Testimony of John O. McGinnis

Professor of Law, Northwestern University

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On The Appropriate Role of Foreign Judgments in the Interpretation of American Law

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Thank you, Mr. Chairman, for inviting me to participate in this hearing on the important subject of the federal judiciary's use of foreign or international law to interpret the Constitution and other laws.

First, I want to make clear that this House has the authority to offer its own opinion on the relevance of foreign or international law to constitutional interpretation, or for that matter, any other contested subject of constitutional interpretation. Congress's duty to share its independent interpretation of the Constitution flows directly from a system of separated powers, designed in part to ensure that each branch has the opportunity to correct the mistakes and excesses of the others. There is no area in which such a self-correcting mechanism should be given freer play than in the interpretation of a constitutional republic's fundamental document. As James Wilson, Framer of the Constitution, Justice of the Supreme Court, and first law professor of the republic, stated, "[t]here is not in the whole science of politicks a more solid or a more important maxim than this -- that of all governments, those are the best, which, by the natural effect of their constitutions, are frequently renewed or drawn back to their first principles." [1] By holding a hearing on whether it is appropriate to use contemporary foreign law as a source of authority in constitutional law, this Committee is directly contributing to conserving the first

principles of republican government.

This hearing, however, is not prompted simply by the academic question of the relevance of foreign and international law to constitutional interpretation. In the recent case of Lawrence v. Texas,[2] the Supreme Court held that the due process clause protected a substantive right to sodomy and relied upon a case from the European Union as persuasive authority for that result.[3] After citing the case, Justice Anthony Kennedy, writing for the majority, pressed the European analogy:

> The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.[4]

Thus, the question I want to address is whether the Court should use foreign or international law as persuasive authority in interpreting our own Constitution. I believe that subject to certain caveats the Court should not use foreign law or international law and that its use in *Lawrence* is exemplary of all that is wrong with such an approach to constitutional interpretation. I should note that this question is entirely separate from the question of whether Lawrence was rightly decided and certainly separate from whether laws against sodomy are wise. I, for my part, think such laws are unwise and should be repealed.

One straightforward argument that rules out most use of foreign law in constitutional interpretation is that in almost all cases it is inconsistent with the correct way of interpreting the constitution–interpreting the Constitution according to its original meaning. Obviously, I cannot provide a complete defense of originalism here, but two important factors powerfully favor its soundness as a method of constitutional interpretation. The first argument for originalism derives from the reasons that

justify giving a provision of the Constitution priority over a statute when the two conflict. A constitutional provision has a greater presumption of beneficence than a statute because it commanded broader social consensus, having had to pass supermajoritarian hurdles to be enacted.[5] But that beneficence depends on the meaning that the ratifiers of the constitutional provision attached to it. It was this meaning that commanded the widespread consensus that permits it to trump statutes passed by contemporary majorities. Therefore only by employing the original meaning of a constitutional provisions are judges justified in invalidating statutes enacted by democratic majorities.

The other primary argument for originalism focuses on the institutional competence of the judiciary. It parallels the argument for democracy itself. Originalism is the worst system of interpretation except for all the others. While sometimes it is difficult to discern the original meaning of the constitution because of the passage of time, at least the inquiry into historical meaning requires judges to engage in disciplined search for objective evidence and to consider the purposes of others rather than their own. As such, originalism constitutes a break on judicial wilfulness and subjectivity–tendencies that deprive the judiciary of the comparative advantage they hold over other political actors in constitutional interpretation and therefore undermine the justification for the judiciary's power to invalidate statutes through judicial review.

Moreover, originalism is the default rule we apply to interpreting any historical document. If a historian wanted to understand the meaning of the Mayflower Compact, for instance, he would obviously consult sources available to those who wrote the document in 1620 rather than contemporary sources. However, if we abandon this common default rule of interpretation, there are scores of current interpretative theories from which to choose and many others that surely will be advanced by

scholars yet unborn. Originalism is thus the only theory that provides a solution to the coordination problem of constitutional interpretation. If our Constitution is a common bond, we need a common way of understanding it and that common understanding can only be provided by the default rule of interpretation that we generally apply to historic documents.

For similar reasons, statutes are to be interpreted according to the meaning a reasonable observer would have attached at time of their passage. The broad acceptance of this theory of interpretation of statutes in fact provides further support for originalism in constitutional law. I am sure members of this committee who labor long and hard over the details of statutes would want them interpreted as its members would have reasonably understood them at the time of enactment. Why should we have a different theory of interpretation for statutes than for the Constitution? Mere age cannot be distinction because many statutes are almost as old as the original constitution and a good deal older than the more recent constitutional amendments. Moreover, the passage of time does not the erase the meaning of historic documents anymore than it erases the meaning of the documents we write in our own lives.

Accordingly, I entirely applaud the premise of the resolution that is subject of this hearing. Orginalism which calls for ascertaining the meaning that a reasonable observer would have to attached to a law at the time of its enactment is the correct theory of the constitutional and statutory interpretation. If orginalism is the right interpretative theory of the Constitution, there will be little occasion to use contemporary foreign precedent as persuasive authority because contemporary foreign precedent would not generally cast light on what a reasonable person at the time of ratifying the Constitution would have understood to be its meaning. Precedent from the United Kingdom or

elsewhere known at the time of the Framing could have been relevant because some provisions of the Constitution might be have been understood in terms of such precedent. But the use of such precedent to establish the Constitution's historic meaning is not the issue here.

Within an originalist theory of interpretation there are two other possible proper uses of foreign and international precedent. Resort to contemporary foreign or international law might be proper if the original Constitution calls for reference to contemporary foreign or international law. The Constitution may do this in limited circumstances as when it permits Congress to "define offenses against the law of nations."[6] Even here it is significant that Congress is the body called upon to mediate the relation of international law to law in the United States–not the courts. Similarly, of course, interpreting treaties which are contracts among nations may require attention to foreign and international precedent as a matter or course. Once again under the constitutional provisions for treaty making the political actors rather the courts are choosing to bring international law into our domestic regime.

Finally, foreign law could be relevant to prove a fact about the world which is relevant to the law. For instance, it might be useful to evaluate an assertion that one consequence follows from another, because one could show that in some legal systems the consequence does not always. follow.

I would thus modify the resolution to make clear that these uses of foreign or international law are legitimate. But none of these possible legitimate uses of foreign law detract from the main thrust of this resolution which is designed to prevent the use of contemporary foreign or international precedent as persuasive authority as matter of course in our interpreting our domestic constitution. I would also modify the resolution to address questions of the use of foreign and international law only in the context of constitutional interpretation, because contemporary foreign and international law may well serve as a

backdrop to statutes, such as those relating to international trade, and thus be often relevant to their interpretation. While the resolution by its terms does not rule out such use, I think it would be better served to focus on what may be a growing problem of abuse of foreign law in constitutional interpretation rather than statutory interpretation where the problem seems to be less acute.

Even if one does not accept an originalist theory of Constitutional interpretation, substantial pragmatic problems militate against relying on contemporary foreign and international law as sources of constitutional authority. Therefore even those not disposed favorably toward originalism should be skeptical of the use of foreign law as persuasive authority.

First, the Constitution contains no rule as to which of the many bits of conflicting foreign rules of law should be used as persuasive precedent. Judges therefore are likely to use their own discretion in choosing what foreign law to apply and what foreign law to reject. Judges will use foreign law as a cover for their discretionary judgments.

Lawrence exemplifies this problem. While the European Union protects sodomy as a constitutional right, many nations still criminalize sodomy. Why should the Court look to the European Union and not these other nations? Perhaps the claim is that we share values with the European Union. But this a very vague rule requiring agreement on what values are relevant. We actually do not share all values with the European Union, as the war in Iraq showed. How do we do know we share their values about the appropriate way law should regulate sexual behavior?

Unfortunately, the *Lawrence* Court never answers this question. It instead simply felt free to pick and choose from decisions around the world the ones that it likes, to use them as justification or at least decoration for its own ruling, and to ignore decisions that are contrary. It is hard to think of a more

ad hoc and manipulable basis for interpreting the United States Constitution.[7]

Second, the problem with using foreign decisions is that they are the consequence of a whole set of norms and governmental structures that are different from those in the United States. They may be appropriate for their nations but out of place in nations with different government structures. *Lawrence*'s use of the EU decision is once again exemplary. European traditions are more favorable than American traditions to the imposition of elite moral views. Indeed, the European notion of human rights in constitutionalism is fundamentally different from ours: human rights in Europe are the product of a search for eternal normative truths to be imposed against democracy.[8] This is quite different from the American conception of rights as products of democracy, albeit of the special democratic processes that produce the state and federal constitutions and their amendments.[9] Moreover, the United States has a structure of federalism and more general traditions of decentralization that are important processes for testing the content of rights.

Thus, foreign constitutional norms do not just reflect certain views about the content of substantive rights but also a foreign mode of defining them. Any judicial opinion from another culture is the culmination of a complex institutional structure for producing norms. The low cost of accessing the mere words of a foreign judicial opinion can blind us to the fact that we are only seeing the surface of a far deeper social structure that is incompatible with American institutions. This does not necessarily mean that the American political system as a whole is better than that of some others, but it does caution against assuming that judicial decisions from other nations will produce the same good effects here that they may produce in a significantly different political system.

Third, promiscuous use of foreign law will undermine domestic support for the Constitution.

The Constitution begins: "We the People . . . do ordain and establish the Constitution of the United States." In a formal sense, the entire Constitution is an expression of the views of the people of the United States, not some other people. Relying on international or foreign law except when the Constitution directs us to look at the law flouts this first principle. This formal points has social implications. The Constitution has commanded respect and allegiance because it our Constitution, not a document imposed from abroad.

This is not a small point but goes to the heart of the stability of a political system. A Constitution cannot be maintained simply by self-interest, because the citizens would then free ride on the efforts of others. Thus, if self-interest is the only perspective that individuals have toward constitutionalism, the attitude adopted will be one of at most benign neglect: let others create the climate of watchful respect for constitutional fidelity that is necessary to preserve the constitutional order. One important feature of the American tradition that overcomes the potential constitutional tragedy of the commons are the bonds of affection that citizens have for their founding document. In the nineteenth century, this affection was marked by parades and celebrations. In our own time which has more distractions, the sense of public affection is no less important but harder to express. If foreign decisions become a routine source of constitutional law, citizens, except for the most cosmopolitan, will lose identity with the document. The emphatically American nature of our Constitution has been a source of affection and pride that have contributed to our social stability.[10]

I want to close by discussing an argument that some may deploy to suggest that quite a bit of foreign and international law should be used in interpreting the Constitution. It is the claim that some clauses of the Constitution themselves contemplate an evolving meaning and foreign law can help chart

the course of this evolution. Thus, the Supreme Court itself appears to interpret the cruel and unusual punishment clause in light of evolving standards of human decency rather than the standards at the time the clause was framed. It is in this context that the Supreme Court in Atkins v. Virginia cited to the worldwide community's general refusal to execute the cognitively impaired as evidence that evolving standards demand that the United States end such executions.[11]

Let us assume for a moment that the cruel and unusual clause should be tied to evolving standards in general It does not follow that the Framers would have wanted to tie these evolving standards to the standards of other nations around the world rather than focus only on domestic evolution. At the time the Constitution was framed the United States was one of the few republican nations in the world and the Framers often distinguished its practices from the world's ancien regimes. It seems very unlikely that given the self-conscious exceptionalism of the United States that the Framers would have wanted make the standards of our Bill of Rights depend on the practices of other nations. They would have no confidence that those standards would not represent retrogression rather than progress. Thus, not only do I find no evidence that a reasonable person would have understood our Bill of Rights to incorporate the evolving standards of foreign nations, the argument seems implausible on its face.

Lawrence's reliance on the law of the European Union to help interpret our Constitution was a mistake. Unfortunately, if accounts of Supreme Court Justices' remarks favorable to the reliance on contemporary foreign law in constitutional interpretation are accurate, Lawrence's error may not be an isolated one.[12] Passing this resolution, as revised along the lines I suggest, would therefore be a warranted expression of correct constitutional views and a respectful suggestion that the

Court reconsider use of contemporary foreign law as persuasive constitutional authority.[13]

1. *See* 1 THE WORKS OF JAMES WILSON 291 (Robert Green McCloskey, ed., 1967)

2. 123 S.Ct. 2742 (2003).

3. The case was Dudgeon v. United Kingdom, 35 Eur. Ct. H.R. (series A) 1981. Some have argued that this citation was simply a response to the claim in Bowers v. Hardwick that homosexual conduct has never been tolerated in Western civilization. Neither the majority opinion in *Bowers* nor Chief Justice Burger's concurrence, however, made any such claim. In any event, the best interpretation of the language quoted is that the Court is citing this as persuasive precedent for its own holding.

4.123 S. Ct. at 2483.

5. John O. McGinnis & Michael Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 791 (2002).

6.U.S. CONST. Art 1, sec. 8.

7. The Court may be headed in this direction, not only in substantive due process, but in other areas as well. *See* J. Harvie Wilkinson III, *International Law and American Constitutionalism* 12 (forthcoming 2004) (wondering what principle judges can use to decide which foreign decisions to cite).

8. *See* Jed Rubenfeld, *The Two World Orders*, Wilson Quarterly, Autumn 2003, at 23.

9. *Id.*

10.See Wilkinson, *supra* note7 at 8. (suggesting that too much citing of foreign law will make the Justices seem out of touch with American culture).

11.Atkins v. Virginia, 534 U.S. 304, 317 (2002).

12. *See* Remarks of Justice Sandra Day O'Connor, Southern Center for International Studies, http://www.southerncenter.org/OConnor_transcript.pdf (seeming to urge greater reliance on foreign law in United States constitutional interpretation.

13. Parts of this testimony are based on Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris* __Mich. L. Rev. __(2004).