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EDITOR'S NOTE

REFERRING TO FOREIGN LAW IN CONSTITUTIONAL INTERPRETATION: AN EPISODE IN THE CULTURE WARS

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Professor Tushnet presented a version of this speech at the University of Baltimore School of Law Center for International and Comparative Law's Annual Lecture on International and Comparative Law. His remarks offer a perspective on the interpretation of foreign law in the U.S. Supreme Court and address the speech given by The Honorable Peter J. Messitte, which can be found at 35 U. BALT. L. REV 171 (2005).

REFERRING TO FOREIGN LAW IN CONSTITUTIONAL INTERPRETATION: AN EPISODE IN THE CULTURE WARS

Mark Tushnet†

As Judge Messitte's essay demonstrates,[1] recent references in Supreme Court decisions to non-U.S. legal materials have generated a great deal of controversy. Those who make such references say that doing so is no big deal.[2] I have called the controversy a tempest in a teapot.[3] My topic here is the disjuncture between the perception on one side that something important and troubling has happened—or, as I will argue, may be about to happen—and the perception on the other that there is nothing to be concerned about. After describing in Section I the practice that has given rise to the controversy, I examine in Section II one feature of the controversy that, I believe, has not yet been addressed in detail: The target of criticism is not really what Justices of the Supreme Court have done, but rather what they might do. I then argue that the fact that the target is an imagined practice rather than the real one is a clue to the nature of the controversy. The controversy, I conclude in Section III, is a skirmish in the ongoing culture wars over the courts. The claims made against and for references to non-U.S. law in constitutional interpretation ought to be analyzed as cultural artifacts rather than as arguments, that is, in terms of the reasons given against and for the practice.

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† Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center. I thank Mortimer Sellers for inviting me to give the lecture on which this Essay is loosely based, Eric Posner for suggesting the lines of argument I pursue here, and Martin Lederman for helpful comments. This Essay is a companion to Mark Tushnet, *When Is Knowing Less Better Than Knowing More?: Unpacking the Controversy Over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275 (2006), where some of the ideas touched on here are developed in more detail, and which touches on this Essay's primary topic.

1. *See* Peter J. Messitte, *Citing Foreign Law In U.S. Courts: Is Our Sovereignty Really At Stake?*, 35 U. BALT. L. REV 171 (2005).
2. Kenneth Anderson, *Foreign Law and the U.S. Constitution*, POL'Y REV., June-July 2005, at 4, *available at* http://www.policyreview.org/jun05/anderson.html (attributing phrase to Justice Stephen Breyer).
3. Mark Tushnet, *Transnational/Domestic Constitutional Law*, 37 LOY. L.A. L. REV. 239, 248 (2003).

I. THE SUPREME COURT'S PRACTICE DESCRIBED

Probably the most striking thing about the controversy is the large gap between what the Supreme Court has actually done—rather little, as I will show—and the rather high level of concern and even outrage the Court's critics have expressed. The practice the critics focus on consists of somewhere between four and seven references to non-U.S. law, in a body of constitutional adjudication that runs thousands of pages. A simple enumeration of the references should be enough to motivate the remainder of my argument. The references fall into two categories: those by the Court, and those by individual Justices. I begin with the references to non-U.S. law in majority opinions.

A. Atkins v. Virginia

A footnote in Justice John Paul Stevens's opinion for the Court in *Atkins v. Virginia*, holding unconstitutional the practice of executing criminal defendants with mental retardation, stated: "Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."[4] This factual assertion followed references to purely domestic sources: the positions taken by U.S. "organizations with germane expertise" and by "representatives of widely diverse religious communities in the United States."[5] These materials were cited to support the proposition that decisions by U.S. legislatures "reflect[ed] a much broader social and professional consensus."[6] After criticizing the majority's analysis of entirely domestic sources of law, Justice Scalia characterized the reference to the fact of disapproval within the world community as "the Court's Most Feeble Effort to fabricate 'national consensus.'"[7] He did not dispute the factual claim the Court made.[8]

B. Lawrence v. Texas

Lawrence referred to non-U.S. law for two purposes. The majority opinion in *Bowers v. Hardwick* had said that the claim that there was a deeply rooted tradition protecting people's right to engage in consensual homosexual activity was "at best, facetious."[9] Chief Justice Warren Burger's concurring opinion in

4. Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (citing Brief for The European Union as Amicus Curiae Supporting Petitioner at 4, McCarver v. North Carolina, 533 U.S. 955 (2001) (No. 00-8727)).
5. *Id.*
6. *Id.*
7. *Id.* at 347 (Scalia, J., dissenting).
8. *Id.* at 347-48.
9. 478 U.S. 186, 194 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

Bowers asserted that "[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards."[10]

In *Lawrence v. Texas*, Justice Anthony Kennedy supported his claim that both assertions were overstated by referring to developments in U.S. law over the prior fifty years, to legislative developments in Great Britain, and to a 1981 decision by the European Court of Human Rights (ECHR) finding anti-sodomy laws to violate the European Convention on Human Rights.[11] That decision, Justice Kennedy wrote, showed the error in "the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization."[12] The decision by the European Court showed, first, that Chief Justice Burger's assertions were too "sweeping,"[13] and, second, that the majority's conclusion in *Bowers* that "the claim . . . was insubstantial in our Western civilization" was erroneous.[14] The references to non-U.S. law were used to refute assertions in *Bowers* about the existence of consensus or substantial unanimity in the Western tradition—that is, essentially as evidence of facts about opinions in Western societies.[15] In this they resemble the reference in *Atkins*.

C. Roper v. Simmons

The decision invalidating the imposition of capital punishment on juvenile offenders contained the Court's most extensive discussion of non-U.S. law.[16] Earlier references amounted to no more than a few sentences in a Court opinion; *Roper* had an entire section devoted to non-U.S. law.[17] The *Roper* opinion had three sections of substantive analysis.[18] The first examined domestic law, and concluded that there was a trend in that law against the

10. *Id.* at 196 (Burger, C.J., concurring).
11. 539 U.S. 558, 571-73 (2003).
12. *Id.* at 573.
13. *Id.* at 572.
14. *Id.* at 573. The *Bowers* majority opinion did not specifically say that the claim there asserted was "facetious" in light of the history of Western civilization, but its reference to tradition makes Justice Kennedy's restatement at least a plausible one.
15. For this reason, Ernest A. Young, author of *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 153 (2005), is mistaken in suggesting that the Court engaged in "sloppy opinion writing" in referring to the European Court's decision "merely . . . [as a] *fact*" rather than for the reasons it contained. The very point was to note the decision as a fact.
16. Roper v. Simmons, 543 U.S. 551 (2005).
17. *Id.* at 574-78.
18. *Id.* at 563-78.

imposition of capital punishment on juvenile offenders.[19] The second contained the majority's own evaluation of the propriety of imposing the death penalty on juvenile offenders, in light of principles of deterrence, retribution, and criminal responsibility, an evaluation the Court asserted was required by precedent.[20] The third contained the references to non-U.S. law.[21] It began by asserting that the conclusions already reached in the prior sections "find[] confirmation" in practices elsewhere in the world.[22] Those practices, the opinion noted, were not "controlling."[23] The final words of the five paragraphs devoted to non-U.S. law reiterated these points: "The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."[24]

Now for the references in separate opinions by individual Justices.

D. Printz v. United States

The first significant reference to non-U.S. law in modern constitutional adjudication came in Justice Breyer's dissenting opinion in *Printz v. United States*.[25] Against the majority's holding, as he interpreted the decision, that important values of federalism were better promoted by barring the national government from requiring state and local executive officials to devote resources to enforcing national law than by allowing the national government to so require, Justice Breyer pointed to the allocation of power in the German federal union and the quasi-federal European Union.[26] Justice Scalia, writing for the majority, replied that reference to non-U.S. experience was perfectly appropriate when the Framers were writing the Constitution, but was inappropriate in interpreting the Constitution they wrote.[27]

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19. *Id.* at 563-67.
20. *Id.* at 567-74.
21. *Id.* at 574-78.
22. *Id.* at 575.
23. *Id.*
24. *Id.* at 578.
25. 521 U.S. 898 (1997).
26. *Id.* at 976-78 (Breyer, J., dissenting)
> The federal systems of Switzerland, Germany, and the European Union, for example, all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central 'federal' body. They do so in part because they believe that such a system interferes less, not more, with the independent authority of the 'state,' member nation, or other subsidiary government, and helps to safeguard individual liberty as well.

(citation omitted).
27. *Id.* at 921 n.11 (majority opinion).

E. Knight v. Florida

Justice Breyer also referred to non-U.S. sources in his dissent from the denial of certiorari in a case raising the question, is capital punishment unconstitutional when the statutes authorizing the penalty are administered in a manner that leads to extended stays on death row, with attendant psychological and physical consequences (the so-called "death row phenomenon").[28] He observed that constitutional courts for Jamaica (that is, the Privy Council in Great Britain), India, Zimbabwe, and the European Union had held that the death row phenomenon amounted to inhumane treatment, while also noting that the Canadian Supreme Court had taken the contrary position.[29] Although the non-U.S. decisions did not "bind" the U.S. Supreme Court, he wrote, "this Court has 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."[30]

F. Grutter v. Bollinger

Opening her concurring opinion in the case involving the affirmative action program at the University of Michigan Law School, Justice Ruth Bader Ginsburg noted that a majority agreed that its members expected that affirmative action programs would be unnecessary—and would perhaps become unconstitutional—at some point.[31] This, she wrote, "accords with the international understanding of the office of affirmative action," citing a number of international agreements.[32] She did not contend that the Court's limitation on the temporal scope of affirmative action programs was somehow compelled by international law, or even that the agreements to which she referred gave the majority some reason to adopt a temporal limitation.[33] And, notably—given that critics of references to non-U.S. materials tend to be political conservatives who believe that affirmative action programs should be more broadly unconstitutional than the Court—the reference was in support of a limitation on affirmative action. It may be worth observing as well that Justice Ginsburg's references to non-U.S.

28. Knight v. Florida, 528 U.S. 990 (1999).
29. *Id.* at 995-96.
30. *Id.* at 997.
31. Grutter v. Bollinger, 539 U.S. 306, 344 (Ginsburg, J., concurring). The majority stated that their expectation was that affirmative action programs would be unnecessary in twenty-five years. *Id.* at 343 (majority opinion).
32. *Id.* at 344 (Ginsburg, J., concurring).
33. *Id.* at 344-45.

law here undermine the claims sometimes made that such references are always in the service of liberal positions.[34]

Having followed the controversy rather closely, I am confident in asserting that the foregoing is a comprehensive list of the controversial instances of recent Supreme Court references to non-U.S. law.[35] It is obviously a very short list. Some of the references—clearly those in *Atkins* and *Grutter*, and less clearly in *Lawrence*—are merely mentions of facts about the state of the law outside the United States. The philosophers' distinction between mention and use seems relevant here: These references mention non-U.S. law, but do not use it in support of some proposition about U.S. constitutional law. The difference can be seen in Justice Scalia's criticism of the reference to opinions of the world community in *Atkins*.[36] Contrary to Justice Scalia's assertion that the majority used the facts about world-wide opinion "to fabricate 'national consensus,'"[37] the majority mentioned those facts as an indication that the national consensus it found in domestic sources was supported by professional organizations, religious organizations, and national governments elsewhere. The Court's evaluation of the national consensus revealed in domestic sources showed U.S. legislatures were not out of tune with other groups. This is true as well with the confirmatory references to non-U.S. law in *Roper*.[38]

Sometimes, of course, the references to non-U.S. law signal genuine disagreement about constitutional interpretation. This is clearly so in *Printz*. Justice Breyer thought that the interpretation of the U.S. Constitution could be informed by experience elsewhere, which, he wrote, might "cast an empirical light on the consequences of different solutions to a common legal problem . . . ."[39] Justice Scalia's response was predicated on the view that consequences were irrelevant, or at least not important enough, in

34. *See, e.g.*, Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 702 (2005) (describing the possibility that reliance on non-U.S. law would lead to the adoption of non-liberal results).

35. In *Foster v. Florida*, 537 U.S. 990 (2002), in dissenting from a denial of certiorari, Justice Breyer reiterated his concerns about the death row phenomenon, again citing non-U.S. decisions. In *Lackey v. Texas*, 514 U.S. 1045 (1995), in a memorandum respecting the denial of certiorari, Justice Stevens observed that "the highest courts in other countries have found arguments [regarding the death row phenomenon] persuasive." Justice Stevens also noted an opinion by two English judges asserting that execution after long delay would violate the ban on cruel and unusual punishments contained in the Bill of Rights of 1689, which was, according to Justice Stevens, "the precursor of our own Eighth Amendment." *Id.*

36. *See* Atkins v. Virginia, 536 U.S. 304, 307 (Scalia, J., dissenting).

37. *Id.*

38. Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 115-16 n.30 (2005).

39. Printz v. United States, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

determining what our Constitution means.[40] Here, though, the controversy ought to be about the underlying theory of constitutional interpretation, not about the references to non-U.S. law, which are only one of many ways in which a Justice might import consequences into the interpretive task.

Criticism of the more extensive references to non-U.S. law in *Roper* seems to rest on the proposition that the Court did not mean what it said. The thought appears to be that the references were too extensive to be mere confirmation of a judgment already reached.[41] More elaborately: Critics find the Court's assertions about the existence of a trend in domestic law and practice unpersuasive, and disagree with the proposition that precedent authorized the Justices to make their own independent judgment about questions of deterrence, retribution, and criminal responsibility. So, the argument seems to be, the only thing that could possibly have supported the majority's conclusion was non-U.S. law. On this view, the majority actually relied on, and did not merely refer to, non-U.S. law.[42] The difficulty with this criticism is that it is cogent only if the majority itself actually accepted the criticisms of its own analysis, which is, to say the least, highly unlikely.

I hope that this enumeration demonstrates how modest the actual practice of referring to non-U.S. law is. The next section examines whether the target of criticism is not the actual practice but some practice that might develop out of it, and concludes that, if so, the criticisms remain ill-founded.

II. FEAR OF THE FUTURE

Close reading of the critical literature on references to non-U.S. law reveals that no one criticizes what the Justices have actually done. Instead, the critics treat what the Justices have done as foreshadowing more extensive uses of, and reliance on, non-U.S. law in future cases. The actual practice, that is, appears to be immune from criticism, but some extensions of that practice might well be mistaken–and, the critics suggest, might be forthcoming

40. *Id.* at 921 n.11 (majority opinion).

41. *See, e.g., Atkins*, 536 U.S. at 343-45 (Scalia, J., dissenting) (arguing that the Court was fabricating a national consensus by relying on non-U.S. law, not finding persuasive the Court's assertions about the trends in domestic law, and concluding that the non-U.S. material must have played a larger role than the majority's modest treatment of that material suggested).

42. *Cf.* Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 90 (2005) (in discussing *Roper*, referring to "the psychological literature that it misused, . . . [and] the national consensus that it concocted"); Young, *supra* note 15, at 155 (referring to "the exceptionally weak evidence of domestic consensus and the Court's close division on the objective morality component" in *Roper*).

unless the existing practice is beaten back.[43] What the Justices have done, on this view, is something like a baby in the crib, which might grow into something threatening and should be strangled right away.[44]

The first part of this criticism is obviously correct. Were a Justice to say, "The ECHR has decided this precise question, and I regard that decision as a binding precedent," the Justice would have acted in a manner completely insupportable within the U.S. constitutional tradition.[45] Even treating the ECHR decision as a relevant precedent would be a jurisprudential mistake. Precedent matters when there are reasons arising from the deciding court's position in a judicial hierarchy, and independent of the merits of the arguments the court provides, for adhering to the deciding court's conclusion. But, again obviously, the ECHR—and indeed nearly all non-U.S. adjudicatory bodies—does not stand in the hierarchical relation to the U.S. courts that the concept relevant precedent requires.[46]

So, the critics' concern has force only if there is some reason to think that a practice, currently defensible, might turn into one that is indefensible.[47] This is essentially a standard slippery slope argument, and as Professor Eugene Volokh has shown, such arguments make sense only when we can describe some mechanism that would lead someone to infer from a defensible practice that it is permissible to engage in an otherwise indefensible one.[48]

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43. *See, e.g.*, Young, *supra* note 15, at 154 (describing what "at least in theory" might be done with references to non-U.S. law).
44. To extend the metaphor, what the Justices have actually done is not a mature practice.
45. Again, the obvious point is that the ECHR has jurisdiction over claims arising out of a treaty to which the United States is not a party, and its interpretation of that treaty cannot bind any U.S. actor, including the Supreme Court, as the U.S. actor interprets the U.S. Constitution.
46. Nor, of course, have any of the references to non-U.S. law treated that law as relevant precedent in the jurisprudential sense.
47. One version of the concern about what lies at the bottom of the slope is "political." Conservatives fear that liberals will be able to refer to decisions from high-prestige foreign courts, like the British House of Lords and the European Court of Human Rights, while they will have to cite low-prestige ones, perhaps the courts of China and the Sudan. If so, the shadow-effects of differential prestige will help their opponents even if conservatives do start referring to non-U.S. law. It is not clear to me, though, that the predicate of this argument is factually accurate. There are, I think, plenty of "conservative" decisions from high-prestige foreign courts, including the German Constitutional Court and, on a range of issues, the European Court of Human Rights. I thank Eric Posner for suggesting that I address this question.
48. *See generally* Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1030-32 (2003) (analyzing how to "sensibly evaluate the risk of slippery slopes").

Professor Volokh describes the structure of the slippery slope in this way: You and I agree that some practice A (referring to non-U.S. law, for example) is defensible, but I believe that another practice B (relying on non-U.S. law, for example) is indefensible or undesirable.[49] You might now agree with me about that as well, but I believe that if you engage in practice A by referring to non-U.S. law, you are more likely to end up thinking that practice B (relying on non-U.S. law) is defensible or desirable.[50] So I want to stop you, and me, from engaging in referring to non-U.S. law. Clearly, as Professor Volokh demonstrates, the key here is figuring out why judges who defensibly refer to non-U.S. law are, as a result of that practice, more likely to indefensibly rely on non-U.S. law.

Professor Volokh identifies six mechanisms by which that outcome can come about.[51] In the present context, only one seems to me even plausible: Referring to non-U.S. law "may change people's attitudes about the propriety of" relying on non-U.S. law.[52] Professor Volokh observes, correctly, that this mechanism "is connected to expressive theories of law."[53] That, in turn, provides a general reason to be skeptical about arguments that we will get on a slippery slope because the attitude-changing mechanism will take hold: Expressive theories are quite dubious as accounts of law and its social operation.[54]

Even putting that general skepticism to one side, I find the attitude-changing mechanism implausible in the context of precedent rather than policy.[55] The problem is that precedents come inextricably packaged with reasons, explicitly offered rather

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49. *See id.* at 1028.
50. *See id.* at 1028, 1031-34 ("Slippery slopes may occur even when a principled distinction can be drawn between decisions A and B.").
51. *Id.* at 1033-34.
52. *Id.* at 1033 (emphasis omitted). The other mechanisms Professor Volokh describes are: engaging in the new practice "may be seen as a small enough change that people will reasonably ignore it" but, when taken together with other similar changes might lead people to think that relying on non-U.S. law is defensible; engaging in the new practice will create "political momentum" or reduce the political power of opponents; doing so will lower the cost of the undesirable practice; and doing so might trigger other rules that make the undesirable practice easier to engage in. *Id.* at 1033-34.
53. *Id.* at 1036.
54. For a general critique of expressive theories of law, see Matthew Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000).
55. Notably, the standard example of attitude changing involves the adoption of anti-smoking policies, which are said to induce people to change their view of the desirability of smoking even in settings not covered by the policies. For Professor Volokh's reference to this example, see Volokh, *supra* note 48, at 1036.

than implicit in the very adoption of the practice.[56] So, in the context of legal reasoning, the slippery slope must occur under the following circumstances. A judge refers to non-U.S. law. The judge offers good reasons for the reference, understands that those reasons are not available to defend a practice of relying on non-U.S. law, and understands as well that there are other good reasons that make relying on non-U.S. law indefensible. Time passes, and the very fact that the judge referred to non-U.S. law leads the judge or the judge's successors to forget the latter two understandings.

The attitude-changing mechanism works in this context because of some uncertainty about what exactly happens when a judge refers to, but does not rely on, non-U.S. law.[57] Successor judges mistakenly think that, notwithstanding what the original judges said, what they did was rely on non-U.S. law.[58] I confess to finding this account utterly implausible: The reasons are displayed fully when the judge refers to non-U.S. law, and are fully available when the successor judge relies on non-U.S. law.[59] If they are rationally persuasive to the original judge, they should be rationally persuasive to successor judges.[60] And, of course, the case against relying on non-U.S. law collapses without reasons to support it, so reaching the bottom of the slippery slope would not be indefensible at all.

To summarize, opponents of the practice of referring to non-U.S. law might be concerned that that practice, innocuous in itself, portends the adoption of more threatening practices. I have argued

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56. *See* Volokh, *supra* note 48, at 1086-88 (discussing the importance of what people perceive to be implicit in policy decisions).

57. *See id.* at 1065 (discussing situations in which "the justification underlying A is vague enough that it could justify B, even if this effect isn't certain"); *id.* at 1112-14 (discussing vagueness of legal rules and its implications for slippery slope mechanisms).

58. It may be worth noting that the persistent mischaracterizations in the critical literature of what the Court has actually done might actually contribute to this later-mistaken assessment. The successor judge might think, "Well, if all these smart people are saying that the Supreme Court actually did rely on non-U.S. law, who am I to go against that consensus?" The critical literature might in that way help bring about the outcome it seeks to prevent occurring.

59. Professor Volokh refers to problems of public perceptions about what courts have done in these terms: "[P]eople might still interpret a decision as endorsing a certain justification even if that's not quite what the decision held, partly because many people don't read court decisions very closely or remember them precisely (again because of rational ignorance)." *Id.* at 1090. This point seems clearly inapplicable—or, if applicable, extremely weak—in the case of Supreme Court Justices.

60. I do not want to press the following point too hard, but I suspect that what drives my skepticism is the view that reasons operate differently from attitudes. Professor Volokh's discussion is premised, in part, on the assumption that successor judges (to use my term) in fact do not find the reasons rationally persuasive. *See id.* at 1069, 1097 (discussing an example that works because the successor judges had principles different from those of the original judges).

that there seems to be no reason to believe that to be so: If judges in the future start relying on non-U.S. law, they will do so not because they found it easier to defend doing so given that Justices before them referred to non-U.S. law, but because they think there are good reasons for doing so. Arguing about the practice of referring to non-U.S. law makes no headway with respect to the as-yet-unadopted practice of relying on non-U.S. law.

III. CONCLUSION: THE CULTURE WARS IN THE SUPREME COURT

Justice Scalia infamously described one of the Court's decisions as an inappropriate intervention in the contemporary culture wars.[61] The political valence of the controversy of references to non-U.S. law strongly suggests that that controversy too is part of the culture wars.[62] The final question I wish briefly to address here is: Why did such a minor practice become one front in the culture wars? I divide this in two parts: How does the dispute fit into the culture wars, and why did it come to matter as part of the culture wars?[63]

I doubt that there can be a neutral or objective description of the issues in the culture wars, in large part because the combatants disagree over how their disagreements should be characterized and over whether anything could count as a neutral description. With that caution, I here identify two components of the culture wars, one limited to the culture wars in the courts, the other applicable more broadly.

Within the courts, the culture wars take the form of disputes about constitutional interpretation. Some conservatives believe that the sources of constitutional interpretation must be carefully limited, while others believe that constitutional interpretation is properly an eclectic matter in which all manner of sources can be used.[64] The former believed—in my view, mistakenly—that they had made great headway in disciplining constitutional interpretation, and see, in references to non-U.S. law, disconfirmation of that belief. They characterize references as

61. Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) ("The Court has mistaken a Kulturkampf for a fit of spite.").

62. I think it worth observing that refusing to refer to non-U.S. law, at least once the possibility has been raised, is as much an intervention in the culture wars as doing so.

63. The premise of this second sub-question is that almost anything can become a front in the culture wars, but only some things do.

64. For a discussion of eclecticism in U.S. constitutional interpretation, see Mark Tushnet, *The United States: Eclecticism in the Service of Pragmatism*, *in* INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY (Jeffrey Goldsworthy ed. 2006).

reliance to reduce the ensuing cognitive dissonance. We can see this phenomenon, I think, in the standard argument that their opponents actually recognize that they have lost the domestic battle over constitutional interpretation, and so, have turned to non-U.S. law to make foreigners' views override Americans'.[65]

The larger issue in the culture wars, I suggest, is a dispute over what it means to be an American patriot.[66] For one side, American patriotism consists in the celebration of the unique contributions the United States has made to the world's prosperity, institutions, and ideals.[67] Among those contributions, of course, is the U.S. Constitution. For the other side, American patriotism consists in celebrating the nation's diversity, its cosmopolitan appreciation of what the world's peoples have contributed to the United States, and of course, the nation's contributions to the world's prosperity, institutions, and ideals. For the first side, making modest reference to non-U.S. law in constitutional interpretation implicitly deprecates the nation's uniqueness. The practice is a form of the cosmopolitanism that it finds inconsistent with its version of American patriotism. And, the practice suggests that the Constitution could be improved from the outside.[68]

Another theme in the culture wars is an asserted disagreement between those who believe that human experience reflects and

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65. For one articulation of this argument, see Young, *supra* note 15, at 163 ("Opponents of the death penalty who have striven in vain to persuade their fellow Americans to abandon the measure will find more support by extending their sphere of argument to take in foreign opinions and practices."). I think it significant that Professor Young uses a case about the juvenile death penalty, where the Court did after all find a domestic trend against the practice, to illustrate an argument about public support for the death penalty generically.

66. *Compare* LARRY SCHWEIKART & MICHAEL PATRICK ALLEN, A PATRIOT'S HISTORY OF THE UNITED STATES: FROM COLUMBUS'S GREAT DISCOVERY TO THE WAR ON TERROR (2004) (offering a right-wing perspective), *with* HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES: 1492-PRESENT (Harper Perennial 2003) (1980) (offering a left-wing perspective). I cite these works because of what the difference in their titles suggests.

67. I note as well that in some versions, this vision of patriotism has a xenophobic tinge. That is typically not associated with sophisticated conservatives, who are sometimes a bit embarrassed about what their allies say. The result, as Eric Posner has suggested to me, is that, in his terms, conservative "elites can shamefacedly depict the left as unpatriotic, while the left can argue that the right is pandering" to its xenophobic allies. E-mail from Eric Posner, Kirkland and Ellis Professor of Law, University of Chicago, to Mark Tushnet, Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center (Nov. 30, 2005) (on file with author).

68. For some, this position may be supplemented or supported by the view that the Constitution is one example of God's intervention in history on behalf of the United States. *See* Alice M. Batchelder, Judge, U.S. Court of Appeals for the Sixth Circuit, Seventh Annual Robert E. Henderson Constitution Day Lecture: The Judiciary: Having "neither Force nor Will, but merely judgment"? (Sept. 16, 2005) (audio recording *available at* http://www.ashbrook.org/events/constitution/batchelder.html (last visited Feb. 8, 2006)).

seeks to realize universal values, and those who are said to take a more relativistic view. That theme comes out in the present context when critics of references to non-U.S. law emphasize that legal doctrines are so embedded in a nation's array of culture, institutions, and values that one nation's experience is rarely relevant to another's problems, to be countered by assertions that thoughtful judges around the world are all trying to come up with appropriate solutions to problems that are roughly similar.[69] What is notable here, and what indicates that we are dealing with a culture-wars issue, is that in this context those who usually defend the idea that there are universal values take the relativists' position.

There may well be other dimensions of the culture wars implicated in this controversy. For example, the "values are relative" argument against referring to non-U.S. law may rest, not on a rejection of universalism, but a suspicion that the values being invoked—sometimes at the urging of transnational human rights non-governmental organizations—are not truly universal values and might indeed be driven in part by anti-Americanism. Some, but not all, of those opposed to the practice of referring to non-U.S. law are also opposed to high levels of immigration, legal and illegal, into the United States, suggesting that for these opponents there might be a substratum of xenophobia to their opposition. But, because I am a legal scholar and not a cultural analyst, I am uncomfortable speculating further about how the controversy considered here fits into the culture wars.

I turn, then, to my second sub-question: Why did this practice become one front in the culture wars? The answer, I think, is that the practice was associated with, though not causally connected to, a set of decisions themselves part of the culture wars: death penalty cases, gay rights cases, and an affirmative action case. I am aware that the answer I suggested to the first sub-question placed the onus on the conservative side in the culture wars, but in partial compensation, perhaps, here my suggested answer puts the onus on the liberal side. That is, precisely because the references to non-U.S. law are so modest, one can ask Justices Kennedy, Ginsburg, and Breyer why they bothered to insert them, except to irritate those on the other side in the culture wars, or perhaps to put their opponents in the awkward position of defending the value of knowing less rather than knowing more.

Can anything be done to damp down the controversy, which seems rationally indefensible? The problem with the culture wars is that once the genie is out of the bottle, it is hard to put it back

69. For a discussion of these arguments, see Mark Tushnet, *When Is Knowing Less Better Than Knowing More?: Unpacking the Controversy Over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275 (2006).

in.[70] That is, once something becomes a front in the culture wars, the only way to end the confrontation is for one side to withdraw, that is, to accept a loss. That would clearly be true were proponents of references to non-U.S. law to stop making such references. Perhaps though, opponents of the practice might recast their opposition in a way that opens up some common ground. If, as I have suggested, their real concerns are with potential extensions of the practice, and not with what has already happened, they might make that concern clear, allowing those who engage in the practice to make clear, in return, that they have no intention to extend the practice and indeed would themselves find troubling the extensions that trouble their opponents.[71] They might start to develop criteria explaining their selection of jurisdictions to which reference can properly be made, for example.[72] But, culture wars being what they are, I would not count on this outcome.

70. That is, one's position on this question is a signal of where one stands on other issues. So, even if on reflection a liberal thought it unimportant that the courts refer to non-U.S. law, such a liberal would nonetheless refrain from criticizing the practice because to do so would be to betray the cause (and similarly for conservatives). Again, Eric Posner's comments suggested this elaboration. *See supra* note 67.

71. In this light, Justice Scalia's comment in *Atkins* may have been particularly unfortunate in converting a practice that might have attracted no attention into a front in the culture wars. *See supra* note 7.

72. *See* Tushnet, *supra* note 69, where I sketch some possibilities along these lines.