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**ASSESSING THE THREAT TO SECOND AMENDMENT RIGHTS
POSED BY THE U.S. SUPREME COURT'S USE OF FOREIGN LAW
IN CONSTITUTIONAL INTERPRETATION**

by

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I. SUPREME COURT'S RECENT USE OF FOREIGN LAW TO INTERPRET THE U.S. CONSTITUTION

Roper v. Simmons. On March 1, 2005, the United States Supreme Court decided Roper v. Simmons, 543 U.S. 551 (2005), in which it overruled a 16-year old precedent upholding the constitutionality of a Missouri state law imposing the death penalty on offenders for murders committed at 16 and 17 years old. To help justify its refusal to be bound by *stare decisis* — and to pronounce its new rule that to impose the death penalty upon a person who committed a murder before his 18th birthday is cruel and unusual punishment prohibited by the 8th and 14th Amendments to the Constitution — Justice Kennedy's majority opinion, for himself and four other justices, found “confirmation in the stark reality that **the United States is the only country in the world** that continues to give official sanction to the juvenile death penalty.” *Id.*, 543 U.S. at 575, 161 L.Ed.2d at 25 (emphasis added).

Although she did not join the majority opinion, now-retired Justice O'Connor agreed with the majority that “foreign and international law [is] relevant to its assessment of **evolving standards of decency** ... from the maturing values of civilized society” (emphasis added) — the Court's century-old standard governing the 8th Amendment's “cruel and unusual punishment” clause — but disagreed with the majority's application of those foreign sources in the case. *See id.*, 543 U.S. at 604, 161 L.Ed.2d at 49.

Only two associate justices — Scalia and Thomas — and the late Chief Justice Rehnquist disagreed with the relevance of international law. In a typically blunt dissent, Justice Scalia wrote: “[T]he basic premise of the Court's argument — that American law

should conform to the laws of the rest of the world — ought to be rejected out of hand.” *Id.*, 543 U.S. at 624, 161 L.Ed.2d at 61.

Breyer-Scalia Debate. This was not the first time that Justice Scalia had registered his view that foreign and international law has no place in American constitutional interpretation. Previously, in a debate with his colleague, Justice Breyer, at the American University School of Law, Justice Scalia stated emphatically that “I do not use foreign law in the interpretation of the United States Constitution,” explaining that “we don’t have the same moral and legal framework as the rest of the world and never have.” Transcript of Scalia-Breyer Debate on Foreign Law, p. 5, <http://www.freerepublic.com/focus/f-news/1352357/posts>. See also http://www.boston.com/news/globe/ideas/articles/2005/03/20/legal_aliases?pg=3.

Lawrence v. Texas. Prior to the debate, Justice Scalia, writing again in dissent for himself and the two colleagues who later joined him in the juvenile death penalty case: “Constitutional entitlements do not spring into existence ... as the Court seems to believe, because *foreign nations* decriminalize [private homosexual] conduct.” Lawrence v. Texas, 539 U.S. 558, 598, 156 L.Ed.2d 508, 538 (2003).

As was the case in the juvenile death penalty case, Justice Scalia wrote in opposition to another Justice Kennedy opinion in which Justice Kennedy had supported the overruling of 17-year old precedent — which had denied 14th Amendment “liberty” protection to private, adult homosexual conduct — by observing that “the reasoning and holding in [that precedent] have been rejected elsewhere [by] [t]he European Court of Human Rights.” *Id.*, 539 U.S. at 576, 156 L.Ed.2d at 524. Freed from its own precedent, Justice Kennedy ruled, in part, that it was irrational for the State of Texas to prohibit private consensual homosexual sex because “[t]here

has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent” than in “[o]ther nations [which] have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct.” *Id.*

Summary. Prior to the death of Chief Justice Rehnquist and the retirement of Justice O’Connor, six members of the High Court have, in two very controversial opinions, rested their decisions, in part, upon foreign law sources. And, as demonstrated below, three of those justices — Ginsburg, Breyer and retired Justice O’Connor — have become ardent Court spokesmen attacking the Court’s critics and defending such reliance in various venues, including law schools, bar association meetings, legal societies and even foreign courts.

II. EMERGING BATTLE OVER USE OF FOREIGN LAW SOURCES BY THE U.S. SUPREME COURT

Justice O’Connor. Before leaving the Court, Justice O’Connor spoke at an event sponsored by the Atlanta-based Southern Center for International Studies where she received the World Justice Award. She said “that over time we will rely increasingly, or take notice at least increasingly, on international and foreign courts in examining domestic issues [thereby] enrich[ing] our own country’s decisions [and] I think ... creat[ing] that all important good impression.” O’Connor: U.S. Must Rely on Foreign Law (*World Net Daily*: Oct. 31, 2003) http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=35367.

Justice Ginsburg. More vociferously, Justice Ginsburg, before the American Society of International Law in Washington, D.C., stated that “[t]he notion that it is improper to look

beyond the borders of the United States in grappling with hard questions has a certain kinship to the view that the U.S. Constitution is a document essentially frozen in time as of the date of its ratification.” “Justice Ginsburg: Supreme Court Considers Foreign Law, Not Just Constitution (*NewsMax.Com*: Apr. 3, 2005).

<http://www.newsmax.com/archives/articles/2005/4/3/82551.shtml>. And just three months ago, Justice Ginsburg — speaking to the Constitution Court of South Africa — assailed various Republican-sponsored bills¹ barring citation of foreign law as “fuel for the irrational fringe,” claiming that both her and Justice O’Connor’s lives had been threatened as a result of the harsh criticism of the Court’s reliance on foreign law sources. “Ginsburg Faults GOP Critics, Cites a Threat from ‘Fringe’” (*washingtonpost.com*: Mar. 17, 2006)

<http://www.washingtonpost.com/wp-dyn/content/article/2006/03/16/AR2006031601860.html>.

Justice Breyer. In a more measured fashion, however, Justice Breyer has emerged as the Court majority’s spokesman that foreign and international law are relevant to constitutional decision-making. On April 4, 2003, in remarks before the American Society of International Law, Justice Breyer attempted a reasoned defense of the Court’s increasingly expansive use of foreign law sources. In doing so, Justice Breyer provided a road-map for an emerging “trans-

¹ Congressman Ron Paul has introduced a bill which would prohibit the use of international law in the interpretation of the Constitution (H.R. 1658, “American Justice for American Citizens Act,”) which provides: “Neither the **Supreme Court** of the United States nor any lower Federal court shall, in the purported exercise of judicial power to interpret and apply the Constitution of the United States, **employ** the constitution, laws, administrative rules, executive orders, directives, policies, or judicial decisions of any **international organization** or **foreign state**, except for the English constitutional and common law or other sources of law relied upon by the Framers of the Constitution of the United States.” (Emphasis added.) Other bills would do likewise. *See, e.g.*, section 201 of H.R. 1070, introduced by Congressman Robert B. Aderholt (R-AL).

national law ... bubbl[ing] up, out of interactions among interested publics, affected groups, specialists, legislatures, and others, who interact through meetings, journal articles, the popular press, legislative hearings, and in many other ways [and ultimately in] decisions from our Court, when they come last, after experience makes the consequences of legislation apparent.” Breyer, “The Supreme Court and the New International Law,” p. 4,

http://www.humanrightsfirst.org/us_law/inthecourts/Supreme_Court_New_Interl_Law_Just_Breyer%20.pdf. With respect to constitutional issues, Justice Breyer envisions a “global”

process revealing an “ever-stronger consensus ... as to the importance of protecting basic human rights, the embodiment [of which will be found] in legal documents, such as national constitutions and international treaties, and the related decisions to enlist judges — *i.e.*, independent judiciaries — as instruments to help make that protection effective in practice.”

Id., p. 2.

Justice Scalia. In their debate at the American University Law School, **Justice Scalia** has positioned himself in direct opposition to Justice Breyer’s interpretive methodology and sources:

[W]hen I interpret the American Constitution ... I try to understand what it meant, what was understood by the society to mean when it was adopted. And I don’t think it changes since then... It seems to me that the purpose of the Bill of Rights was to prevent change, not to encourage it, and have it written into a Constitution. [Transcript to the Scalia-Breyer Debate on Foreign Law, pp. 8-9.]

In contrast to Justice Scalia’s “originalist” approach, Justice Breyer favors “active liberty,” a shorthand term for a more “flexible and adaptive interpretation of the Constitution’s words.”

See N. Totenberg, "Supreme Court Justice Breyer on 'Active Liberty,'" (npr:Sept. 30, 2005)

<http://www.npr.org/templates/story/story.php?storyId=4929668>.

The question is: which way will the Court go with the newly-appointed Chief Justice Roberts and Justice Alito? Will the two follow the lead of Justice Breyer, or will they side with Justice Scalia?

Justice Alito. In an exchange with Senator Tom Coburn (R-OK) at the Senate Judiciary hearings on his confirmation, **Justice Alito** stated that he did not "think that we should look to foreign law to interpret our own Constitution." "Alito: 'Framers Would be Stunned,'" p. 2 (Opinio Juris: Jan. 11, 2006)

<http://lawofnations.blogspot.com/2006/01/alito-framers-would-be-stunned.html>. Elaborating

on that thought, Justice Alito continued:

I think the framers would be stunned by the idea that the Bill of Rights is to be interpreted by taking a poll of the countries of the world. The purpose of the Bill of Rights was to give Americans rights that were recognized practically nowhere else in the world at the time. The framers did not want Americans to have the rights of people in France or the rights of people in Russia or any of the other countries on the continent of Europe at the time. They wanted them to have the rights of Americans.... And I don't think it's appropriate to look to foreign law. [*Id.*]

Chief Justice Roberts. Chief Justice Roberts's testimony at his confirmation hearing before the Senate Judiciary was more muted. In response to Senator Jon Kyl's question, "[W]hat, if anything, is the proper role of foreign law in U.S. Supreme Court decisions?", the Chief Justice answered:

I would say ... that a couple of things ... cause concern on my part about the use of foreign law as precedent The first has to do with democratic theory ... judges of course are not

accountable to the people, but we are appointed through a process that allows for participation of the electorate. The President who nominates ...[and] [t]he Senators who confirm judges are accountable to the people.... If we're relying on a decision from a German judge about what our Constitution means, no President accountable to the people appointed that judge, and no Senate accountable to the people confirmed that judge, and yet he's playing a role in shaping the law that binds the people in this country.... The other part of it that would concern me is that relying on foreign precedent doesn't confine judges. It doesn't limit their discretion the way relying on domestic precedent does. [Judge Roberts — In His Own Words, p. 5 (Republican Policy Committee: Sept. 20, 2005) <http://rpc.senate.gov>.]

On the basis of this Senate testimony of the Chief Justice and Justice Alito, there is reason to expect that the balance on the Court has shifted, from a 6 to 3 majority favoring the Breyer view — that foreign sources are relevant to the interpretation of the American constitution — to a bare 5 to 4 majority. Given the new Chief Justice's and Justice Alito's stated commitment to *stare decisis*, however, one cannot be too sure. As Colorado University law professor, Robert F. Nagel, has recently pointed out, despite the promises of several recent Republican presidents, their judicial appointees to the Court have not “resulted in the overruling of a single revolutionary Warren Court decision,” but actually have resulted in an ever-expanding role of the Court because following its precedents “*requires* judges to legislate from the bench,” regardless of whether they testified, as nominees, that “judges should interpret, not make, law.” R. Nagel, “Bowling to Precedent,” pp. 1-2 (*The Weekly Standard*: Apr. 17, 2006)

http://www.weeklystandard.com/Utilities/printer_preview.asp?IdArticle=12083&R=EC01.

III. POTENTIAL MISUSE OF FOREIGN LAW IN A SECOND AMENDMENT CASE

The right to keep and bear arms is (i) secured against abridgement by the United States governments by the Second Amendment to the Constitution, and (ii) secured against abridgment by the states by the privileges and immunities of United State citizenship provision of the Fourteenth Amendment. These protections are uniquely American. As St. George Tucker wrote in his popular edition of Blackstone's *Commenataries on the Laws of England*, the people's right to keep and bear arms, as secured by the Second Amendment, was not even derived from England's 1689 Bill of Rights or English legal history. See "Original Intent and Purpose of the Second Amendment," p. 1, <http://www.guncite.com/gc2ndpur.html>. To the contrary, it was, according to Tucker, a repudiation of the British tradition to secure that right only to those who were thought "qualified" by the government:

The right of **self-defense** is the first law of nature; in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Whenever **standing armies** are kept up, and the right of the people to keep and bear arms is, under any color or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction. **In England, the people have been disarmed, generally**, under the specious pretext of preserving the game: a never failing lure to bring over the landed aristocracy to support any measure, under that mask, though calculated for very different purposes. True it is, their bill of rights seems at first view to counteract this policy: but the right of bearing arms is confined to protestants, and the words suitable to their condition and degree, have been interpreted to authorise the prohibition of keeping a gun or other engine for the destruction of game, to any farmer, or inferior tradesman, or other person not qualified to kill game. So that not one man in five hundred can keep a gun in his house without being subject to a penalty. [*Id.* Emphasis added.]

In the *Federalist*, both Alexander Hamilton and James Madison wrote of this uniquely American right. *See Federalist Nos. 29 and 46*. In *Federalist No. 46*, Madison observed:

[T]he Americans possess [the advantage of being armed] over the people of almost every other nation.... Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the **governments are afraid to trust the people with arms.** [*Federalist No. 46* quoted in “Original Intent and Purpose of the Second Amendment,” p. 4, <http://www.guncite.com/gc2ndpur.html>.]

Quoting from Madison’s observation at his American University College of Law school debate with Justice Breyer, Justice Scalia observed:

[T]he Federalist Papers [are] full of ... statements that make very clear [the founders] didn’t have a whole lot of respect for many of the rules in European countries. Madison, for example, ... [spoke] contemptuously of the countries on continental Europe ... ‘who are afraid to let their people bear arms.’ [Transcript of Scalia-Breyer Debate on Foreign Law, p. 5, <http://www.freerepublic.com/focus/f-news/1352357/posts> (emphasis added).]

Given Justice Scalia’s “originalist” approach to constitutional analysis and interpretation, Madison’s words would reinforce his commitment to disregard foreign law sources as irrelevant in the interpretation and application of the Second Amendment. But Justice Breyer is **not an originalist** or any sort of **Constitutionalist**; rather he is a “**conversationalist**,” *i.e.*, one who treats the constitutional text as the end point of a “conversation” among the founders and a beginning point for a continuing “conversation among judges, among professors, among law students, among members of the bar,” out of which “emerges law” responsive to the perceived needs of, and usefulness to, an increasingly global community. *See id.*, Transcript of Scalia-Breyer Debate on Foreign Law, at p. 6 and

“The Supreme Court and the New International Law,” at pp. 1-2,

http://www.supremecourtus.gov/publicinfo/speeches/sp_04-04-03.html.

It is Justice Breyer’s “conversational” approach to law, not Justice Scalia’s originalist view, that dominates today’s international law-making. This fact is no better evidenced than in what is now occurring in the United Nations with respect to civilian possession of small arms and light weapons. On January 9, 2006, the “Preparatory Committee for the United Nations Conference to Review Progress Made in the Implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects” issued a report entitled “Importance of the Subject on Civilian Possession in the Combat Against the Illicit Trade of Small Arms and Light Weapons.” The report begins with the revealing sentence: “According to the **Center for Humanitarian Dialogue**, 60% of the global stockpile of small arms and light weapons is in the hands of civilians.” (Emphasis added.) It continues with a brief account of the history of U.N. resolutions and studies calling for strict national controls on civilian ownership, possession and use of small arms and light weapons, and ends with a current “declaration of principles about the national regulation for firearm civilian possession” containing 11 elements which, if adopted, would — in the words of St. George Tucker — “annihilate” the people’s natural right of self-defense against tyrannical rulers.

While the report acknowledges that some countries regard “the possession of firearms as means of self-defense [to be] a legitimate individual right,” it considers that principle to be subordinate to the overwhelming evidence that “civilian possession of small arms represents a serious challenge to the security of the international community and that of the States.” Thus,

as England did in St. George Tucker's day, the United Nations report overwhelms the right of the people to keep and bear arms with empirical data on the misuse of small arms and light weapons, thereby **justifying government control** of "civilian possession" to "prevent illicit trafficking."

This is the very kind of reasoning that Justice Breyer supports in his new book, Active Liberty: Interpreting Our Democratic Constitution, wherein Justice Breyer contends that every constitutional case requires a **judicial balancing** of the **constitutional interest** of the majority, as expressed in a statute or regulation, with the competing interest of a constitutional restraint upon the **majority's exercise of power**. See D. Hardy, "Justice Breyer and Active Liberty," p. 1, http://www.armsandthelaw.com/archives/2005/11/justice_breyer.php. As Hardy contends, such constitutional interpretation leads to a "**leveling**" of individual rights, rather than to a **preserving** of rights as set forth in the constitutional text. *Id.* Indeed, according to Justice Breyer, the judicial weighing process — which takes place in the Supreme Court in the privacy of the deliberation room **after** oral argument — should include a "conversation" with foreign law sources from which the "law" of the American constitution shall "emerge." See Transcript of Scalia-Breyer Debate, p. 6, <http://www.freerepublic.com/focus/news/1352357/posts> and Breyer, "The Supreme Court and the New International Law," p. 2, http://www.supremecourtus.gov/publicinfo/speeches/sp_04-04-03.html.

This is clearly the process that dominated the Court in Lawrence v. Texas and Roper v. Simmons. Indeed, except for Justices Scalia and Thomas, there is no one else on the Court — including the new chief justice and Justice Alito — who has committed himself as a sitting justice to a constitutional methodology requiring fidelity to the original constitutional text

which would absolutely preclude the use of foreign sources as interpretive aids to a provision of the United States Constitution. Thus, in any case interpreting the Second Amendment, the use of foreign law, or other international sources — such as the United Nations — is very much in play.

RESEARCH PERFORMED

To prepare this memorandum, we have examined and analyzed the following sources:

(a) two recent U.S. Supreme Court cases — Lawrence v. Texas, 539 U.S. 558 (2003) (Texas sodomy case) and Roper v. Simmons, 543 U.S. 551 (2005) (juvenile death penalty case);

(b) several articles (identified herein) reporting the views of U.S. Supreme Court Justices Scalia, Breyer, and Ginsburg and retired Justice O'Connor;

(c) a law school debate between Justice Breyer (pro) and Justice Scalia (con) at American University (Transcript of Scalia-Breyer Debate on Foreign Law (Jan. 13, 2005) <http://www.freerepublic.com/focus/f-news/1352357/posts>);

(d) Justice Breyer's speech on "The Supreme Court and the New International Law" before the American Society of International Law's 97th annual meeting;

(e) Justice Breyer's recent lecture, "Active Liberty," delivered at the Harvard Law School; see http://www.supremecourtus.gov/publicinfo/speeches/sp_04-04-03.html;

(f) Justice Breyer's recently published book, Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution, Vintage Publishing, 2006;

(g) David Hardy's brief review of Justice Breyer's book: Active Liberty: Interpreting Our Democratic Constitution;

(h) excerpts from the testimonies of newly-appointed Chief Justice Roberts and Justice Alito before the Senate Judiciary Committee;

(i) Nagel, R., "Bowling to Precedent" (*The Weekly Standard*: Apr. 14, 2006), http://www.weeklystandard.com/Utilities/printer_preview.asp?idArticle=12083&R=EC01;

(j) Selected excerpts on the “Original Intent and Purpose of the Second Amendment” compiled at <http://www.guncite.com/gc2ndpur.html>;

(k) a January 9, 2006 Report of the Preparatory Committee for the United Nations Conference to Review Progress Made in the Implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects; *see* [http://www.un.org/events/smallarms2006/pdf/RC-1%20\(E\).pdf](http://www.un.org/events/smallarms2006/pdf/RC-1%20(E).pdf).