The Relevancy of Foreign Law as Persuasive Authority and Congress's Response to its Use: A Preemptive Attack on the Constitution Restoration Act

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THE RELEVANCY OF FOREIGN LAW AS PERSUASIVE AUTHORITY AND CONGRESS’S RESPONSE TO ITS USE: A PREEMPTIVE ATTACK ON THE CONSTITUTION RESTORATION ACT

INTRODUCTION

Justice Antonin Scalia, notorious for his scathing dissents, did not disappoint with his analysis of the majority’s use of foreign law to support the consensus against executing the mentally retarded in Atkins v. Virginia. He wrote the following: “But the Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus’ must go to its appeal . . . to the views of . . . the so-called ‘world community’ . . . whose notions of justice are (thankfully) not always those of our people.” Though one of the most outspoken and high-profile opponents of the use of foreign law in judicial decisions, Justice Scalia is certainly not alone.

Congress and sectors of the public have joined Justice Scalia and similarly minded Justices in condemning the use of foreign law as judicial authority. In fact, there is a movement to prohibit using foreign law as persuasive authority or for any other purpose. Many even see the 2005 decision in Roper v. Simmons as sparking a renewed interest in the movement against using foreign law, as well as contributing to it by “rekindl[ing] a fledgling effort . . . in favor of an intellectual protectionism which would ban all ‘foreign opinions’ from American judicial decision-making.”

2. Id. at 347.
3. See e.g., Hadar Harris, “We Are the World”—Or Are We? The United States’ Conflicting Views on the Use of International Law and Foreign Legal Decisions, 12 HUM. RTS. BRIEF 5, 7 (2005).
4. Id. at 6-7.
5. Id. at 7-8; see also Constitution Restoration Act of 2005, H.R. 1070, 109th Cong. § 201 (2005) [hereinafter CRA] (prohibiting a federal court from using foreign law, other than English common law, in interpreting and applying the United States Constitution); The Feeeny Resolution or Reaffirmation of American Independence Resolution, H. R. Res. 97, 109th Cong. (2005) (seeking to reaffirm the sense that judicial decisions based on Constitutional interpretation should not be based upon foreign law, unless such law informs an understanding of the Constitution’s original meaning).
6. Harris, supra note 3, at 7.

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The Constitution Restoration Act of 2005 (CRA), legislation which would bind all federal courts if signed into law, is an integral part of the movement against the use of foreign law in judicial decisions.\(^7\) In addition to stripping federal courts of jurisdiction in certain cases,\(^8\) the CRA seeks to declare any act by a judge that "exceeds . . . jurisdiction[al]" limitations (including citing to any kind of foreign authority) an impeachable offense, and to prohibit a federal court's use of foreign law in judicial decisions.\(^9\)

Despite objections to using foreign law as persuasive authority, real considerations weigh in favor of its continued use in judicial decisions.\(^10\) This Note will argue that international and comparative law has a relevant place in the judiciary's interpretation of domestic law, and that Congress's politically motivated response to its use in the CRA is likely unconstitutional and certainly imprudent.\(^11\)

Part I of this Note will trace the history of the Supreme Court's use of international and comparative law as persuasive authority, including a more detailed look at recent cases that are the center of the current controversy.\(^12\) Part II of the Note will articulate the relevance and benefits of using international and comparative law as persuasive authority.\(^13\) Part III will convey the arguments against using foreign law as persuasive authority.\(^14\) Part IV of the Note will discuss Congress's response to using international law as persuasive authority by looking at the CRA, will argue that the response is likely unconstitutional, and will argue that policy considerations weigh against its adoption.\(^15\) The Note will conclude that including comparative references in judicial decisions is helpful and

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7. See H.R. 1070, § 201.
8. Jurisdiction-stripping provisions in the CRA are beyond the scope of this Note.
10. See infra Parts II, III.
11. See infra Part IV.
12. See infra Part I.
13. See infra Part II.
14. See infra Part III.
15. See infra Part IV.
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appropriate in our increasingly interconnected world, and that Congress's response to its use is reactionary and unwise.16

I. TRACING THE USE OF INTERNATIONAL LAW THROUGH SUPREME COURT DECISIONS

A. Historical Use of International Law

Though some would have the public believe that using international law as persuasive authority is a novel idea to subvert the United States Constitution,17 the Supreme Court has, in fact, long used foreign law to analyze and compare the way constitutional standards are applied by the Court in the United States.18 For example, Chief Justice John Marshall, in the case commonly known as The Charming Betsy, held that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."19 Again in McCulloch v. Maryland, Chief Justice Marshall implied that "the universal assent of mankind," the same appealed to in the first paragraph of the Declaration of Independence, can be relevant to judicial considerations.20 Moreover, Justice Stephen Breyer stated the following: "Willingness to consider foreign judicial views in comparable cases is not surprising in a Nation that from its birth has given a 'decent respect to the opinions of mankind.'"21

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16. See infra CONCLUSION.
20. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776); McCulloch v. Maryland, 17 U.S. 316, 405 (1819).
Despite the Supreme Court’s continued use of foreign law, its use is manifestly rare and is marked by de minimis importance. Its use in this country attracts attention “precisely because it is so rare.” For instance, between 1990 and 2003, the United States Supreme Court cited British or Canadian decisions only 21 times. “By . . . comparison, the Canadian Supreme Court cited American decisions 230 times in the year 1990 alone.”

Though the use of foreign law as persuasive authority remains rare, recent controversial cases bring its use to the attention of lawmakers and the public. The following section explores recent controversial decisions that have contributed to the increased attention paid to federal courts’ citing international law as persuasive authority.

B. Recent Supreme Court Cases Relevant to the Foreign Law Polemic

1. Atkins v. Virginia

In Atkins v. Virginia, a mentally retarded man (IQ of 59) was sentenced to death after being convicted of abduction, armed robbery, and capital murder. He appealed his case to the Supreme Court, arguing that executing a mentally retarded person constitutes “cruel and unusual punishment” under the Eighth Amendment, and the Supreme Court reversed his sentence.

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22. Hearing, supra note 17, at 11-12 (statement of Michael J. Gerhardt, while serving as Hanson Professor of Law at William and Mary Marshall—Wythe School of Law); Law, supra note 18, at 699.
23. Law, supra note 18, at 699.
25. Id.
27. See infra Part I.B.
29. See U.S. CONST. amend. VIII; Atkins, 536 U.S. at 310-11.
In holding that executing mentally retarded criminals constitutes "cruel and unusual punishment" and is unconstitutional as a violation of the Eighth Amendment, the Court stated that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." With this analysis, the Court implied that international norms can be relevant to the evolving standard of decency. Though Chief Justice William Rehnquist, joined by Justice Scalia and Justice Thomas, dissented and failed "to see . . . how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination," Atkins stands first in the line of high-profile cases utilizing international authority.

2. Lawrence v. Texas

In the landmark case of Lawrence v. Texas, the Court, overturning Bowers v. Hardwick, held that an anti-sodomy law was unconstitutional. In so holding, the court cited a European Court of Human Rights (ECHR) decision which factually paralleled the Lawrence case. In the ECHR case, “[t]he court held that the laws proscribing the conduct were invalid,” and the Court used this as evidence that banning consensual sodomy was not a value we shared with wider civilization. Again, Justices Scalia and Thomas dissented, in part, on the grounds that including references to foreign views are “meaningless” and “[d]angerous” dicta.

30. See U.S. CONST. amend. VIII; Atkins, 536 U.S. at 321.
31. Atkins, 536 U.S. at 316.
32. See id.
33. Id. at 325.
35. Lawrence, 539 U.S. at 573.
36. Id. at 573, 576.
37. Id. at 598.
3. Republic of Austria v. Altmann

In a departure from the Supreme Court’s regard for, and use of, international law in recent cases, the Court conspicuously downplayed the relevance of foreign law in a case that may have greatly benefited from its use. In *Altmann*, an heiress of six Gustav Klimt paintings, which were confiscated by the Nazis during World War II or later expropriated by the Austrian Republic, sought their return from an Austrian museum. They had been held by the museum since the death of her uncle, who bequeathed her the paintings in his will. In holding that the plaintiff was entitled to the paintings, the Court downplayed the applicability of the “expropriation exception” of the Foreign Sovereign Immunities Act of 1976, which would have required the Court to consider whether taking the property violated international law. The Court decided the case primarily on other grounds.

Though the Court maintained its practice of rarely using international law in declining to analyze international law in *Altmann*, the case did not prevent the outcry of disapproval from some Justices within the Supreme Court after its use in the following case.

4. Roper v. Simmons

In a case that drew sharp criticism both on and off the Court, the Supreme Court held that executing a person for a crime committed as a minor is a violation of both the Eighth and Fourteenth Amendments. The Court supported this holding by noting “the stark
reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."\textsuperscript{45} Justice Kennedy wrote the following:

This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court's decision in \textit{Trop} [(1957)], the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments'.\textsuperscript{46}

Additionally, Justice Kennedy stated that "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."\textsuperscript{47}

In response to Justice Kennedy's analysis, Justice Scalia concluded 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."\textsuperscript{48} Justice Scalia's opinion further claims that some members of the Supreme Court use foreign law as authority only when it comports with their argument and ignore it in any other circumstances and, as such, its use should be disregarded as "sophistry" that has no bearing on judicial decisions.\textsuperscript{49}

Though Justice O'Connor dissented on other grounds, she countered Justice Scalia's argument against using foreign law with the idea that "this Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries," and that an international consensus can serve to confirm an American consensus, particularly in Eighth Amendment analyses.\textsuperscript{50}

\textsuperscript{45} \textit{Roper}, 543 U.S. at 575.
\textsuperscript{46} \textit{Id.} at 575.
\textsuperscript{47} \textit{Id.} at 578.
\textsuperscript{48} \textit{Id.} at 624 (Scalia, J., dissenting).
\textsuperscript{49} \textit{Id.} at 627.
\textsuperscript{50} \textit{Id.} at 605 (O'Connor, J., dissenting).
The controversy among Roper Court Justices did not remain internalized, but spread to Congress, intellectuals, and the public. 51 Two days after Roper was decided, Representative Joseph Pitts (R-PA) remarked in response to the decision that “foreign law is . . . a baneful foe of our republican government”—effectively bringing Congress and the public into the debate that was already brewing within the Court. 52

Recently confirmed Chief Justice John Roberts also joined the debate during his confirmation hearings. 53 He rebuked the Supreme Court’s decision in Roper, claiming that relying on foreign law is “a ‘misuse of precedent’ that substitutes a judge’s ‘personal preferences’ for the Constitution.” 54

The next two sections evaluate both sides of this emerging debate about the role of international law as persuasive authority in judicial decision-making.

II. ARGUMENTS FOR THE USE OF FOREIGN LAW AS PERSUASIVE AUTHORITY

A. Historical Consistency

Beginning with the text of the Declaration of Independence, which stated that there should be given a “decent respect to the opinions of mankind,” 55 the Founding Fathers of the United States recognized that for the fledgling American system to be successful, it would have to be compatible with the more time-tested foreign systems of law. 56 In fact, the early Supreme Court “envisioned that they would not

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51. See 151 Cong. Rec. H947-03 (2005) (statement of Rep. Pitts); see generally Harris, supra note 3, at 6-7 (commenting on the emerging controversy surrounding the place of foreign law in U.S. judicial decision-making).
54. Id.
55. DECLARATION OF INDEPENDENCE, para. 1 (U.S. 1776).
56. Koh, supra note 34, at 44.
merely accept, but would actively pursue, an understanding and incorporation of international law standards."^57

This idea of incorporating standards of international law is echoed in *The Charming Betsy*^58 and *McCulloch*,^59 showing the Court's attempts to harmonize American and foreign decisions. In addition to these cases, *Hilton v. Guyot* stands for the proposition that "[i]nternational law, in its widest and most comprehensive sense . . . is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination."^61

While *Hilton* explicitly incorporates international law into American jurisprudence, many international foreign law ideas were internalized without note because they were inherently transnational. For example, *lex mercatoria* incorporated the customary rules of international industries and trade into American law, and any criminalization of piracy on the seas was clearly international, though many Supreme Court decisions did not so state. This body of implicit foreign law utilized by the early courts contributes greatly to the historical use of foreign law, and often goes unnoticed.^

Because American courts integrated and noted international law both explicitly and implicitly, it would truly be a "stunning reversal of history" if courts now ceased to recognize any form of international or foreign jurisprudence. Not only would it be a stunning reversal of history, but it would also be a dangerous departure from historical consistency. Ignoring international standards today "would ensure constant frictions with the rest of the

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57. *Id.*
59. 17 U.S. 316 (1819).
60. *See supra* Part I.A.
63. *Id.* at 45, 57 n. 11.
64. *Id.* at 45.
65. *Id.*
66. *Id.*
world, [and] also would diminish . . . [the] ability to invoke those international rules that served its own national purposes."  

Further, ceasing to maintain the consistent (though admittedly rare) use of international law, as the Founders intended, would put many precedents based in full or in part on international law in jeopardy. For example, the Framers relied on precedents from classical antiquity in fashioning certain parts of the Constitution, such as separation of powers. 

Additionally, because the use of foreign law has been so consistent, although infrequent, from the inception of the American legal system, its continued use is preferable, so that stability stemming from settled precedent and the effect of stare decisis will be maintained in the courts. Cases utilizing foreign law remain the "operative legal doctrines," and if Congress were to foreclose the consideration of foreign authority in constitutional analysis through bills like the CRA, it "would pull the rug from beneath many of our core constitutional values, including the doctrines delineating many of the powers of . . . Congress."

B. Foreign Decisions Are Important Resources

In addition to maintaining historical consistency, using international law has a more practical and less abstract argument in its favor: it can be an important legal resource because many foreign nations have dealt with similar legal conundrums before the United States, and they may provide experience worth consulting.

67. Id. at 44.
68. See generally, Hearing, supra note 17, at 12 (prepared statement of Michael J. Gerhardt) (stating that both Bowers v. Hardwick and Lawrence v. Texas referenced foreign traditions).
69. Id.
70. See generally id. (stating that the Court has looked to foreign traditions and under the CRA may Justices would have been impeached in the past).
72. See O'Scannlain, supra note 24, at 1896-97.
This is an idea that Justice O'Connor, among many others, espouses. In a speech at the Southern Center for International Studies, she remarked:

I suspect that with time, we will rely increasingly on international and foreign law in resolving what now appear to be domestic issues, as we both appreciate more fully the ways in which domestic issues have international dimension, and recognize the rich resources available to us in the decision of foreign courts.

Similarly, Justice Breyer concluded that there is "enormous value in any discipline of trying to learn from the similar experience of others." The strength of Justices O'Connor and Breyer's argument is illuminated when considering the result of not maintaining the ability to take into account foreign law and experience. Because many foreign courts have addressed the same difficult issues that American courts face today, consciously denying the empirical value of foreign courts' resolutions of those issues would deprive the Court of a knowledge base that could greatly contribute to successful judicial decision-making. A wholly isolationist approach to judicial interpretation would be detrimental in a world where most cultures share common aspirations.

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73. See Setear, supra note 26, at 582; see also Koh, supra note 34, at 53 (supporting the citation of international law for the purpose of learning from other nations' experiences and applying to similar problems in the United States).
75. Koh, supra note 34, at 53 (quoting Justice Stephen Breyer, Keynote Address (Apr. 2-5, 2003), in 97 ASIL Proc. 265, 266 (2003)).
76. See O'Scannlain, supra note 24, at 1897.
77. Id. at 1896-97.
Moreover, other disciplines (including medicine, physics, and engineering) draw experience and wisdom from the international community. It would seem anomalous if law were the only discipline to decline wisdom gained in other nations. For this and other reasons, Judge Patricia Wald believes that consulting foreign decisions "not as precedent, but for knowledge" and as a useful resource is something "that should be encouraged."

C. Assists in Interpreting Modern Jurisprudential Attitudes Towards Evolving Standards of Decency

Looking to international norms to evaluate "evolving standards of decency" has been standard in Supreme Court cases addressing constitutional issues like cruel and unusual punishment, due process of law, and unreasonable searches and seizures. For example, in deciding that executing persons convicted of crimes committed as a minor was cruel and unusual punishment under the Eighth Amendment, the Roper Court recognized that the United States was, at the time, the only country in the world to officially sanction the juvenile death penalty. Likewise, in Lawrence, the Court held that restricting private sexual encounters violated due process rights, noting that many other countries similarly rejected a state’s attempt to restrict private sexual conduct in private homes. In addition, in Justice Sandra Day O’Connor’s dissent in Roper, she recognized that “[o]ver the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency.”

Because we live in an inter-connected world, using international norms to analyze cases like Roper and Lawrence is arguably

79. Id. at 439.
80. Id. at 441.
81. Id.
82. Koh, supra note 34, at 46.
85. Roper, 543 U.S. at 603 (O’Connor, J., dissenting).
necessary.86 In evaluating a community standard, such as what is unusual, it would be shortsighted to limit the analysis to the United States when so many different nations and cultures affect the United States, just as the United States affects the rest of the world).87

Because it is a Federal Constitutional issue and the United States "Constitution is not free of outside influences; nor has it ever been," the use of international norms in considering an evolving standard of decency is especially important.88 Particularly when analyzing values and ideas like the evolving standard of decency, "[f]ederal constitutional law influences, and is influenced by, other bodies of law."89

III. ARGUMENTS AGAINST THE USE OF FOREIGN LAW AS PERSUASIVE AUTHORITY

A. The Goal of an Indigenous American Legal System

Despite the arguments for using international law as persuasive authority, some scholars argue, in direct opposition, that history shows that the Founders wanted to create an indigenous American legal system.90 Refusing to incorporate other nations' laws into American jurisprudence is the express purpose of this indigenous legal system.91 Historical evidence suggests that the Framers did want to create this indigenous American legal system because of the specialized needs of a fledgling nation.92

The Framers’ reservations about using foreign law in the developing American legal system were rooted in their conception of

86. See Law, supra note 18, at 659.
87. Id. at 658-59.
88. Id. at 658.
89. Id. at 658; see also Koh, supra note 34, at 46.
91. See O'Scannlain, supra note 24, at 1900-09.
92. Id. at 1900.
federalism and their desire to break away from the European system of hierarchy. 93 James Madison's statement in The Federalist indicates evidence of these reservations: "[N]either the common nor the statute law of [England], or any other nation, ought to be a standard for the proceedings of this, unless previously made its own legislative adoption." 94 "Madison further asserted that English law 'would be . . . [an] illegitimate guide' for the United States to follow." 95

For originalists, who believe in giving the Constitution the plain meaning of its text and the meaning that the Framers intended at the time of its adoption, 96 the idea that the Framers did not want the Constitution influenced by foreign law is to be given much deference. 97 "Because men such as Madison and Jefferson believed that the United States should develop a legal system that was tailored to American conditions and that did not place significant reliance upon foreign sources of law, some proponents of originalism are wary of according weight to foreign precedent." 98 However, one of the failings of looking at the intentions of the Founders to interpret the Constitution, namely the arduous task of deciding whose intentions should be considered, is evident in this context as well; 99 some Founders intended to incorporate international law and some did not. 100 In effect, the arguments may cancel each other out. 101

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93. Wilkinson, supra note 90, at 427.
94. O'Scannlain, supra note 24, at 1904 (quoting THE FEDERALIST NO. 42 (James Madison)) (alteration in original).
95. Id. (alteration in original).
96. See generally Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. REV. 204, 204 (1980). Brest defines originalism as "the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters." Id. at 204.
97. O'Scannlain, supra note 24, at 1906.
98. Id.
99. See Brest, supra note 96, at 213-17 (articulating some of the difficulties in intentionalist interpretation).
100. See supra Part II.A.
101. See id.
B. Incompatible Values

Another point of contention between opponents and proponents of using international law as persuasive authority is whether American values are different and independent of other nations, such that international values and norms would be entirely inconsistent with those in the United States.\textsuperscript{102} Justice Scalia, an opponent of the use of international law, sided with those claiming the incompatibility of international values with American values while dissenting in \textit{Atkins}.\textsuperscript{103} He argued that the values of the world community are "irrelevant," and international "notions of justice are (thankfully) not always those of our people."\textsuperscript{104}

Justice Scalia feels that the values of the international community are irrelevant; according to Scalia, the United States does not "have the same moral and legal framework as the rest of the world."\textsuperscript{105} The differences in our moral and legal framework include differences in culture, politics, and economics.\textsuperscript{106} "For example, belief in the so-called ‘American Creed’ of liberty, equality, individualism, democracy, and the rule of law largely defines what it means to be an ‘American.’ While other societies certainly share these values, in no other country are these ideas so central to the national identity."\textsuperscript{107}

Because of these value gaps, judicial decisions should not use international values and norms.\textsuperscript{108} Some believe that values are best expressed by American legislative bodies who are accountable to the public—as opposed to federal judges who are not accountable to the public—for their value interpretations and law making.\textsuperscript{109}

\textsuperscript{104} \textit{Id.} at 347-48.
\textsuperscript{105} Justice Scalia, \textit{supra} note 102, at 5.
\textsuperscript{106} See O'Scannlain, \textit{supra} note 24, at 1906.
\textsuperscript{107} \textit{Id.} at 1907.
\textsuperscript{108} See \textit{id.}
\textsuperscript{109} \textit{Id.}
C. *Unclear When Foreign Law Should Be Cited*

Finally, another criticism of the use of international law is the inconsistency with which it is used—it is unclear when, where, and how to cite foreign authorities. Justice Scalia highlights this point in *Roper*, and claims that some use international authority only when it supports their position:

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.

In response to the Court’s decision in *Roper*, House Representative Ted Poe (R–TX) agreed with Justice Scalia and put forth the following questions to Congress: “Now it appears the Supreme Court is inconsistent on which foreign decisions they will follow and which ones they will not. Is this the law of chaos? Is this the law of arbitrary decisions?”

Supreme Court decisions have inconsistently applied foreign law, arguably using it when it helps their case and declining to use it when it does not. Thus, many claim that courts should be wary to use international authorities, and some advocate not using them at all. The problem with using international authorities arbitrarily, according to Justice Scalia, is that “it lends itself to manipulation.” A judge could potentially use law from Zimbabwe, for example, to prove whatever point she wants to make without a required reference.

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113. See *Roper*, 543 U.S. at 627; see also 151 CONG. REC. H4391 (statement of Mr. Poe).
to any other foreign authorities.\textsuperscript{116} On this point, newly confirmed Chief Justice John Roberts agrees with Justice Scalia.\textsuperscript{117} In commenting on the use of foreign law in his confirmation hearings, he stated:

\begin{quote}
[In] foreign law you can find anything you want. If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia or wherever . . . And that actually expands the discretion of the judge. It allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent . . . , and use that to determine the meaning of the Constitution.\textsuperscript{118}
\end{quote}

This potentiality can be exceptionally troublesome when addressing a social issue given the great number of various social ideals throughout the world.\textsuperscript{119} In contrast to the potential "Zimbabwe" situation or a citation of the law of any other nation, another concern is that judges may begin to practice a certain "Eurocentrism" by acknowledging European authorities while ignoring the rest of the world.\textsuperscript{120}

IV. CONGRESSIONAL RESPONSE TO THE FEDERAL JUDICIARY'S USE OF FOREIGN LAW

As a result of the recent high-profile cases citing to foreign law, the arguments being perpetuated against its use, and quite possibly Justice Scalia's aggressive dissents, a bitter congressional reaction among many Senators and Representatives of Congress arose.\textsuperscript{121} The Constitution Restoration Act of 2005 (CRA), among other similar

\begin{footnotesize}
\begin{enumerate}
\item[116.] Id.
\item[117.] Prepared Remarks of Attorney Alberto Gonzalez at the University of Chicago Law School (Nov. 9, 2005), in FED. NEWS SERV. (quoting Chief Justice John Roberts).
\item[118.] Id. (alteration in original).
\item[119.] Wilkinson, supra note 90, at 428.
\item[120.] Id.
\item[121.] See Harris, supra note 3, at 7.
\end{enumerate}
\end{footnotesize}
bills and resolutions, was introduced to address the issues of those concerned with using international law as persuasive authority and aims to restrict the judicial branch from citing to foreign authorities when interpreting the constitution. According to Judge Roy Moore, former Chief Justice of the Supreme Court of Alabama, "[the] CRA . . . protects and preserves the Constitution of the United States by restricting federal courts from recognizing the laws of foreign jurisdictions and international law as the supreme law of our land."  

A. A Legislative Overview of the CRA

On February 11th, 2004, Republican Representative Robert Aderholt of Alabama first introduced the CRA as the Constitution Restoration Act of 2004. Subsequently introduced were both a 2005 House version and a 2005 Senate version. The CRA currently has 50 co-sponsors in the House who are committed to supporting the CRA if it were to be voted on, including Representative Michael Pence (R–IN), Representative Phil Gingrey (R–GA), and Representative Charlie Norwood (R–GA). The Senate version of the CRA, introduced by Senator Richard Shelby of Alabama, currently has 9 sponsors, including Senator Trent Lott (R–MS) and Senator Richard Burr (R–NC).

Since the CRA’s Hearing before the Subcommittee on Courts, the Internet, and Intellectual Property in the House, the Senate version of the CRA was read twice and referred to the Senate Committee on the

122. See Constitution Restoration Act of 2005, H.R. 1070, 109th Cong. § 201 (2005); see also Reaffirmation of American Independence Resolution, H.R. 97, 108th Cong. (2004) ("[e]xpressing the sense that . . . judicial determinations regarding the meaning of the Constitution of the United States should not be based on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution of the United States").


126. See H.R. 1070, § 201.

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Judiciary. On June 6, 2006, Senator Shelby gave introductory remarks on the measure before the Senate. The sponsors of the CRA await further action on the bill, including debate and a vote in both the House and the Senate.

Known as a "court-stripping" provision, section 101 seeks to strip the federal judiciary of jurisdiction over any case against "an entity [including an official] of Federal, State, or local government" resulting from that element or officer's "acknowledgment of God as the sovereign source of law, liberty, or government." In short, this section denies Federal Courts jurisdiction over some of the more controversial questions involving religion.

Section 201 of the CRA seeks to restrict any federal judge, including Supreme Court Justices, from utilizing foreign authorities as binding or persuasive law, with the exception of English common law. It directs:

In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional up to the time of the adoption of the Constitution of the United States.

128. Thomas, http://thomas.loc.gov/bss/109search.html (Browse by Type "Senate Bill;" then follow link for S. 520) [hereinafter S. 520 bill tracking].
130. See S.520 bill tracking; Thomas, http://thomas.loc.gov/bss/109search.html (Browse by Type "House Resolutions;" then follow link for H.R. 1070).
132. H.R. 1070, § 101; see Hearing, supra note 17, at 1.
133. Id.
134. Id. § 201.
135. Id.
Section 301 of the CRA declares that any decision made by a federal court that relates to an issue removed from federal jurisdiction under the CRA—any case relating to the acknowledgement of God under section 101 or any case which relied in any way upon foreign authority—will cease to be binding precedent on any state court. 136

Finally, section 302 of the CRA concludes with a broad addition to the activities that constitute impeachable offenses for federal judges. 137 If any judge rules on a case relating to the acknowledgement of God or uses any kind of foreign authority in their opinion, then they have committed an impeachable offense. 138

The following section will argue that section 201 of the CRA is probably unconstitutional and certainly constitutes plain bad policy. 139

B. Disturbing Aspects of the Act

1. Unconstitutionality

The constitutionality of the CRA has been regarded as "highly questionable" for the reasons that follow. 140

   a. A Violation of the Separation of Powers Doctrine

Although the term "separation of powers" is not written expressly within the Constitution, "the United States Supreme Court has said . . . that the very structure of the Constitution, which enumerates and separates the powers of the three branches of government in Articles I, II, and III, exemplifies the concept of separation of

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136. Id. § 301.
137. Id. § 302.
139. See infra Part IV.B. Scholars have also argued that other sections, particularly section 302 of the CRA, are unconstitutional and imprudent. See Hearing, supra note 17, at 12. However, any constitutional or policy arguments for or against other sections of the CRA are beyond the scope of this Note.
140. Harris, supra note 3, at 8.
powers." Accordingly, the Supreme Court has been called on to decide whether a congressional enactment violates the separate powers guaranteed to the federal judiciary under Article III of the Constitution.

Article III, Section 1 of the United States Constitution states, in part, that "[t]he judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." The potential conflicts with this section of the Constitution begin with the oft-stated premise from Marbury v. Madison: "It is emphatically the province and duty of the judicial department to say what the law is." It follows from this premise that "[t]he power to ‘say what the law is’ necessarily encompasses the power to determine where to look for guidance in interpreting the law."

Moreover, it is not only within the judiciary’s realm to determine what the law is, but also included is the power to determine how much weight should be given to a particular authority. Section 201 of the CRA constrains judges’ ability to interpret the law by restricting what types of law may be cited as authority, and it clearly strips away the weight attached to certain types of authority by disallowing the use of foreign law. The CRA intrudes on "core" Article III functions by prohibiting federal courts from relying on authorities they deem relevant.

142. See id.
143. U.S. Const. art. III, § 1, cl. 1.
144. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
146. Id. at 11 (prepared statement of Michael J. Gerhardt).
148. See Hearing, supra note 17, at 11 (prepared statement of Michael J. Gerhardt).
b. A Violation of the Fifth Amendment Due Process Clause

Additionally, section 201 of the CRA violates substantive due process principles.149 “The Fifth Amendment Due Process Clause requires [that] every congressional enactment must have, at the very least, a legitimate objective.”150

The officially stated objective of the CRA is “to limit the jurisdiction of Federal courts in certain cases and promote federalism.”151 However, many have noted the irony of the bill’s title and have remarked on its political motivations.152 Representative Howard Berman (D-CA) commented that the CRA “is a reactionary piece of legislation, [and] [i]t is borne out of an attempt to politicize recent decisions of the supreme court [sic] and lower Federal courts.”153 Moreover, other commentators believe that section 201 of the CRA stems from simple frustration with some of the recent decisions of the Supreme Court.154

Because recent decisions citing to foreign authorities have frustrated members of congress and the public (Roper or Lawrence, for example), the bill seeks to deprive the Court of the ability to utilize foreign law to prevent what some see as misguided decisions.155 However, “[n]either mistrust of the federal judiciary nor hostility to particular substantive judicial decisions (or to particular rights)” qualify as a legitimate objective to congressionally regulate the form, content, or outcome of judicial decisions.156

Because the objective of section 201 of the CRA stems from political motivations relating to judicial decisions with which the supporters of the CRA simply disagree, there is not a legitimate

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149. See id. at 130 (supplemental prepared statement of Michael J. Gerhardt).
150. Id.
151. See H.R. 1070, § 201.
153. Id.
154. Id. at 130 (supplemental prepared statement of Michael J. Gerhardt).
155. See H.R. 1070, § 201.
156. Hearing, supra note 17, at 13 (prepared statement of Michael J. Gerhardt).
objective for the legislation. Consequently, the CRA violates the Fifth Amendment Due Process Clause.

Notwithstanding the constitutional problems section 201 faces, public policy warrants even greater criticism of the bill. The next section argues that section 201, if enacted, has negative policy implications for the judicial community and beyond.

2. Contrary to Policy Considerations
   
   a. Goal of an Independent Judiciary

   In addition to ignoring history, denying judges the use of helpful parallel resources, and limiting the analysis of evolving standards of decency, other policy considerations warrant the rejection of section 201. First, the adoption of this section is contrary to the goal of an independent judiciary.

   The Framers thought it essential to have an independent judiciary. That independence has been cultivated and fostered from the date Article III courts came into existence. Section 201 seeks to impair the independence of the federal judiciary by dictating to the courts what they may and may not rely on when making judicial decisions. Indeed, the CRA makes it an impeachable offense for any judge to rely on an authority prohibited by section 201. Moreover, “[j]udicial independence means nothing if it does not allow for judges and justices to decide for themselves how to prioritize the sources on which they rely in deciding constitutional cases.”

157. Id.
158. Id.
159. See supra Part IV.B.1; see infra Part IV.B.2.
160. See infra Part IV.B.2.
161. See supra Part II.
163. Id. at 14-15.
164. Id.
165. Id.; see H.R. 1070, 109th Cong. § 201 (2005).
166. See H.R. 1070, § 302.
167. Hearing, supra note 17, at 129 (prepared supplemental statement of Michael J. Gerhardt).
In limiting what sources a judge can rely on at the risk of impeachment, Congress is not only dictating what authorities are permissible, but is, in effect, attempting to dictate outcomes.\textsuperscript{168} This flies in the face of an independent judiciary and, as such, was a result the Framers sought to avoid.\textsuperscript{169} For the checks and balances of our government to remain effective, an independent judiciary is essential, and the CRA puts those imperative checks and balances at risk through the degradation of the independent judiciary.\textsuperscript{170}

\textit{b. Negative Message to the Public and the World Community}

In addition, the adoption of the CRA and, in particular, section 201, would send a negative message to the public and to the world community about the efficacy of the United States’ federal courts.\textsuperscript{171} As the proposal of the CRA indicates, there is already a growing hostility towards the federal courts, despite their important functions, including upholding constitutional rights and federal law.\textsuperscript{172} The adoption of the CRA would legislatively validate that hostility and would send the wrong message to the public and people around the world: “If a branch of our government demonstrates a lack of respect for federal courts, our citizens and citizens in other countries may have a hard time figuring out why they should do otherwise.”\textsuperscript{173} Stated differently, others could pick up on Congress’ disrespect for Article III courts, which could lead not only to more damage between

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\textsuperscript{168} See Hearing, supra note 17, at 15 (statement of Arthur D. Hellman).
\textsuperscript{169} See \textit{The Federalist No. 78} (Alexander Hamilton).
\textsuperscript{170} See Hearing, supra note 17, at 15 (statement of Arthur D. Hellman).
\textsuperscript{171} Id. at 14 (prepared statement of Michael J. Gerhardt).
\textsuperscript{172} Id.
\textsuperscript{173} Id.
\end{flushleft}
the judiciary and Congress, but also to decreased stability within the federal courts.\(^{174}\)

The role of federal courts is an important one in this nation, and not one that should be lightly undermined by reactionary legislation.\(^{175}\)

**CONCLUSION**

Aside from arguments against the use of comparative references in judicial decisions, precedent and practicality stand behind their continued relevancy in today’s judiciary.\(^{176}\) Though some historical evidence shows that the Framers desired the creation of an indigenous American legal system, that argument does not carry much weight for non-originalists, and in the face of a culturally and economically globalized world (with little evidence of globalization discontinuing or contracting), the ideas of the Framers concerning sources of law in the very localized early colonies become more distant.\(^{177}\)

Moreover, although concerns about some foreign values being incompatible with our own are well-founded, denying judges the opportunity to make choices regarding which values are compatible and which ones are not shows little confidence in a federal judiciary that makes determinations every day just as, if not more, significant.\(^{178}\) This same argument follows for concerns regarding when, where, and how federal judges should cite foreign authorities while interpreting the Constitution.\(^{179}\) Confidence in federal judges should help to allay these concerns, and it is also helpful to remember that judges pick and choose certain American persuasive authorities to support their cases without note.\(^{180}\) With that in mind, who is to

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175. See generally *id. at 127* (prepared supplemental statement of Michael J. Gerhardt).
176. *See supra* Part II.
177. *See supra* Part III.A.
178. Wald, *supra* note 78, at 441.
179. *Id.*
180. *Id.* at 438-42.
doubt the judiciary’s capacity to determine when and where to apply other non-American persuasive authorities?\textsuperscript{181}

Finally, although foreign law has always been used sparingly in federal decisions, globalization and interdependency today create an even stronger demand for foreign references.\textsuperscript{182} This makes legislation like the CRA more dangerous, in addition to the constitutional and policy concerns.\textsuperscript{183} The CRA and similar legislative proposals, when the benefits of the use of foreign law of law as persuasive authority are kept in mind, unnecessarily restrict the judiciary from using, validating and illuminating international authority.\textsuperscript{184} Even opponents of the use of foreign law in interpreting the Constitution—Attorney General Alberto Gonzalez for example—typically concede that foreign law may be necessary in limited circumstances, and that bills like the CRA may unnecessarily restrict judicial decision making.\textsuperscript{185} Keeping this type of reactionary legislation off the books is vitally important in today’s increasingly interconnected world.\textsuperscript{186}

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\textsuperscript{181} Id.
\textsuperscript{182} See generally Harris, supra note 3.
\textsuperscript{183} See supra Part IV.B.
\textsuperscript{184} See supra Part IV.
\textsuperscript{185} Prepared Remarks of Att’y Gen. Alberto Gonzalez at the University of Chicago Law School (Nov. 9, 2005), in \textit{Fed. News Serv.} “Finally, I agree that foreign law has a role to play in the interpretation of the Constitution, but I think it is a limited one.” Id.
\textsuperscript{186} See supra Part IV.B.2.