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Usage of Foreign Law in the Expansion of Human Rights Protection in the US Supreme Court Case Law

Abstract: *This paper seeks to shed further light on the issue of citing and referring to foreign law in the United States Supreme Court, especially in cases surrounding the expansion of human and constitutional rights. Therefore, the author introduces the reader to the origins and most important features of the human rights system in the American constitutional and legal system. Likewise, he points to the issue of conflicts between different kinds of methods of constitutional interpretation, a debate especially controversial and difficult in American constitutional adjudication. Likewise, the author looks back to the issue of relationship between the American domestic legal system and international law, as a part of the controversy surrounding this debate. Last part of the article is dedicated to examining most important cases in this domain, which are mostly with regard to the VIII and XIV Amendments of the US Constitution.*

Keywords: *Supreme Court of the United States of America, Foreign Law, Human Rights, Fundamental Rights, Constitutional Interpretation, VIII Amendment, Death Penalty, XIV Amendment, LGBT Rights, International Law, Comparative Constitutional Law, Constitutional Fertilisation*

> "We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and of our property under the Constitution…"
>
> Charles Evans Hughes

Introduction

With the end of the Cold War a great number of countries started the process of democratization and constitutionalization, as a means of establishing the rule of law, good governance and protection of citizens' rights and freedoms. In this situation, many new constitutions came to

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life.[2] They were modeled after various prototypes.[3] With this proliferation of new constitutions and the intensification of the dialogue between the judicial branches in various countries, given their role as the interpreters of the law and safeguards of civil rights and liberties, there came also a process of "constitutional fertilization". This process boiled down to alignment of constitutional norms which occurred not only with regard to structural characteristics of constitutional and political systems, but implied moreover the convergence of aspects of human rights protection, establishment of rule of law and the requirements of legitimacy and legality of the government. This kind of constitutional convergence was not only horizontal, in that some key constitutional corner stones existed in different constitutional systems (e.g. fundamental rights, democracy, separation of powers, etc.), but also there was a need of establishing vertical convergence. This meant that some principles were regarded so highly that they were elevated to the pedestal of international legal and customary standards. This phenomenon indicated also the trend of referring to international law and foreign constitutions and constitutional doctrines in domestic constitutional interpretation.[4]

These processes triggered a debate on the legality and legitimacy of usage of foreign law and foreign court decisions and precedents by domestic courts.[5] This debate is, in my view, most interesting, most fruitful, most exciting, but also most controversial in the United States of America and in the United States Supreme Court. The debate on the use of foreign law in the US can be followed not only in the academia, but also among the members of both Houses of Congress,[6] among the judges in various federal and state courts[7] and

2 Mark Tushnet, Thomas Fleiner, and Cheryl Saunders, eds., *Routledge Handbook of Constitutional Law* (New York: Routledge, 2013), 55.

3 Vučina Vasović, *Savremene demokratije* [Contemporary Democracies], vol. 1 (Beograd: Službeni glasnik, 2008), 137, 307, 432.

4 Tushnet, Fleiner, and Saunders, *Routledge Handbook of Constitutional Law*, 56.

5 Recently Justice Ruth Bader Ginsburg of the US Supreme Court said in an interview with regard to the drafting of a new Egyptian constitution that, if she was creating a constitution in the year 2012, she would not look to the US Constitution, but rather to the South African counterpart. Fox News, "Ginsburg to Egyptians: I wouldn't use the U.S. Constitution as a model," February 06, 2012, http://www.foxnews.com/politics/2012/02/06/ginsburg-to-egyptians-wouldnt-use-us-constitution-as-model/. South African Constitution is a prime example of the influence of the idea of constitutional fertilization, as it prescribes in Article 39 that "when interpreting the Bill of Rights, a court, tribunal or forum […] must consider international law, and may consider foreign law". See *Constitution of the Republic of South Africa*, Article 39, http://www.gov.za/documents/constitution/chapter-2-bill-rights#39.

6 Carla M. Zoethout, "The Dilemma of Constitutional Comparativism," *Heidelberg Journal of International Law* 71 (2011): 791.

7 Paras D. Bhayani, "Profs Debate Foreign Law," *The Harvard Crimson*, November 18, 2005, http://www.thecrimson.com/article/2005/11/18/profs-debate-foreign-law-judge-richard/.

even among the Justices on the Supreme Court.[8] The controversy of this issue is so great, that in the last few years a number of states have pushed to enact legislation which would proscribe judges from turning to foreign law in their interpretation and application of state law.[9]

The phenomenon of citing and referring to international and foreign law in not new in the Supreme Court's jurisprudence. Actually, international law (or, more precisely, confirmed international law, i.e. international treaties that the United States has signed and ratified) presents a source of law according to the Constitution, alongside the Constitution and the laws made in the pursuance of the Constitution.[10] Therefore, when it came to interpreting treaties or settling business or commercial disputes that contained an international element, the enterprise of looking to law outside of the US was never particularly controversial.[11] However, due to the complex constitutional structure of the US Constitution and the unique features of this legal document, problems started occurring. Namely, because of the shortness and generalness of this Constitution's provisions and because of the absence of instructions for the correct way of interpreting the Constitution, there is a tension between various Justices on the Court with regard to the method of interpreting the Constitution, especially its human rights provisions, such as the ones contained in the VIII and XIV Amendments. Since there is a staggering opposition between these methods of interpretation with regard to what sources of law can be used in adjudicating, the debate on the use of foreign and international law fits into this conflict neatly, to the point of some scholars arguing that the issue of using foreign law in constitutional adjudication is actually nothing more and nothing less than the debate on interpretation taking new cloth.[12]

Nevertheless, this issue continues to be persistently in the spot of attention not just of legal scholars, but also of ordinary people, mostly because it is usually connected to sensitive social issues, such as LGBT rights and the death penalty, the domains of human rights protection where, arguably, the United States is mostly falling behind other developed liberal democracies

8 Free Republic, "Constitutional Relevance of Foreign Court Decisions," Scalia–Breyer debate on foreign law, February 2, 2005, http://www.freerepublic.com/focus/news/1352357/posts.

9 Liz Farmer, "Alabama is the Latest State to try to Ban Foreign Law in Courts," *Governing*, August 29, 2014, http://www.governing.com/topics/politics/gov-is-alabamas-proposed-foreign-law-ban-anti-muslim.html.

10 *Constitution of the United States of America*, Article 6, https://www.law.cornell.edu/constitution/articlevi.

11 Jeffrey Toobin, "Swing Shift. How Anthony Kennedy's passion for foreign law could change the Supreme Court," *The New Yorker. Annals of Law*, September 12, 2005, http://www.newyorker.com/magazine/2005/09/12/swing-shift.

12 C-Span, "International Law on the U.S. Supreme Court," video clip, 01:14:36, February 21, 2006, http://www.c-span.org/video/?191294-4/international-law-us-supreme-court.

of the world. Likewise, on the issue of the legal status of such references in constitutional interpretation, no matter the method of interpretation applied, Justices are unanimous in confirming that foreign law is not in any way authoritative, nor dispositive to the Court. Regardless of this, it can be argued that foreign law is often crucial to the Court's formulation of its opinion on the constitutionality of a certain practice. These kinds of judgments, through the doctrine of precedent, become in time settled case law and binding law *erga omnes* and become cited and reflected in subsequent judgments involving the same or similar issues raised before the Supreme Court.

Human Rights in the Constitution and the Bill of Rights of the United States

In understanding the significance of human rights, as one of the pillars of the American political and constitutional system and the American political culture, it is important and necessary to go all the way back to the foundation of the United States and re-examine the place and role of human rights in the drafting and the structure of the Constitution of the United States.

Development of human rights, understood in their modern meaning, is connected with their confirmation in legislative and state acts that were drafted during the American and French Revolutions at the end of the XVIII century. As early as 1620, therefore a century and a half before the start of the American Revolutionary War, the process of accepting and acknowledging human equality and human dignity started with the Mayflower Compact, an agreement between the settlers in New Plymouth that arrived to America from England.[13] The Mayflower Compact introduced the idea of the necessity of "just and equal laws, ordinances, acts, constitutions and officers".[14]

The first colony formed in the northern part of the American continent was Virginia in 1607. Exactly this colony was the place of adoption of the first charter of human rights, even before the Declaration of Independence. Its principal author was James Mason and it was written only a month before the American Declaration of Independence, which in turn was authored by another Virginian: Thomas Jefferson. The Virginian Declaration of Rights proclaims in Section 1 "That all men are by nature equally free and independent and have certain inherent rights […] enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety".[15] Likewise, it affirms the idea that by entering

13 Thomas Fleiner and Lidija Basta Fleiner, *Constitutional Government in a Multicultural and Globalized World*, 147, http://www.thomasfleiner.ch/files/categories/Lehrstuhl/Constitutional_democracy.pdf.

14 "The Mayflower Compact," http://mayflowerhistory.com/mayflower-compact/.

15 *The Virginia Declaration of Rights*, http://www.constitution.org/bcp/virg_dor.htm.

into the society, individuals do not lose their rights and privileges. On the contrary, governments draw their power and sovereignty from the people. The Declaration of Independence, which was adopted by the Second Continental Congress in Philadelphia on the 4th of July 1776, contained similar ideas. As was the case with the Declaration of Rights, the Declaration of Independence was also under a great influence of Locke's ideas of natural law and social contract. One of the authors of this document, Thomas Jefferson, proclaimed that "all men are created equal" and that "they are endowed by their Creator with certain unalienable Rights that among these are Life, Liberty and the pursuit of Happiness".[16] Furthermore, ideas of national sovereignty and that powers of the state are derived from the people, could be seen in the following sentence: "to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed […] whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government".[17] Here, the influences of theories of national sovereignty of Rousseau and his Social Contract can be detected.

After the victory of the revolutionary American army and the securing of independence through the Versailles Treaty of 1783, the former American colonies were faced with the problem of constructing new government and regulating their respective relations. The first constitution – The Articles of Confederation and Perpetual Union – did not meet the expectations and demands of the revolutionary generation. Therefore, a Constitutional Convention (or, as it was called, the Federal Convention) was convened with the aim of amending The Articles. However, the Convention went beyond its mandate and drafted a completely new document – the Constitution of the United States of America. There was considerable criticism with regard to the fact that this document did not contain a bill of rights, i.e. a document outlining the most important human rights and freedoms and mechanisms for their protection. Even though the Constitution did not originally contain a bill of rights, there were provisions that guaranteed certain rights: Article 1 (Section 9) sets forth guarantees of *habeas corpus* and prohibitions of bills of attainder and of *ex post facto* laws.[18] The main reason for omitting human

16 *Declaration of Independence*, http://www.archives.gov/exhibits/charters/declaration_transcript.html.

17 Ibid.

18 Benjamin Ginsberg et al., *We the People: An Introduction to American Politics* (New York: W.W. Norton & Company, Inc, 2013), 115. "Bill of attainder": A legislative act that singles out an individual or group for punishment without a trial, see http://www.techlawjournal.com/glossary/legal/attainder.htm. *Ex post facto* laws: Latin "from a thing done afterward", most typically used to refer to a criminal law that applies retroactively, thereby criminalizing conduct that was legal when originally performed, see http://www.law.cornell.edu/wex/ex_post_facto.

rights is that at the time most states had already adopted a bill of rights or a similar document protecting individuals' rights. Moreover, as the powers of the federal government were limited and explicitly enumerated, a federal bill of rights was seen as unnecessary.[19] However, as the process of ratification was prolonged and faced with troubles, the first Congress decided to adopt a set of amendments to the Constitution acting as limits to the national government and securing people's liberties. These first ten amendments were called the Bill of Rights. These amendments were first imposed only on the activities of the federal government. However, in time, and through the XIV Amendment which was adopted during the American Civil War, the Supreme Court slowly extended the Bill of Rights on the states and their activities.[20]

The power of protecting these rights, and of interpreting the Constitution as a whole, was (implicitly) given to one of the three main institutions set up by this document – the Supreme Court. Even though the power of constitutional review (i.e. the power of determining the constitutionality of legislation and to being able to declare them void if they are not in compliance with the higher legal act) was not provided by the Constitution, but was created through a precedent (*Marbury v. Madison*, 1803), nonetheless it was accepted and acknowledged that the Supreme Court has the final word on what the Constitution says.[21] With this regard the Supreme Court became a distinctive feature of the American justice system, clearly breaking ties with the English tradition of parliamentary sovereignty. Likewise, it was different compared to the continental systems of constitutional review, such as the one created in Austria in the 1920s, which was based on Kelsen's idea on hierarchy of norms, and also the French system where the *Conseil Constitutionnel* gives preliminary rulings on the constitutionality of promulgated laws.[22] In time, the Supreme Court used its powers to expand and protect individuals' rights and freedoms: from slavery, through women's and workers' right; to segregation, through engaging political issues, controversies and disputes by transforming them into legal and judicial questions.[23] In attempting to achieve this, the Supreme Court often had to deploy new techniques in providing wider and more substantial human rights protection.

19 Kenneth Janda, Jeffrey M. Berry, and Jerry Goldman, T*he Challenge of Democracy: American Government in the Globalized World* (Boston: Wadsworth Cengage Learning, 2013), 487.

20 Ibid.

21 Donald A. Ritchie, *Our Constitution*, 37, http://www.annenbergclassroom.org/Files/Documents/Books/Our%20Constitution/COMPLETED_Our%20Constitution.pdf.

22 Tushnet, Fleiner, and Saunders, *Routledge Handbook of Constitutional Law*, 48.

23 Kermit L. Hall and John Patrick, *Pursuit of Justice*, 8, http://www.annenbergclassroom.org/Files/Documents/Books/The%20Pursuit%20of%20Justice/Pursuit_of_Justice.pdf.

Methods of Interpreting the US Constitution

The next big step in observing the complexity of the issue of constitutionality and relevance of referring to foreign law by American courts is the fact that divergent systems and theories of interpreting the United States Constitution exist. They offer different sets of rules on how a judge should go about deciding what the law means (or, in fact, what it ought to mean). Moreover, there is a belief among some scholars that the conflict on the issue of the right method of constitutional interpretation actually encapsulates the debate on the usage of foreign law and that the latter is somewhat a proxy for the former, an echo of the "war" between Justices on the Supreme Court regarding the opposite methods of construction.[24] In other words, the debate on foreign law is actually an annex to the more fundamental debate revolving around the issue of constitutional interpretation and adjudication.[25]

Having in mind the debates conducted between Justices Scalia and Breyer, as the two most prominent figures of the liberal and conservative currents within the Supreme Court, one would argue that the willingness of a Supreme Court Justice to refer to foreign law depends on their ideological background and political (or even party) affiliation. In the bottom line this means that Justices appointed by Democrats will be more inclined to take a look at a foreign constitution, statute or court decision, as they are often represented as liberal judges trying to expand the constitution both in terms of federal government's competences and powers and in terms of civil rights protection. On the other hand, Justices appointed by conservative presidents, i.e. presidents from the Republican Party, will welcome narrower and more conservative, or even original, interpretation of constitutional provisions. Accordingly, through this kind of method of interpretation they would fulfill goals on the other side of the ideological spectrum-limited government, states' powers and civil rights and freedoms restricted mostly to "negative rights" that persons have against the government. However, this kind of thinking is, in my view, incorrect. It seems as though it is self-evident that in the most prominent judgments that contained foreign law citations, proponents of this kind of practice came from both sides of the "ideological spectrum". Conservative appointees, such as Justices Anthony Kennedy and Sandra Day O'Connor, both appointed by Ronald Reagan, and liberal Justices, such as Stephen Breyer and John Paul Stevens, have cited and referred to foreign law in their opinions and outlined advantages that could come out of a practice like this.[26]

24 C-Span, "International Law on the U.S. Supreme Court".

25 Ibid.

26 WND, "O'Connor: US must rely on Foreign Law," October 31, 2003, http://www.wnd.com/2003/10/21551/; Robert J. Delahunty and John Yoo, "Against Foreign Law," *Harvard Journal of Law and Public Policy* 29, no. 1 (Fall 2005): 291–292.

The real divide between the Justices on the subject of using foreign law is built on the ground of the differences in methods of constitutional interpretation. The issue of constitutional interpretation is even more important and sensitive in American constitutional law as there are great specifics of the US Constitution. It is clear that the US Constitution is the oldest constitution in the world that is still enforced. But, this document is also one of the shortest constitutions in the world, as it contains only seven articles with an addition of twenty seven amendments adopted in the span of a little over two centuries. Because of its shortness and, in many aspects, generalness, over time distinctively different methods, forms and theories of constitutional interpretation have been developed by the courts.[27] Keeping in mind that constitutional interpretation is not the main subject of this paper, the discussion on this topic should remain short. Therefore, out of many ways the US Constitution could be interpreted, we can sum them up into two broad categories: "textualism" (especially its sub-category "originalism") and the theory of an expanding constitution – the "living (evolving) constitution", often referred to as "non-originalism".

The problem with choosing a method of construing the US Constitution stems out of the fact that the framers of the Constitution did not specify, neither in the constitutional provisions nor in their writings, what the right way of understanding the constitutional document should be.[28] At the Constitutional Convention there was not much discussion about the federal judicial branch and the only substantive reference to the power of constitutional interpretation can be found in *Federalist* 78, where Hamilton endorsed the idea of the Supreme Court as a final arbiter of constitutionality.[29] Likewise, Article 6 of the Constitution enumerates, in general and wider terms, the sources of American constitutional law: the Constitution, the laws made in pursuance of the Constitution and the treaties made under the authority of the US.[30]

However, despite all of this, the question of interpretation remains: should the courts, when adjudicating cases, look only at the text and the structure of the Constitution, should they keep in mind the intent behind those words, should this intent be objectively or subjectively interpreted, or should the judges go further and adapt constitutional principles (such as the due process clause, the equal protection clause, commerce clause, etc.) to new

27 Miodrag Jovičić, *Ustavni i Politički Sistemi* [Constitutional and Political Systems] (Beograd: Službeni Glasnik, 2006), 81–82, 114.

28 William Bianco and David Canon, *American Politics Today* (New York: W.W. Norton&Company, 2013), 358.

29 Ibid., 358–359; Štefica Deren-Antoljak, *Politički Sistem Sjedinjenih Američkih Država* [Political System of the United States of America] (Zagreb: Biblioteka "Politička Misao", 1983), 545–546.

30 *Constitution of the United States of America*, Article 6.

social, political and ethical norms. This is, put it in a really simple manner, the main question to which originalists and non-originalists give different answers. These different answers are, in fact, the result of the different sources of constitutional interpretation originalists and non-originalists use. Out of the six main sources of interpretation (text, history, tradition, precedents, purpose and consequence), originalists would constrain themselves to using the first four tools, while the non-originalists would want to give judgments based on understanding what the consequences of alternative interpretations would be, and what the purpose of various legal norms is.[31]

Originalism

As far as applying the Constitution and determining its meaning is concerned, the originalists, as Judge Bork argues, look at the Constitution as any other legal act in the sense that its meaning is the meaning the lawmakers intended it to have in the time of its adoption. This means that the Constitution and its original meaning bind courts and the legislators. Subsequently, courts may not, in their application of the Constitution, create new constitutional rights, nor undermine or encroach those already existing ones.[32] Thus, originalists point out that, through this kind of method of interpretation, democracy is safeguarded, since the discretion of the courts is severely limited, if not fully eliminated, and the only way of changing the Constitution is through amendments that are adopted by democratically elected legislators.[33] In this way sovereignty remains in the hands of the American people and not in unelected members of the judiciary.[34] There is no doubt what the originalists would have to say on the possibility of referring, citing or even applying foreign law and foreign court decisions by the Supreme Court and other judicial bodies in the United States. Article VI, Section 2 of the Constitution explicitly sets forth the following:

31 The Federalist Society, "A Conversation on the Constitution with Supreme Court Justices Stephen Breyer and Antonin Scalia," audio clip, 1:35:56, December 5, 2006, http://www.fed-soc.org/multimedia/detail/a-conversation-on-the-constitution-with-supreme-court-justices-stephen-breyer-and-antonin-scalia-event-audio.

32 UMKC School of Law, "Robert Bork Making the Case for Originalism," http://law2.umkc.edu/faculty/projects/ftrials/conlaw/interp.html.

33 Originalism, or the jurisprudence of initial intent, is closely related to the idea of democracy, as it confines the role of the judges not in creating new law, but in revealing the initial, true intent of the legitimate creators of law. Thus, true principles of governance, not blurred by any ideological prejudice, could be fortified. Dragoljub Popović, *Postanak Evropskog prava ljudskih prava* [The Emergence of the European Human Rights Law] (Beograd: Službeni glasnik, 2013), 30.

34 "Originalism and the Living Constitution (excerpted from *The Myth of Judicial Activism by Kermit Roosevelt III*)," https://d396qusza40orc.cloudfront.net/constitution/Excerpt%2C%20Myth%20of%20Judicial%20Activism%20.pdf.

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding".[35]

According to the originalists, this means that the cases brought before the Supreme Court should be adjudicated in such a manner that only the Constitution and the adequate laws should be treated as sources of constitutional adjudication. Because of this, one can see that the originalism is prescriptive in its nature, since its objective is to eradicate judicial activism from courts, as the only task of the judge should be to interpret the legal norm, and not to create new ones.[36] There is no place for foreign practice. Moreover, international human rights norms, the originalists conclude, have no importance in American constitutional law. This is why Scalia stated in the judgment *Printz v. United States* that the determination of the meaning of constitutional provisions cannot by any means be done through comparative constitutional analysis.[37] Similarly, originalists raise the question of real reasons for referring to foreign law. Justice Clarence Thomas, another originalist on the Court, claims that Justices turn to foreign law only because they cannot find support for their claims in their own jurisprudence.[38] Chief John Roberts also points to the issue of selectivity, as Justices, when turning to foreign law, can find whatever they 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 […] looking at foreign law for support is like looking out over a crowd and picking out your friends."[39]

Justice Scalia also argues that the framers would be appalled if they knew that the Supreme Court is, in its decisions, citing foreign law and court decisions. In this line of thought, he refers to James Madison[40] who,

35 *Constitution of the United States of America*, Article 6.

36 Popović, *Postanak Evropskog prava ljudskih prava*, 29–31.

37 Rebecca Lefler, "A Comparison of Comparison: Use of Foreign Case Law as Persuasive Authority by the United States Supreme Court, the Supreme Court of Canada, and the High Court of Australia," *Southern California Interdisciplinary Law Journal* 11, no. 1 (Winter 2001): 169.

38 Ibid, 170.

39 Robert Barnes, "Breyer says Understanding Foreign Law is Crucial to Supreme Court's Work," *Washington Post*, September 12, 2015, https://www.washingtonpost.com/politics/courts_law/breyer-says-understanding-foreign-law-is-critical-to-supreme-courts-work/2015/09/12/36a38212-57e9-11e5-8bb1-b488d231bba2_story.html.

40 C-Span, "Constitutional Relevance of Foreign Court Decisions," video clip, 01:44:07, January 30, 2005, http://www.c-span.org/video/?185122-1/constitutional-relevance-foreign-court-decisions.

in *Federalist* 46, mentions "several European kingdoms" where "governments are afraid to trust the people with arms".[41] In order to prove the irrelevance of using foreign law in its entirety, he argued that the use of foreign law is not even consistent with the concept of the "living (evolving) constitution". He states that the American society and societies in the rest of the world do not have the same legal or moral framework – what can be accepted in Europe to be just, fair or desirable is maybe not viewed as such in America. Even if one accepts the notion that the ever changing views in society influence the changes in how we interpret the Constitution and the statutes, the social views and norms of other countries and civilization is not important.[42] In other words, the United States and the rest of the world, Europe including, do have completely different constitutional experiences.[43] Because of this he justifies what was done in *Coker v. Georgia*, when Justices looked into the changing moral perception in the American society on whether the death penalty is an acceptable punishment for the crime of rape, even though he does not support the conclusion reached by the Justices writing the plurality opinion.[44] Similarly, arguing from the standpoint of a strict originalist, he rejects judgments that were reached in *Roper v. Simons* and *Roe v. Wade*. In the former, where the Court banned the execution of persons who were minors at the time when the crime was committed, Scalia points to the fact that the execution of minors was constitutional when the VIII Amendment (which prohibits "cruel and unusual punishment") was adopted. Likewise, in the latter case, where

41 James Madison, "The Influence of the State and Federal Governments Compared," *Federalist Papers* no. 46, http://thomas.loc.gov/home/histdox/fed_46.html. Likewise, as originalist would want to quote, Madison stressed the difference between Europe and the newly founded American nation when saying that "In Europe, charters of liberty have been granted by power; America has set the example […] of charters of power granted by liberty" – see Steve Simpson, "A Charter of Power granted by Liberty," *Ayn Rand Institute Blog,* September 17, 2014, https://ari.aynrand.org/blog/2014/09/17/a-charter-of-power-granted-by-liberty. This notion is somewhat agreed upon in comparative constitutional law, since it is argued that, unlike the European perspective according to which the constitution is first to create and facilitate power and then to limit it, the American model presumes that the aim of the constitution is to restrict state power. Fleiner and Basta Fleiner, *Constitutional Government in a Multicultural and Globalized World*, p. 362.

42 Especially influential is the idea of American exceptionalism, popular not only in academia, but also in the general public, according to which there is a particular kind of an American creed and ideology which are enshrined in the Constitution, the Bill of Rights and the Declaration of Independence. Therefore, the battles over what goes in and out of the Constitution and what the Constitution really says are actually battles to define America's creed and mission. American constitutionalism is, in this respect, seen as a kind of a secular religion. Steven G. Calabresi, "'A Shining City on a Hill': American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law," *Boston University Law Review* 86, no. 5 (December 2006): 1335.

43 C-Span, "International Law on the U.S. Supreme Court".

44 C-Span, "Constitutional Relevance of Foreign Court Decisions".

the Justices declared a ban of abortion unconstitutional, he reasons that the XIV Amendment, upon which this judgment was reached, never prohibited defining abortion as a criminal act in the states' respective criminal codes.[45]

In the end, Scalia refers to the famous line from the *Trop v. Dulles* judgment, which was later on reiterated in many other judgments dealing with social issues and the death penalty: "Evolving standards of decency that mark the progress of a maturing society". Having in mind this statement, Justice Scalia amusingly indicated that the development of societies is not always a straight forward line going upwards, but those societies can also devolve or even rot.[46]

Non-originalists (The "Living (Evolving) Constitution")

The non-originalist view is much more diverse, as there is a significant difference between Judges and Justices on the issue what additional legal, political, social or doctrinal norms and values should be used in the process of constitutional interpretation. However, we could sum up the non-originalist view in a few points. One of the most prominent proponents of the "living Constitution" concept outside of the Supreme Court is Judge Richard Posner. In his book "Overcoming Law" he argues that the Constitution contains both general and specific provisions. As far as specific provisions are concerned, some of them have stood the test of time, some have been adapted to new social demands (e.g. the Sixth Amendment and the assistance of a counsel in a criminal prosecution), while some have been discarded.[47] On the other hand, general provisions have variously been interpreted in accordance with the political and social understandings of the time, e.g. the due process clause, equal protection clause, establishment clause, etc. If we would accept this kind of a interpretational scheme, there is a lot of room for various sources that could help the courts in reaching decisions in protecting constitutional rights that maybe had not existed in the time of the Federal Convention of 1787, but have developed as social and ethical norms and values over time and deserve to be legally formed.[48] One of the helpful tools in doing this is referring to foreign law and foreign court decisions. On the Supreme Court there are many proponents of looking to foreign sources. Even though these Justices themselves claim that foreign law cannot be in anyway controlling

45 Ritchie, *Our Constitution*, p. 42.

46 C-Span, "Constitutional Relevance of Foreign Court Decisions".

47 Richard Posner, *Overcoming Law* (Boston: Harvard University Press, 1995), 233.

48 According to Justice Kennedy, apart from the Constitution with a capital "C", there is also a constitution with a small "c"- the sum of customs and mores of the community, evolving standards of society, which the courts are also obliged to consider in their adjudication. The closer the two constitutions are, the better. See Toobin, "Swing Shift".

or authoritative for the Supreme Court, they gladly refer to it. Justice Ruth Bader Ginsburg and her views on this topic have already been mentioned.[49] Apart from her, Justice Sandra Day O'Connor, now retired from the Court, has also voiced her support for using foreign law in adjudicating cases.[50] Anthony Kennedy, the author of majority opinions in *Lawrence v. Texas* and *Atkins v. Virginia*, referred to foreign law and foreign court decisions, especially those from Europe. Support does not only come from members of the Supreme Court that were appointed in the last few decades, but can be traced much earlier. Scholars often point their finger at the first sentence of the Declaration of Independence, where it is written that a "decent respect to the opinions of mankind"[51] is important. And, just like Justice Scalia in his case against citing foreign law, proponents of this kind of practice can likewise point to *Federalist* no. 63, where is said that "an attention to the judgment of other nations is important to every government".[52] Justice Breyer has also been an avid supporter of such a practice, and since he has been most prominent in various public debates and speeches, his views on the subject will be outlined in more detail.

In his debate with Justice Scalia, Justice Breyer states few arguments in favor of considering foreign law by the courts. First, he points out there are more and more people in the world who, as appointed judges, deal with legal concepts and cases much similar to those from the United States. Justice Breyer starts off from the basic premise of the theory of the evolving Constitution by saying that the Constitution is not something that was handed down, but that it represents a complex democratic interactive process. This means that the Constitution should be interpreted in the light of the modern morals and society.[53] Furthermore, one also must not forget that many legal principles and

49 Apart from praising the solutions found in the new South African Constitution, Justice Ginsburg also referred to international law and the international understanding of the institute of affirmative action, through citing various international agreements in her concurring opinion in Grutter v. Bollinger. Mark Tushnet, "Referring to Foreign Law in Constitutional Interpretation: An Episode in the Culture Wars," *Baltimore Law Review* 35 (2006): 303. Likewise, she expressed her dissatisfaction with the criticism of citing foreign law, arguing instead that she should be capable of reading foreign statutes and court decisions as much as she's capable of reading law review articles. Barnes, "Breyer says Understanding Foreign Law is Crucial to Supreme Court's Work".

50 Justice Sandra Day O'Connor was one of the most explicit proponents of citing foreign law since she said that in the future the Supreme Court will have to draw more and more upon judgments from other jurisdictions, and especially from the European Court. Lefler, "A Comparison of Comparisons," 174.

51 *Declaration of Independence*.

52 Alexander Hamilton or James Madison, "The Senate Continued," *Federalist Papers* no. 63, https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-63.

53 Zoethout, "The Dilemma of Constitutional Comparativism," 793.

normative claims are universal and are present in different legal systems and transcend national borders. Thus, a right way of interpreting the Constitution would be to adopt the principles of comparativism and universalism, which should allow better understanding of the Constitution.[54] Secondly, Breyer makes a point that the American federal system, although unique in many aspects, is similar to other political and legal systems throughout the world. By looking to the solutions in these other systems one can see what consequences would happen in case of adopting different decisions in cases that come up before the Court. He gives the example of *Printz v. USA*, where, in a dissenting opinion, he researched federal systems of Switzerland, Germany and the European Union, stating that enabling the federal units in implementing federal laws, rules and regulations not only is in accordance with the nature of federalism, but is also beneficial for the protection of individual liberty.[55] He believed that reference to other countries experience could shed light on the consequences which various kinds of interpretations of constitutional provisions would produce.[56] Lastly, Justice Breyer gives a diplomatic-political argument. If, as Breyer puts it, foreign courts, especially in developing countries, where rule of law, democracy and civil rights are yet to be fully recognized, have cited the US Supreme Court in its cases, why wouldn't the Supreme Court cited them from time to time.[57] That would give them credentials in their domestic legal systems.[58]

International Law and the American Constitutional System

Within the debate on use of foreign law by the Supreme Court, one could isolate a special part dealing with the relationship between international law and the American domestic legal system. However, the problem presented is twofold: firstly, scholarly debates are often corrupted by great confusion when there are talks on the usage of foreign law, since this term is used generically for describing both international law and the law of other countries.[59] This unclearness is that more dangerous since international law (or, some parts of it) is explicitly outlined in the Constitution as a source of law, while law of other nations is not. Therefore, there is difference in terms of the legal

54 Ibid., 794.

55 C-Span, "Constitutional Relevance of Foreign Court Decisions".

56 Tushnet, "Referring to Foreign Law in Constitutional Interpretation," 302.

57 C-Span, "Constitutional Relevance of Foreign Court Decisions".

58 Along similar lines, Justice Kennedy said that citing foreign law sends an implicit message to the rest of the democratic world that the American society shares its values. See Toobin, "Swing Shift".

59 C-Span, "The Role of International Law," video clip, 58:05, February 21, 2006, http://www.c-span.org/video/?191294-3/role-international-law.

status, value and relevance of international law and law of other nations in constitutional adjudication.[60] Secondly, the role of international law in American constitutional law is not clear, even when it comes to confirmed international treaties. Reason for this is great tension that exists between international obligations of the United States in the world community and the structure of its internal constitutional obligations. This tension underpins the uniqueness of the American constitutional structure, which is very much due to the system of shared sovereignty, not only on the vertical level (between the federal government and federal units), but also on the horizontal level (division between the three branches of government).[61]

The relationship between the American constitutional law and international law and the issue of incorporation of international law into American domestic law is defined in judgment *Medellin v. Texas* from 2008. This case was connected to the Vienna Convention on Consular Relations and a case which arose before the International Court of Justice (ICJ), which held that the US violated the above mentioned treaty by failing to inform 51 Mexican nationals of the rights that stem out of the Vienna Convention. Therefore, as the ICJ concluded, they were entitled to review and reconsideration of their convictions and sentences.[62] The problem was that they were not federally prosecuted and tried, but before state courts in Texas. Therefore, the President, as the branch of government which is given supreme power in conducting foreign affairs and signing international treaties, issued a Memorandum, urging the state court to give effect to the ICJ decision.[63]

As the state courts denied Medellin, one of the 51 detained Mexican nationalists, a *habeas* petition, on the basis of a Texan statute that limits the number of such petitions, and arguing that neither the ICJ decisions, nor the Presidential Memorandum, present binding domestic law which supersede state law, the case was heard before the Supreme Court.[64] Examining the structure of the Constitution and the relevant international documents at stake, as well as the precedent for such an issue – *Foster v. Nielson* from 1829, the Court firstly concluded that obligations stemming out of the Constitution trump international obligations. Likewise, following the differences made between self-executing and non-self-executing treaties made by Chief John

60 Because of this, usage of international law in some aspects is acceptable even to originalists- not in the domain of constitutional interpretation, but when it comes to statutory interpretation, i.e. when interpreting a treaty provision the Court can look to the interpretation given by foreign tribunals. C-Span, "The Role of International Law".

61 Ben Geslison, "Treaties, Execution, and Originalism in *Medellin v. Texas*, 128 S. Ct. 1346 (2008)," Harvard Journal of Law and Public Policy 32, no. 2 (Spring 2009): 767.

62 *Medellin v. Texas*, 552 US, 491, 1 (2008), http://www.supremecourt.gov/opinions/07pdf/06-984.pdf.

63 Ibid.

64 Geslison, "Treaties, Execution, and Originalism in *Medellin v. Texas*," 769–770.

Marshall in *Foster v. Nielson*, the Court assessed that non-self-executing international treaties, signed by the President and ratified by the Senate, do not automatically present binding domestic law, but require subsequent federal legislation. Furthermore, the Court found that there is a presumption that all international treaties are non-self-executing and that there is a requirement to prove that a particular treaty is equivalent to an act of the legislature, in order for it to be enforced as domestic law.[65] Consequently, the Court stipulated that neither the Vienna Convention, nor the ICJ decisions, or the UN Charter which refer to the ICJ, can be enforced as domestic law in the US.[66] Contrary to this majority decision, Justice Breyer, in his dissenting opinion, held the ground that, in the light of Article VI of the Constitution, there was always a presumption that international treaties are self-executing. Thus, he argued that the international documents at hand were enforceable as domestic law and that the US was bound by the ICJ decision, since it accepted its compulsory jurisdiction, and as the ICJ decisions are final and cannot be appealed.[67]

This kind of an approach towards the relationship between the US internal constitutional law and international law, especially in cases where human rights are at stake, creates legal difficulties for the proponents of referring to international law (and foreign law in its widest meaning) in cases of expanding human rights protection in the American constitutional structure. Not only can it prevent the US from fulfilling international obligations, it also runs counter the rules established in international law by the ICJ, according to which the *pacta sunt servanda* principle is to be respected and internal, even constitutional rules, cannot be used as a means of avoiding international obligations. These rules exist not only in the ICJ's case law, but are also codified in the in the Declaration on the Rights and Duties of States, in Article 13, where it was recognized that no state can invoke its constitution or internal law in justifying why it had not honored its international obligations.[68] Moreover, a similar provision was included in the Vienna Convention on the Law of Treaties from 1969.[69] It seems as though that the Justices on the Supreme Court have adopted a dualistic approach towards the relationship between American domestic law and international law, which represents a transformation of the monistic approach generally perceived to be the approach taken by Article VI of the Constitution.[70] This novel approach to the relationship between the US

65 *Medellin v. Texas*, 552 US, 491, 2-3 (2008).

66 Ibid., 1.

67 *Medellin v. Texas*, Breyer, J., dissenting, 552 US, 491, 1 (2008).

68 Smilja Avramov, *Međunarodno javno pravo* [International Public Law] (Beograd: Akademija za diplomatiju i bezbednost, 2011), 72, 75.

69 Miodrag Jovanović, Dragica Vujadinović, and Rodoljub Etinski, *Democracy and Human Rights in the European Union* (TEMPUS JEP POGESTEI: 2009), 187.

70 Milenko Kreća, *Međunarodno javno pravo* [International Public Law] (Beograd: Pravni fakultet Univerziteta u Beogradu, 2012), 76.

legal system and international law can create problems for the US in fulfilling its international obligations and in following up with the contemporary developments in human rights law, where most modern constitutions of democracies allow for the precedents of international human rights law over domestic constitutional law (or at least those parts of international law that have direct effect).[71] Furthermore, this approach of widening the scope of the possibility of the direct effect of international law in the American legal system and increasing the difficulty of incorporating international law into domestic law, additionally toughens the debate on the use of foreign law by the Supreme Court, and creates a new layer of controversy, as it makes ever more difficult to legitimize any kind of reference to foreign law.

Judgments involving Foreign Law after the End of the Second World War

Reference to foreign law in the process of constitutional interpretation implies one general issues, which is with regard to the fact that the traditional claim of constitutional courts is that the sole basis for constitutional interpretation are the constitution and the domestic commentaries.[72] This idea stems out of the theory of the basic law of Hans Kelsen, who thought that the constitution, as a basic law, has to be enforced by a court-like-body.[73] Even though the American system of judicial review is not based on Kelsen's theory, but rather it emerged earlier, there are significant similarities in the logic being applied to the relationship of the constitution and secondary legislation between Kelsen's ideas and Chief Justice John Marshall's argumentation in *Marbury v. Madison* from 1803. Despite the recent trends of "judicial fertilization" and constitutional comparativism, many lawyers and observers keep to the position that this transformation has had little influence on American courts and the American constitutional law.[74]

Likewise, there were those who praise this kind of a situation, saying that the "spirit of the Constitution should be limited to the scope of inquiries to American sources".[75] Nevertheless, the presence of citations of foreign court decisions, foreign law and foreign practices in Supreme Court judgments, especially with regard to the interpretation of some of the most important

71 Jovanović, Vujadinović, and Etinski, *Democracy and Human Rights in the European Union*, 186, 187.

72 Cody Moon, "Comparative Constitutional Analysis: Should the United States Supreme Court Join the Dialogue?," *Washington University Journal of Law and Policy* 12 (January 2003): 229.

73 Ibid.

74 Lefler, "A Comparison of Comparisons," 166.

75 Moon, "Comparative Constitutional Analysis," 240.

provisions of the US Constitution, asserts that the highest American judicial body has indeed entered the process of "judicial fertilization" within which it participates in on an equal footing with other judicial and constitutional bodies of other states in the international community. However, the problem in determining the real and chief role and place of foreign law in the US Supreme Court jurisprudence stems out of the issue that even those Justices on the Court who do refer to it, tend to downplay its significance and its role.[76] Even when foreign law is used not only as a means of determining some factual claims, but as a normative guidance in the process of interpreting legal norms and principles, Justices will deny that it has authoritative persuasive force, but would rather speak in vague terms that the Supreme Court is "learning from others" and "being aware of what other countries are doing".[77]

The controversy of referring to foreign law in the jurisprudence of the US Supreme Court seems to be a modern phenomenon, connected with the process of globalization and creating regional, and even global, legal arrangements and legal institutions that, in turn, lead to even greater aligning of legal systems and legal norms. None the less, one can see that this issue has arisen as early as the creation of the United States, as many states in the early republic enacted statutes forbidding their courts to use foreign law.[78] Likewise, there were some judgments of the Court which, in a limited span, initiated the discussion of referring to foreign law – in cases such as *Fong Yue Ting* (1893), where there were arguments over the relevance of referring to foreign law, *Hilton v. Guyot* (1894), where the Court upheld the enforceability of a foreign court decision, and *The Paquette Habana* case (1900), where the Court gave effect to certain international legal norms.[79]

Since the 1940s the Supreme Court has started turning to foreign law in a lot more substantial degree that it did thus far. Moreover, this citation occurred most frequently in criminal law cases and in controversial social issues cases, such as abortion. Therefore, it stirred public opinion, both in a positive and a negative way and cause different kinds of sensations and reactions. These cases can be arranged into different categories – considering the sources of foreign law that is cited, considering Justices of the Supreme Court who wrote such decisions, whether the reference is to be found in a majority or a dissenting opinion, considering which constitutional rights is address, etc. However, in this place these cases are to be differentiated into two strict categories: the first category encompasses the cases related to criminal law, especially the application of the VIII Amendment – which

76 Earnest A. Young, "Foreign Law and the Denominator Problem," *Harvard Law Review* 119 (2005): 151.

77 Ibid.

78 Ibid., 149, n. 11.

79 Moon, "Comparative Constitutional Analysis," 232, n. 16.

prohibits cruel and unusual punishment; while the second group consists of judgments with regard to various social issues, ranging from abortion to LGBT rights, which are covered by the constitutional rights to privacy and equal protection of the laws.

As far as the first group of cases is concerned, it seems as though in the last few decades there has hardly been a prominent VIII Amendment judgment where the Justices have not at least mentioned foreign law, foreign court decision and foreign practices. This is true also for other criminal law cases that are not with concern to the VIII Amendment – such as *Miranda v. Arizona*.[80]

The first case that is to be examined is *Trop v. Dulles*. The judgment in this case is of paramount importance for the Supreme Court and American constitutional law. Not only does it refer to foreign law in a way and for a purpose not seen before in Supreme Court case law, but it also provides the future courts with a new standard in assessing whether some practices and activities are in line with the values and principles set forth in certain constitutional provisions: "the evolving standards of decency that mark the progress of a maturing society".[81] More importantly for this topic, *Trop v. Dulles* actually sets the standard for looking to foreign law in VIII Amendment cases, to determine whether some activity or behavior is deemed "cruel and unusual punishment". This can be proven through the words of Justice Anthony Kennedy who, in another important VIII Amendment judgment, stated that "at least from the time of the Court's decision *in Trop*, 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'".[82] Moreover, the specificity of this case is that foreign law was cited not in upholding a state statute, which was the case up to *Trop*, but in declaring a statute unconstitutional.[83]

Trop v. Dulles is with regard to the constitutionality of government taking away a person's citizenship. This forfeiture of citizenship was done by a court-martial for wartime desertion. The judgment starts off with asserting that the basis for assessing constitutionality under the VIII Amendment is in the Anglo-American criminal justice tradition and the concept of human dignity. Likewise, the Justices stipulated that any further assessment of this question has to be in the context of the "evolving standards that mark the progress of a

80 Steven Calabresi and Stephanie D. Zimdahl, "The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision," *William and Mary Law Review* 47, no. 3 (2005): 846.

81 *Trop v. Dulles*, 365 U.S. 86 (1958), https://supreme.justia.com/cases/federal/us/356/86/case.html.

82 *Roper v. Simmons*, 543 U.S. 551 (2005), http://www.npr.org/documents/2005/mar/scotus_juvenile.pdf.

83 Calabresi and Zimdahl, "The Supreme Court and Foreign Sources of Law," 847.

maturing society", which, according to the Justices writing the opinion, meant exploring not only American, but also various different legal systems around the world. Justice Warren, writing the plurality opinion, argued that stripping away of persons' citizenship and their banishment or denationalization are not usual in civilized legal systems and are acts which are usually condemned, as they create stateless persons. In arguing for this position, Justice Warren also calls upon various studies of the United Nations. Interesting enough, in *Trop*, even Justice Frankfurter, writing the dissenting opinion, refers to foreign law, especially various foreign acts on nationality, as well as the United Nations Conventions on the subject.[84]

Only a few years after *Trop*, the Supreme Court gave yet another important decision in the area of the criminal justice system – *Miranda v. Arizona*. Here, again, the Justices in reaching the final decision substantially referred to different foreign legal systems and foreign statutes regarding criminal proceedings. Unlike other decisions that are mostly concerned with the VIII Amendment, *Miranda* actually caused the extension of the V Amendment's protection against self-incrimination even for persons under police interrogation. *Miranda* referred mostly to legal systems and criminal justice systems of other English speaking countries, or countries that were once under the rule of the British Empire, such as India. The Justices recognized the great significance of acquiring the advice of an attorney during police interrogation and the limitations imposed on obtaining and using confession from police interrogation as evidence both in English and Scottish law. The *Miranda* ruling introduced great changes and it was very influential in the subsequent development of the criminal justice system in the US. This is why Justice O'Connor recognized the great importance of looking to English, Scottish and Indian law in clarifying the behavior of police in interrogations and the rights of persons detained and subjected to interrogation.[85]

Going back to cases dealing with the "cruel and unusual" Amendment, in the late seventies there was yet another important judgment which addressed the practices in criminal law in other countries. The *Coker v. Georgia* case was with concern to the constitutionality of the death penalty for criminals who committed the crime of rape. Justices writing the opinion argued that the death sentence for such a crime is cruel and unusual and they, in proving their stance, referred to practices of most states, but also to most of countries around the world in which "it would be difficult to support a claim that the death penalty for rape is an indispensable part of the States' criminal justice system".[86] Likewise, the Justices participating in this plurality vote invoked

84 Ibid., 846–850.

85 Ibid., 850–855.

86 *Coker v. Georgia*, 433 U.S. 584, 15 (1977), https://supreme.justia.com/cases/federal/us/433/584/case.html.

Trop v. Dulles in justifying their reference to foreign law and in indicating international climate regarding the death penalty for the crime of rape.[87]

The trend of limitation on the imposition on the death penalty which had its origins in the *Enmund* case, continued significantly in the forthcoming decades with the prohibition of executing juveniles, mentally challenged people and declaring unconstitutional prolonged waiting for the execution. In all of these cases, references to foreign law, and especially different European legal systems, including the law of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Foreign law and foreign court decisions were used in order to determine the meaning of the "cruel and unusual" provision in every specific case regarding the death penalty. The second important Supreme Court case in line in the category of death penalty cases was *Thompson v. Oklahoma* where Justices declared the execution of juveniles under the age of 16 unconstitutional and not in compliance with the VIII Amendment. In their judgment, Justices referred mainly to legal systems of common law and Anglo-Saxon heritage, such as United Kingdom, New Zealand and Australia where the execution of juveniles has long been prohibited and where the death penalty has been restricted only for the most severe crimes, such as treason.

Likewise, the Court referred also to several Western European states which, at the time, started abolishing death sentences. Moreover, the Court also stipulated that three different international instruments (International Covenant on Civil and Political Rights, American Convention on Human Rights and the Geneva Convention relative to the Protection of Civilian Persons in the Time of War) forbid executions of minors. Thus, the *Thompson* judgment actually stems its motivation of looking into the "opinions of the world community" from the need of determining the "evolving standards of decency", which was set forth in *Trop*. Again, *Trop* finds its place as a standard in adjudicating VIII Amendment cases through referring to foreign law.[88]

Thompson v. Oklahoma is a case upon which another significant case regarding the VIII Amendment is built – *Roper v. Simmons*. *Roper* seems to be a natural continuation of what was found in *Thompson*. Unlike many other judgments where there is involvement of foreign law and where Justices cite foreign law or foreign court decisions in a sentence or two, in Roper there is however a whole section of the judgment devoted to foreign law.[89] Here, the question of constitutionality of sentencing juveniles to execution again was put to the spotlight. However, this time it was with concern to juveniles above the age of 15 – therefore, juveniles who, at the time of the committed crime, where 16 or 17. As was already mentioned, Justice Kennedy, writing

87 Calabresi and Zimdahl, "The Supreme Court and Foreign Sources of Law," 855–858.

88 Ibid., 858–860.

89 Tushnet, "Referring to Foreign Law in Constitutional Interpretation," 301.

the majority opinion, first goes back to emphasize the importance of the *Trop* judgment and its role as a precedent both in terms of setting new standards in assessing VIII Amendment cases and in terms of referring to foreign law in determining international and, also, domestic opinion on certain issues.

However, the Court first needed to settle the controversy surrounding the usage of foreign law in its judgments, which has become frequent during the 1970s and 1980s. This is why Justice Kennedy wrote that "opinion of the international community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions".[90] Therefore, what the Justices wanted to acknowledge is that the whole practice of citing certain foreign legislation, foreign court decision or foreign countries' practices is so that it justifies its conclusions of the opinion of the American society on certain issues.[91] As far as the structure of the judgment is concerned, there are three segments of substantial analysis: changes in US law with regard to imposing the capital punishment of juveniles; examinations of whether the execution of juvenile offenders is proper in the Justices' own moral perceptions, especially with regard to principles of deterrence, retribution and criminal responsibility; lastly, the Court drew inspiration from foreign law in reaching the conclusions for determining the constitutionality of the above mentioned practice.[92]

In the judgment, Justice Kennedy points to the United Kingdom, where the death penalty has been abolished and where for several decades it was considered illegal to sentence juveniles to be executed. Further on, the judgment states that the United States is alone in the world with regard to sentencing juveniles to death, as all other countries that had this practice (e.g. Iran, Pakistan, China, etc.) outlawed the practice, or simply stopped using it. Justice Kennedy also points to the UN Convention on the Rights of the Child, which banned the death penalty for children (i.e. persons under the age of 18). Also, he states his astonishment that only United States, alongside Somalia, is not a party to this Convention.[93] Justice Kennedy's decision and argumentation were heavily criticized by Justice Scalia in a dissenting opinion, where he argued that the reference to foreign law was not present in order to prove that there is domestic consensus on the topic of sentencing juveniles to death, but had the function of basing providing proof that the case should be adjudicated with the Justices' own personal opinions on the issue. Scalia especially found looking into modern British law inappropriate as he argued that the development of American and British law, even though having same roots

90 *Roper v. Simmons*, 543 U.S. 551, 4, (2005).

91 Calabresi and Zimdahl, "The Supreme Court and Foreign Sources of Law," 858, 860.

92 Tushnet, "Referring to Foreign Law in Constitutional Interpretation," 301–302.

93 Calabresi and Zimdahl, "The Supreme Court and Foreign Sources of Law," 858–860.

and some structural concepts, has gone in two different directions since the end of the Revolutionary War.[94] Unlike the modern British legal system, Scalia has often voice his keenness to rely on old English law when interpreting and understanding many legal concepts and provisions that found their place in the US Constitution.[95] There was, however, another dissenting opinion which was not in convergence with Justice Scalia's – and it was written by Justice O'Connor. Even though not in consent with the majority opinion of Justice Kennedy, she approved the usage and reference to foreign and international law, especially in cases which are concerned with the VIII Amendment, where the evolving standards of decency of the American society can be traced also through looking into consensus in the international community. Therefore, *Roper* was important and interesting at the same time as it was the case where both the majority opinion and the dissenting opinion of Justice O'Connor cited foreign law.[96]

Apart from judgments that prohibited the execution of minors, there were other developments in the Supreme Court's case law in the domain of the capital punishment, namely with regard to executing mentally challenged persons. In *Atkins v. Virginia*, Justice Stevens, writing for the majority, stated that there was a national consensus formed against executing mentally challenged persons, as it was considered cruel and unusual.[97] In proving the changing tendencies and opinions in the American society, he argued that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved".[98] He not only referred to the opinion of the world community, but also mentioned various non-governmental and religious organizations that filled briefs as *amici curiae* in arguing against a practice of sentencing mentally challenged persons to death. In his dissenting opinion, Chief Justice Rehnquist criticized the findings as he said that referring to foreign law has no basis in precedents and in clarifying these important constitutional questions. On the other hand, Scalia, in another dissenting opinion, saw the reference to foreign law and international opinion as a means of fabricating national consensus on the issue.[99]

Knight v. Florida is also to be mentioned. This case was concerned with prolonged waiting on the death row – more than 10 years, but it was never heard by the Court as it denied the *writ of certiorari* (i.e. it never issued

94 Ibid.

95 Free Republic, "Constitutional Relevance of Foreign Court Decisions".

96 Calabresi and Zimdahl, "The Supreme Court and Foreign Sources of Law," 858–860.

97 Ibid, 860–861.

98 *Atkins v. Virginia*, 536 U.S. 304, 14, (2002), https://supreme.justia.com/cases/federal/us/536/304/case.html.

99 Tushnet, "Referring to Foreign Law in Constitutional Interpretation," 300.

an order to lower courts to transfer the case to the higher judicial level for review). However, Justice Breyer disagreed with the decision and wrote his dissenting opinion where he referred to various foreign sources in order to show that waiting six or more years for the execution constitutes a cruel and unusual punishment. In doing so, he mentioned the decisions of the Privy Council of the United Kingdom, the Supreme Court of India, and the case law of the European Court of Human Rights, all of which ruled in favor of viewing prolonged stays on the death row an inhumane treatment.[100] Even though Justice Breyer noted that the Supreme Court of Canada was one of the courts that took an opposite stand with regard to prolonged waiting for the execution, deeming it constitutional, and although accepting that foreign law cannot in any circumstances be binding precedents for the Supreme Court,[101] he nevertheless acknowledged that the Supreme Court has regarded "relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances."[102] In arguing against Breyer's judicial philosophy with regard to expanding the sources of constitutional interpretation, Justice Thomas stated that there would be no need for referring to the case law of the European Court of Human Rights, or constitutional court decisions in other countries, if there was support in the American jurisprudence.[103]

As a "last word" of the Supreme Court on VIII Amendment cases, one should mention the *Graham v. Florida* judgment where Justice Kennedy, again writing the majority opinion, attempted to clear up the issue of citing foreign law in Supreme Court decisions. Even though he reiterated all previously mentioned stances on referring to foreign law, as a benign practice that has the sole ambition of playing a role of a supplement and proof of domestic constitutional agreements, he nevertheless implicitly showed the true nature of this "source of law" by acknowledging and confirming his attitude towards all other judgments that contained such narratives. Namely, the judgment first outlines three reasons, located domestically, why sentencing juveniles to life for non-homicide crimes without parole is unconstitutional: society's standards expressed through legislative enactments and state practice; standards expressed in controlling precedents and the Court's own understanding of the VIII Amendment's text, history, meaning and purpose; and the Court's own opinion on the constitutionality of the punishment having in mind that it applies to a whole category of persons.[104] Likewise, the judgment, as

100 Ibid., 303.

101 Ibid.

102 *Knight v. Florida*, 528 U.S. 990 (1999), Justice Breyer's dissenting opinion, November 8, 1999, http://www.law.cornell.edu/supct/pdf/98-9741P.ZD.

103 Lefler, "A Comparison of Comparisons," 170.

104 *Graham v. Florida*, 560 U.S. 48, 2–4 (2010), http://www.supremecourt.gov/opinions/09pdf/08-7412.pdf.

all previous, states that the judgments of other nations and the international community are not dispositive to the meaning of the VIII Amendment and can be used only as a supplement in proving the Court's own conclusions on the matter and is not controlling to the Court.[105] Nevertheless, the judgment continues on by examining in detail the attitudes of other nations and the international community regarding this practice, as it confirms that sentencing juveniles to life for non-homicide crimes without parole is rejected the world over, as the US is the only nation that still allows for such a punishment to take place.[106] The judgment also invokes the "evolving standards of decency" principle and cites *Roper*, as a key precedent.[107]

Therefore, *Graham v. Florida* actually completes a full circle in establishing the meaning of the VIII Amendment. It not only confirmed and reiterated what was said in *Roper*, it extended the findings from this judgment and broke new ground in VIII Amendment jurisprudence.[108] This was done through strictly following the logic and notions clearly established in *Tropp* and relied on in all subsequent decisions regarding the VIII Amendment. Despite regular and explicit stipulations that citations of foreign law do not represent a substantive part of the judgment, it is clear the massive importance of referring to laws, opinions and practices of other nations and the world community, which acted more than a supplement in the Court's adjudicative process.

As far as social issues are concerned, there have been two most important domains where there was reference to foreign law in Supreme Court decisions-right to abortion and LGBT rights. Therefore, two cases from the last forty years can be sidelined for examining – *Roe v. Wade* which is concerned with abortion and *Lawrence v. Texas* which deals with LGBT rights. However, the reference to foreign law in these two judgments is different with regard to the purpose of looking towards foreign law and court decisions. Unlike *Roe*, where referencing was done in order to gather evidence on the consequences of a certain legal rule, in *Lawrence* looking to foreign law was done with the purpose of setting out moral guidance with regard to the content of the American constitutional provisions.

Roe v. Wade is a judgment from 1973 which confirmed that the Constitution protects women's right to abortion in certain circumstances. Therefore, this judgment abolished anti-abortion legislation in many states. In essence, the Court stipulated that the right to privacy, whether it's covered

105 Ibid., 4.

106 Ibid., 34.

107 *Graham v. Florida*, 560 U.S. 48 (2010).

108 Martin Guggenheim, "*Graham v. Florida* and a Juvenile's Right to Age-Appropriate Sentencing," *Harvard Civil Rights-Civil Liberties Law Review* 47, no. 2 (Spring 2012): 459.

by the XIV or the IX Amendment, protects women's right to abortion.[109] In reaching its conclusions, the Court referred to foreign law and this can be divided into two major parts- the common law treatment of abortion and the treatment of abortion in English statutory law. Even though abortion was classified as a crime and implied a criminal penalty ever since the beginning of the XIX century, the Court noticed that a change occurred in the 1930s both in the case law of English courts and in the penal system. These changes were with regard to exceptions that appeared with regard to imposition of criminal penalties for abortion in circumstances where the retaining of pregnancy would harm the health of the mother. Lastly, in the 1960s a new Criminal Code in England was adopted which broadened the provision of the protection of the health of the mother as a circumstance in which there are no criminal penalties for abortion. In the Court argumentation, these developments meant that the protection from the XIV Amendment covers the women's rights to abortion to the same extent as the English statutes from the 1930s and the 1960s. In the end, the Court referred to the practices in foreign countries in order to affirm that the abortion procedure, applied adequately, are not hazardous to women's health.[110]

Lawrence v. Texas is a case from 2002 in which the Supreme Court declared unconstitutional a Texan statute which banned sodomy, i.e. deviant sexual intercourse, between persons of the same sex. Justice Kennedy, writing for the majority, found that this legislation was an infringement of the right to equal protection of the laws from the XIV Amendment. This judgment overruled a decision adopted by the Supreme Court from 1986 – *Bowers v. Hardwick* – which upheld these sodomy laws. In its judgment, the Court referred to a decision made by the European Court for Human Rights (*Dudgeon v. United Kingdom*) where it also tackled the issue of homosexual conduct. The European Court found that laws forbidding persons from engaging into consensual homosexual conduct were not in compliance with the European Convention.[111]

Furthermore, Justice Kennedy argued that sexual freedoms form integral parts of human freedom and dignity. One of the justifications why the Justices referred to foreign law was the fact that in the previous case – *Bowers v. Hardwick* – it was stated that there are universal bans and restrictions imposed on homosexual conduct through the world.[112] Also, the majority in *Bowers* said that the notion that there is a tradition of protecting persons engaging into homosexual activity is at best facetious. Likewise, Justice Burger, who issued a concurring opinion, argued that the condemnation of this kind of an activity

109 Calabresi and Zimdahl, "The Supreme Court and Foreign Sources of Law," 869–872.

110 Ibid.

111 Ibid., 877.

112 C-Span, "Constitutional Relevance of Foreign Court Decisions".

is deeply rooted in the Judeo-Christian heritage.[113] The decision in *Lawrence* case was of course significantly criticized by Scalia in his dissenting opinion where he stated that "constitutional entitlements do not spring into existence [...] because *foreign nations* decriminalize conduct".[114] Likewise, he pointed to the fact that the Justices only refer to those foreign court decisions and foreign practices which go hand in hand with their world views. In other words, only favorable foreign law was evaluated and presented. He, therefore, concludes that this whole referencing to foreign law is nothing more than *obiter dicta*.[115] Moreover, since he pointed that only favorable European law had its place in the judgment, Scalia offered to cite the legal practices in the rest of the world as verification that the world is split on this issue.[116] This line of argumentation was severally criticized by Brayer who justified this reference to foreign law in the *Lawrence* judgment as a need of dismissing one of the main hypothesis from the *Bowers* case: that there is universal condemnation of homosexual activity.[117] Or, as Justice Kennedy wrote in his judgment, that there was a need of disproving "the premise in Bowers that the claim put forward was insubstantial in our Western civilization".[118]

The importance of the *Lawrence* judgment can be seen in subsequent decisions with regard to homosexuality which went towards further approval of this group status in the American legal system. In *US v. Windsor*, the Court held that a section of the Defense of Marriage Act, which prohibited federal recognition of same-sex marriages, was in violation of the due process and equal protection clauses of the Constitution.[119] Further on, the Court in *Obergefell v. Hodges* went a step further as it resolved the issue of constitutionality of state same-sex marriage bans since it legalized same-sex marriages throughout the country, through requiring states to issue marriage licenses to same-sex couples and to recognize same-sex marriages that were legally formed in other states.[120] Even though there is no reliance, nor citation of foreign law in these judgments, there is substantial reference to *Lawrence* as the authoritative precedent which dictates the Court's attitude to this social issue and its understanding of the equal protection clause.

113 Tushnet, "Referring to Foreign Law in Constitutional Interpretation," 301.

114 Calabresi and Zimdahl, "The Supreme Court and Foreign Sources of Law," 878.

115 C-Span, "Constitutional Relevance of Foreign Court Decisions".

116 Ibid.

117 Ibid.

118 *Lawrence v. Texas* 539 U.S. 558 (2003), https://supreme.justia.com/cases/federal/us/539/558/case.html.

119 Alison M. Smith, *Same-Sex Marriage: A Legal Background after United States v. Windsor* (Congressional Research Service, October 10, 2014), 2, https://www.fas.org/sgp/crs/misc/R43481.pdf.

120 Rodney M. Perry, *Obergefell v. Hogdes: Same-Sex Marriage Legalised* (Congressional Research Service, August 7, 2015), 2, https://www.fas.org/sgp/crs/misc/R44143.pdf.

Conclusion

The issue of using the foreign law in the United States' highest judicial body is closely related to the key features of the American Constitution. It is also connected to the division between the Supreme Court's Justices on the correct method of interpreting the provisions of the Constitution, to the point of many arguing that this debate is only another name for the dispute on what method of interpretation the Justice on the Court should use. However, it is clear that the question of the role of foreign court in Supreme Court's case law attracts great attraction, criticism and interest, and, therefore, stands on its own feet as a legitimate topic of legalistic and scholarly examination. Moreover, it also is affected by the unresolved and sensitive issue of relationship between the American domestic law and international law, which takes new shapes in contemporary case law. Despite regular explanations made by the Justices on the Court that references to foreign law represent only curiosities of seeking what other nations and the international community do and providing supplements to already forged own opinions and internal consensus, it is clear that, through the role of the precedent of the judgments of the Supreme Court, certain notions and novelties are established, such as the "evolving standards of decency that mark the progress of a maturing society", regularly followed by references to foreign law and detail examinations of foreign and international practices. These principles are, throughout a span of more than a half of a century, followed and confirmed in subsequent decisions. Likewise, these kinds of judgments have great influence even on those cases where there is no direct citation of foreign law. Also, as was shown, the cases at hand are with concern to some of the most delicate and urgent issues facing the contemporary American society, such as LGBTI rights and the death penalty. It is, therefore, without a doubt, that citations of foreign law will continue to play a great role in the future adjudications of the Court, even without formal recognition of its normative status.

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Резиме

Андреј Стефановић

Примена страног права у ширењу заштите људских права у судској пракси Врховног суда САД

Кључне речи: Врховни суд Сједињених Америчких Држава, страно право, људска права, основна права, уставно тумачење, VIII амандман, смртна казна, XIV амандман, ЛГБТ права, међународно право, упоредно уставно право, уставна фертилизација

Доношење великог броја нових устава и стварања уставних система у којима највиши судски органи, било да су врховни или уставни судови, играју улогу заштитника људских права и слобода, је довело до јављања феномена „уставне фертилизације“ који подразумева остваривање дијалога између поменутих институција у размени искуства на који начин треба тумачити одређене норме у циљу остваривања владавине права и заштите људских права. Вршећи ове функције многи судови су почели да гледају ка другим правним системима и јурисдикцијама, као и ка судској пракси страних судова како би решили случајеве који се пред њима појаве. Овај феномен је можда највише видљив у Сједињеним Америчким Државама и њеном Врховном суду који је, захваљујући одређеним одликама Устава САД попут општости, краткоће, недоречености и ригидности, успео да измени суштину многих права и слобода гарантованих Уставом и то користећи, макар као инспирацију, правна решења из других јурисдикција. Оно што додатно ојачава контроверзу у вези са употребом страног права у САД јесте и одсуство консензуса у вези са прихватањем правила о тумачењу Устава САД, што доводи до постојања различитих праваца схватања тога како уставне одредбе усвојене пре два века треба примењивати на случајеве који се јављају у савременом друштву. Такође, оно што даље усложњава питање откривања стварног статуса и улоге страног права у америчком уставном праву јесте што истовремено долази до промене схватања односа овог унутрашњег правног система према међународном праву.