe that the meaning of provisions of the Constitution "should be determined by the subjective views of five Members of this Court *and like-minded foreigners*."<sup>9</sup> He went on to say that the "basic premise of the Court's argument-- that American law should conform to the laws of the rest of the world-- ought to be rejected out of hand."<sup>10</sup> With regard to the majority's position that its citations to foreign sources were made to underscore the position of values within our own system, Justice Scalia said:

Foreign sources are cited today *not* to underscore our "fidelity" to the Constitution, our "pride in its origins," and our own [American] heritage." To the contrary, they are cited *to set aside* the centuries-old American practice . . . of letting a jury of 12 citizens decide whether, in particular case, youth should be the basis for withholding the death penalty. . . . "Acknowledgment" of foreign approval no has place in a legal opinion of this court *unless it is part of the basis of the court's judgment*-- which is surely what parades as today.<sup>11</sup>

In reality, this dispute is simply a rephrasing of the long-running argument over the sources of fundamental rights. It is a rephrasing that seems to allow judicial conservatives to claim that the Supreme Court has ceded sovereignty to some sort of international consensus. But, that is not in fact the case. When the *Lawrence* Court cited to *Dudgeon*, it did not suggest that its outcome was controlled by the decision of the European Court of Human Rights. Nor did the *Roper* Court contend that its decision was controlled by either the laws of other countries or by United Nations Convention.

Rather than the decisions of foreign and international courts being the source of United States law, a situation that might reasonably be seen as a ceding of sovereignty, those bodies of law merely help to provide definition with regard to long, if not universally, recognized sources of United States law. The disagreement over the use of foreign sources is then more properly seen as simply another manifestation of this long-standing debate over what counts in the recognition of fundamental rights. Under one approach to that question, foreign sources may be seen as legitimate sources of definition

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<sup>7</sup> *Id.* at 575.

<sup>8</sup> *Id.* at 578.

<sup>9</sup> *Id.* at 608 (Scalia, J., dissenting)(emphasis added).

<sup>10</sup> *Id.* at 624 (Scalia, J., dissenting).

<sup>11</sup> *Id.* at 628 (Scalia, J., dissenting)(emphasis and addition in original).

for already existing U.S. constitutional norms. Under a competing approach, they must be seen as irrelevant.

The recognition that there are non-textual limits on legislative authority has a long history. It may be found in pre-colonial English cases, such as *Dr. Bonham's Case*,<sup>12</sup> and in opinions in colonial and postcolonial American cases, such as Justice Chase's opinion in *Calder v. Bull*.<sup>13</sup> However, it finds its best statement for the present purposes in an opinion by Justice Washington. In *Corfield v. Coryell*, he considered what constituted the privileges and immunities protected by Article 4 of the Constitution. In that regard, he said: "We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments . . ."<sup>14</sup> He did go on to add that these privileges and immunities "have, at all times, been enjoyed by the citizens of the several states,"<sup>15</sup> but the standard of rights being fundamental based on whether or not they belong to the citizens of all free governments is both important and relevant to the current controversy.<sup>16</sup>

Moving to a more modern analysis of fundamental rights, Justice Harlan's opinion in *Griswold v. Connecticut*<sup>17</sup> also seems relevant. While concurring in the Court's judgment holding the application of the anti-contraception statute to married couples unconstitutional, he objected to what he saw as the Court's restricted view of the scope of the 14th Amendment's Due Process Clause. Justice Harlan's view of the proper inquiry was not whether there was in right found within the penumbrae of other constitutional rights but whether the statute violated the Due Process Clause, "because the enactment violates basic values 'implicit in the concept of ordered liberty.'"<sup>18</sup> He saw the Due Process Clause as protecting rights independently of any other provisions of the Constitution, and the standard for the recognition of those rights was their implicitness in the concept of ordered liberty. Justice Harlan's test was arguably adopted by the majority in *Roe v. Wade*.<sup>19</sup> In discussing the right of privacy, the Court examined its prior to decisions and concluded that those decisions "make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' are included in this guarantee personal privacy."<sup>20</sup>

If the test for fundamental right is to be that "which belong[s], of right, to the citizens of all free government," evidence of what is regarded to be of right in other free governments would certainly seem relevant. If the European Court of Human Rights has recognized a right to be free from

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<sup>12</sup> 8 Co. 113b, 77 Eng.Rep. 646 (1610).

<sup>13</sup> 3 Dall. (3 U.S.) 386 (1798).

<sup>14</sup> 6 F.Cas. 546, 552 (No. 3,230).

<sup>15</sup> *Id.*

<sup>16</sup> Justice Washington's interpretation of privileges and immunities was accepted by the dissent in the *Slaughterhouse Cases*, 16 Wall. (83 U.S.) 36 (1873), as providing meaning for the Privileges and Immunities Clause of the Fourteenth Amendment. While it was a dissent, it does seem to have the better historical justification for its view, as opposed to the far more stilted view of the majority.

<sup>17</sup> 381 U.S. 479 (1965).

<sup>18</sup> *Id.* at 500 (Harlan, J., concurring)(citing the opinion for the Court in *Palko v. Connecticut*, 302 U.S. 319, 325,(1937)).

<sup>19</sup> 410 U.S. 113 (1973).

<sup>20</sup> *Id.* at 152 (also citing to *Palko*).

prohibitions on consensual homosexual activity, that court's analysis, as representative of a significant proportion of those countries deserving to be called free, is relevant to the recognition of a fundamental right. If fundamental rights are those rights that are "implicit in the concept of ordered liberty," what better evidence for the claim of a right is there than the fact that it is recognized in those countries or groups of countries that would be recognized as participating in ordered liberty?

In terms of death penalty cases, the prohibition on cruel and unusual punishment requires an analysis of what is cruel and unusual. That analysis might be limited to views found within the United States, but it might also include other sources. If every other country views the application of the death penalty to juveniles as unacceptable, that may not dictate its unconstitutionality in the United States, but it does indicate that, on some scale, the punishment is unusual.

Viewed in this way, recourse to foreign law is not the ceding of power or sovereignty to some entity outside the United States. It is the application of long-standing Constitutional tests for the fundamentality of rights. Foreign law does not dictate the standard; it provides definition for already accepted standard.

Not all judicial conservatives directly contradict this position. Instead, they may refuse to recognize the tests to which international recourse is relevant. When Justice Scalia dissented in *Lawrence*, he stated a more limited test for fundamental rights. He said "that *only* fundamental rights qualify for this so-called 'heightened scrutiny 'protection-- that is, rights which are' deeply rooted in this Nation's history and tradition."<sup>21</sup> In *Roper*, Justice Scalia not only denied a role for foreign law, he denied any role for the Court to other than discerning the moral consensus of the American people. That task, like the identification of American history and tradition, allows no role for foreign judgments or values.

Political conservatives outside the membership of the Court have not appreciated the real nature of the conflict. In the recent confirmation hearings for Judge Sonia Sotomayor, Senator Sessions raised the issue of her reliance on foreign law.<sup>22</sup> This led *The Washington Times* to assert that there was "ample reason to reject her nomination to the Supreme Court."<sup>23</sup> According to the paper,

On April 28, Judge Sotomayor delivered a speech in which she worried that "unless American courts are more open to discussing the ideas raised by foreign cases, and by international cases ... we are going to lose influence in the world." She also said judges rightly have looked to foreign authorities "to help us understand whether our understanding of our own constitutional rights fell into the mainstream of human thinking."<sup>24</sup>

While the suggestion that courts should make decisions based on what the rest of the world might think is problematic, the idea that foreign judgments may help judges understand "our own constitutional

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<sup>21</sup> 539 U.S. at 593 (Scalia, J., dissenting).

<sup>22</sup> See *Sotomayor's Foreign Ideas: Supreme Court Nominee Backs Transnationalism*, WASHINGTON TIMES (July 2, 2009), available at [www.washingtontimes.com/news/2009/jul/02/sotomayors-foreign-ideas/](http://www.washingtontimes.com/news/2009/jul/02/sotomayors-foreign-ideas/)

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

rights” is reasonable, not because it helps understand where we fall in the mainstream of international thought but because constitutional tests call for an examination of other nations deserving to be called free or possessing ordered liberty.

In a more direct invocation of the loss of sovereignty, a conservative website states:

Placing Sotomayor on the court would be a major coup for the transnationalist movement. While Justice Ginsburg already represents the transnationalist view on the court, if President Obama could add a second Justice to the court with transnationalist views it would strike a blow against Constitutional sovereignty. Hillary Clinton, Rahm Emanuel, Harold Koh, Cass Sunstein, and many other high ranking Obama administration officials favor application of United Nations protocols and international law over the Constitution. Sotomayor believes that use of foreign law can be “very important and a source of good ideas.”<sup>25</sup>

Recognizing foreign law as a source of ideas is not a ceding of sovereignty. It is not the acceptance of foreign law as authoritative. Rather, it is the recognition that some constitutional tests need definition and that those tests invite comparative analysis.

If one accepts a test for fundamental rights based on the concept of ordered liberty or rights in countries deserving the appellation “free,” one is left with two possibilities. Either the definition must be provided by philosophical analysis as to what constitutes freedom or ordered liberty, or one may look to practices in countries recognized as free or as participating in ordered liberty. The empirical approach would actually seem the more conservative of the two. It allows for less imposition of individual values by judges. On the other hand, if one rejects the freedom or liberty tests and insists that rights may only rest on American tradition, reference to the law of other countries is simply irrelevant. The debate between the two approaches is certainly not of recent vintage. What is of recent vintage is the assertion that those on one side, who rely on relevant evidence in the application of their test, are somehow anti-American or willing to give up national sovereignty. It is that characterization that must be rejected, even as the debate over proper constitutional tests proceeds.

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<sup>25</sup> Brian J. Barnes and Jesse Williams. *Executive Summary of Judge Sonia Sotomayor*, THE ETHICS & RELIGIOUS LIBERTY COMMISSION (Barrett Duke, ed., July 10, 2009), available at <http://erlc.com/documents/pdf/sotomayor-exec-summary.pdf>