Adios Scalia: For or Against Foreign Law?

*Editors**

It is unimaginable how the death of a judicial figure would come as a shock to the world. United States Supreme Court Justice Antonin Scalia was such a figure. When this renowned defender of judicial conservatism died unexpectedly during a hunting trip on February 13, 2016, the world stopped and mourned this judicial giant. For a law student, digesting Scalia's witty dissents and consistent reasoning has always been pleasurable for late-night readings. For a transnational law review, Scalia's opinions spurred debates and provided valuable insights into whether and when foreign law could be used to construe U.S. domestic laws.

In memorial of Scalia, we have devoted 4 pages to his quotes on the application of foreign law in the interpretation of domestic laws.

Scalia has consistently rejected the use of foreign law to interpret the U.S. Constitution, as enshrined in the following famous quotes from Supreme Court decisions:

> We must never forget that it is a Constitution for the United States of America that we are expounding . . . [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.[1]

> 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.[2]

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[1] Thompson v. Oklahoma, 487 U.S. 815, 868 (1988) (Scalia, J., dissenting).

[2] Lawrence v. Texas, 539 U.S. 558 (2003) (Scalia, J., dissenting).

> The notion that a law of nations, redefined to mean the consensus of states on *any* subject, can be used by a private citizen to control a sovereign's treatment of *its own citizens* within *its own territory* is a 20th-century invention of internationalist law professors and human rights advocates . . . American law—the law made by the people's democratically elected representatives—does not recognize a category of activity that is so universally disapproved by other nations that it is automatically unlawful here, and automatically gives rise to a private action for money damages in federal court.[3]

> The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners' views as part of the *reasoned basis* of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry . . . [t]he 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.[4]

The crux of Scalia's reasoning is that foreign laws should not be used to interpret the Constitution because they could only invite manipulation. Judges' role is not to make moral judgments, not to find the correct answer, but to faithfully interpret what the Constitution provided, even if it is *wrong*. Intelligent men and women abroad can make very intelligent arguments, but that's not the issue, because it should not be up to judges to make those moral determinations.[5]

Proponents of using foreign law to interpret the Constitution, led by Justice Stephen Breyer, attack Scalia's contentions for three main reasons. First, foreign or international law influences the decisions of domestic legal issues. For instance, if Congress's legislative purposes included harmonization of Amer-

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[3] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (Scalia, J., concurring).

[4] Roper v. Simmons, 125 S. Ct. 1183, 1226 (2005) (Scalia, J., dissenting).

[5] Paltz, *Full Written Transcript of Scalia-Breyer Debate on Foreign Law*, FREE REPUBLIC (Feb.28, 2005), http://www.freerepublic.com/focus/f-news/1352357/posts.

ican and foreign laws, courts must look at that foreign law to evaluate that American objective. Second, decisions of foreign courts render helpful comparisons in resolving U.S. constitutional issues. Third, it is valuable to learn from how other democracies responded to constitutional questions in similar circumstances. Fourth, treaties on public international law might also be relevant to particular domestic legal disputes, such as the legality of death penalty, and should be taken into consideration.[6] In a nutshell, "a global legal enterprise . . . is now upon us."[7]

Albeit the debate on using foreign laws in the Constitutional analysis is unresolved, Scalia does agree that under certain circumstances, foreign laws offer valuable references. He allows for and even encourages the use of foreign law in treaty and statute interpretations. In his ironic comments, courts mistakenly use foreign laws to justify their constitutional arguments, whereas they do not give enough attention to foreign laws when analyzing treaties. The quotes below offer a glimpse of his witty observations and suggestions for what the court should do:

> Today's decision stands out for its failure to give any serious consideration to how the courts of our treaty partners have resolved the legal issues before us . . . This sudden insularity is striking, since the Court in recent years has canvassed the prevailing law in other nations (at least Western European nations) to determine the meaning of an American Constitution that those nations had no part in framing and that those nations' courts have no role in enforcing . . . We can, and should, look to decisions of other signatories when we interpret treaty provisions. Foreign constructions are evidence of the original shared understanding of the contracting parties. Moreover, it is reasonable to impute to the parties an intent that their respective courts strive to interpret the treaty consistently.[8]

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[6] *Id.*

[7] Stephen Breyer, Remarks at the 97th Annual Meeting of the American Society of International Law on the Supreme Court and the New International Law (Apr. 4, 2003) (transcript available at http://www.supremecourtus.gov/publicinfo/speeches/sp_04-04-03.html).

[8] Olympic Airways v. Husain, 540 U.S. 644 (2004) (Scalia, J., dissenting).

> More recent lower court precedent has also tempered the extraterritorial application of the Sherman Act with considerations of "international comity." . . . [T]he practice of using international law to limit the extraterritorial reach of statutes is firmly established in our jurisprudence.[9]

> [F]or every argument why juries are more accurate factfinders, there is another why they are less accurate . . . Finally, the mixed reception that the right to jury trial has been given in other countries, . . . though irrelevant to the meaning and continued existence of that right under our Constitution, surely makes it implausible that judicial fact-finding so "seriously diminishe[s]" accuracy as to produce an "impermissibly large risk" of injustice. When so many presumably reasonable minds continue to disagree over whether juries are better factfinders at all, we cannot confidently say that judicial fact-finding seriously diminishes accuracy. [10]

Returning to the constitutional discussion, Scalia, as an originalist, would never look at foreign laws but only the text of the Constitution to interpret this instrument. This would be, as noted in his famous quote, giving the courts the chance to "look over the heads of the crowd and pick out its friends."[11]

On a final note, would this discussion be relevant to the Chinese legal environment? Would it offer any valuable reference for the current judicial reform? What is the value of foreign law to Chinese statutory interpretation? If the judiciary would one day retain the power to apply the Chinese Constitution, might it abuse its power as such? We have all these intriguing debates unresolved; yet sadly, we have lost a judicial giant to fiercely defend the other side.

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[9] Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993) (Scalia, J., dissenting).

[10] Schriro v. Summerlin, 542 U.S. 348 (2004).

[11] Conroy v. Aniskoff, 507 U.S. 511 (1993) (Scalia, J., concurring).