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But What Does Europe Say?—On Citing Foreign Court Decisions

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The question of foreign court decisions in the making of American law and in the work of the Supreme Court has spawned a lively debate in law journals and legal circles. Nevertheless, all that was eclipsed on January 13 when two sitting justices of the U.S. Supreme Court debated the issue before an assembly of lawyers and law students at the American University in Washington, D.C.

In a fascinating and revealing discussion, Justices Antonin Scalia and Stephen Breyer defended their own approach to constitutional interpretation and provided much-needed insights into how the justices of the Supreme Court do their work and debate crucial issues.

Public engagements between sitting Supreme Court justices are exceedingly rare. The Supreme Court has traditionally had something of an obsession with guarding its secrecy. Writing over 25 years ago, authors Bob Woodward and Scott Armstrong noted the Court's deliberate effort to hide its decision making process from public view. "For . . . nearly two hundred years, the Court has made its decisions in absolute secrecy, handing down its judgments in formal written opinions. Only these opinions, final and unreviewable, are published. No American institution has so completely controlled the way it is viewed by the public. The Court's deliberative process—its internal debates, the tentative positions taken by the Justices, the preliminary votes, the various drafts of written opinions, the negotiations, confrontations, and compromises—is hidden from public view."

Few citizens have actually visited the Court in order to observe the justices engaged in oral arguments. No television cameras are present, and the proceedings are off-limits to recording devices. So far as the public is concerned, virtually all knowledge about the Court's operations comes from reporters covering oral arguments.

But the oral arguments are only the public face of the court. The actual decision-making between the nine justices takes place in Wednesday conference sessions that are absolutely off-limits to anyone outside the justices themselves. As Chief Justice William H. Rehnquist has commented, "To anyone familiar with the decision-making process in other governmental institutions, the most striking thing about our Court's conference is that only the nine justices are present. There are no law clerks, no secretaries, no staff assistants, no outside personnel of any kind."

With all that as background, the Scalia-Breyer debate takes on increased importance. [Note that the debate is referred to as a "Scalia-Breyer" discussion, putting Scalia ahead of Breyer, rather than placing the names in alphabetical order. This is because the Court's regard for seniority is almost as obsessive as its concern for secrecy.]

Setting the terms of the public discussion, Justice Scalia delivered the first salvo. America doesn't have "the same moral and legal framework as the rest of the world," Scalia asserted. "If you told the framers of the Constitution that we're [trying to be just like Europe] they would have been appalled."

Scalia, who argues that foreign court decisions should have absolutely no influence in the interpretation of the U.S. Constitution, bases his argument on the fact that the Court's responsibility is to interpret the U.S. Constitution as the framers intended—not to go shopping for legal arguments that would support a justice's own interpretation, whether from domestic or foreign authorities.

"Now, my theory of what I do when I interpret the American Constitution is I try to understand what it meant, what [it] was understood by the society to mean when it was adopted. And I don't think it changes since then." He continued: "Now, obviously if you have that philosophy—which, by the way, used to be the orthodoxy until about 60 years ago—every judge would tell you that's what we do. If you have that philosophy, obviously foreign law is irrelevant with one exception: Old English law, because phrases like 'due process,' the 'right of confrontation' and things of that sort were all taken from English law. So the reality is I use foreign law more than anybody on the Court. But it's all Old English law."

In keeping with his originalist understanding of the Constitution and its proper interpretation, Scalia argues that the decisions of contemporary foreign courts should have absolutely no bearing on the interpretation of America's Constitution. The influence of English common law and the British legal tradition are taken into account, so far as they determined the understanding of crucial legal terms and issues as understood by the framers of the U.S. Constitution in the late eighteenth century.

As Justice Scalia sees it, foreign law might be a topic of individual interest for a jurist, but should be acknowledged as absolutely irrelevant to what an American judge does when he interprets the Constitution.

Justice Breyer argued that American law "emerges" as the society matures and as the legal process is negotiated between judges, law professors, law students, and other legal scholars. According to Breyer, this process of lawmaking—with a particular view to the work of judges—is "a conversation." When deciding cases, judges should involve themselves in this conversation, Breyer argued, for out of this conversation emerges the law of the land.

With respect to the decisions of foreign courts, Breyer insisted that "foreign law doesn't bind us," but can be instructive. Judges are human beings, Breyer insisted, who, along with other human beings, are dealing with "certain texts, texts that more and more protect basic human rights."

Since so many of these human rights issues are international in scope and application, Breyer argued, American judges should take developments and arguments emerging from foreign courts into account.

Furthermore, Breyer argued that since foreign courts often cite the U.S. Supreme Court, "why don't we cite them occasionally?"

Controversy over the citation of foreign court decisions in the work of the U.S. Supreme Court came to a focal point in the Court's 2003 decision, *Lawrence v. Texas*. Writing for the Court's majority, Justice Anthony Kennedy cited European precedent for arguing that the Texas law criminalizing sodomy was a violation of human rights and the Constitution's guarantee of privacy. In other decisions, Justice Breyer has cited decisions of foreign courts, including a case from Zimbabwe dealing with the death penalty.

In answer to a question, Breyer stated his case clearly. "So what I'm saying is that this world we live in is a world where I think it's out of date for people to teach about foreign law in a course called 'Foreign Law.' I think it's in date to teach in contract law or in court law, because those are the cases we're getting. And that reflects the truth about the world, which is that of course business is international; law is more and more international; and of course, human rights, too, are more and more international."

The Scalia-Breyer debate revealed where the two justices disagree on the basic task of a judge, with Scalia arguing that the judge's responsibility is to interpret the Constitution as its framers would have intended, and Breyer arguing for an evolutionary concept of the law with the judge trying to come to the best understanding of the needs of the society in the shape of the law.

At the same time, other arguments asserted by the two justices offer considerable illumination. Scalia accused Breyer and other judges who argue for the citation of foreign court decisions of being highly selective. In dealing with cases related to controversial issues such as abortion, homosexuality, and civil rights, more liberal judges are quick to cite decisions handed down by European courts, but Scalia noted that they stay far away from decisions handed down by courts in Asia and other parts of the world. At this point Breyer lightheartedly acknowledged his tactical error in citing a case from Zimbabwe in opposing the death penalty. Zimbabwe is "not the human rights capital of the world," he explained.

Scalia also pressed his point with relation to the selective use of foreign decisions by judges who cite one point without acknowledging other dimensions of these cases that would be problematic. For example, Scalia acknowledged that Russia has adopted its own form of the American "Miranda Rule." Thus, arresting officers must inform anyone taken into custody of basic rights, including protections against self-incrimination. So far, so good. But Scalia insisted that Russia's adoption of the Miranda Rule is rather meaningless when it has not adopted the "Exclusionary Rule" that prevents evidence wrongly obtained from a defendant from being used against him in court.

In the most important segment of the discussion, Scalia attacked the idea that a judge should look for "evolving standards of decency" in American society. He parodied liberal judges who consider themselves to be moral arbiters with the authority to determine what these "evolving standards of decency" are and then interpret the Constitution in order to meet these standards. "Do you think you're representative of American society?," Scalia asked the students. "Do you not realize that you are a small cream at the top, and that your views on innumerable things are not the views of America at large? And doesn't it seem somewhat arrogant for you to say, 'I can make up what the moral values of America should be on all sorts of issues, such as penology, the death penalty, abortion, whatever'?"

The Scalia-Breyer debate offers an invaluable glimpse of the inner workings of the Court and what must be a fascinating exchange of ideas among the justices—who also clash on the most fundamental questions of jurisprudence, constitutional interpretation, and the role of judges.

This nation would be better served by more public arguments of this caliber. The U.S. Supreme Court must protect its dignity, and the Court's conference sessions are appropriately conducted in private. Nevertheless, on issues as fundamental as the philosophy of constitutional interpretation, and on questions as specific as the use of foreign court decisions in the work of the Supreme Court, this debate should be made public.

The audience at the American University was treated to a display of intellectual vigor, legal combat, and two fascinating public personalities. This should happen more often—and in public view.

