On foreign law, Justice Larsen echoes Scalia

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December 29, 2016

As President-elect Trump nears his selection of a nominee to replace Justice Antonin Scalia, Justice Joan Larsen of the Michigan Supreme Court is rumored to be among the final five contenders. Of these potential finalists, she is notable for having the shortest tenure on the bench and being the only non-federal judge. Thus, she has had far fewer opportunities to interpret the federal constitution in her judicial opinions. If she is nominated, the scholarship she produced during her lengthy academic career will therefore be all the more important to understanding the philosophy she might bring to the highest court in the land.

Perhaps the most revealing of Larsen's works is a 2004 article on the use of foreign judicial decisions to inform interpretations of our own Constitution. Early on, Larsen clarifies that she has no objection to citations of foreign law for two basic purposes: "expository" and "empirical." The former is when a foreign rule is cited as an example "to contrast and thereby explain a domestic constitutional rule." The latter is when the practical effects of a legal rule in another country is examined "to see what the effect of the proposed rule might be" if it were adopted in the United States.

But the focus of Larsen's article is a much more controversial use of foreign law: cases where the Supreme Court has "looked to the judgments and practices of foreign nations and international agreements to determine what the content of the domestic constitutional rule should be."
As a prime example of this approach, Larsen points to the Court's 2003 decision in *Lawrence v. Texas*, which found a constitutional right to engage in same-sex intimate relations. As part of its reasoning, the *Lawrence* majority observed that such a right "has been accepted as an integral part of human freedom in many other countries," and that there "has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent."

Similarly, Larsen identifies the Court's 2002 opinion in *Atkins v. Virginia*, which held that the execution of mentally retarded criminal defendants is unconstitutional. In its opinion, the Court

noted that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."

What was the Court doing in these opinions, and why does Larsen object to it?

In answer to the first question, the clearest explanation comes from a prolific defender of the practice, Justice Stephen Breyer. In his book "The Court and the World," Breyer observes that foreign constitutions "have often been crafted and modified to resemble our own, including provisions that protect both democratic political systems and basic individual liberties." This perceived similarity between constitutional provisions is crucial to the value Breyer places on cross-national wisdom. For him, judges in these countries "have all found themselves facing somewhat similar problems." If a foreign judge "interpreting a document that resembles the one I look to has written a legal opinion about a similar matter," Breyer asks, "why not read what that judge has said?"

This justification is one Breyer made many times in public debates with the late Justice Scalia himself. And Scalia's response to that argument is likewise illuminating. As he put it in one typical forum: "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. Now, obviously if you have that philosophy . . . 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."

Scalia's reply reveals the significance of the debate over foreign law. It is really a proxy debate for a much broader question of constitutional interpretation: whether to give constitutional provisions a fixed meaning based on the public understanding *when they were enacted*. The foreign constitutions alluded to by Breyer were all enacted significantly later than the American Constitution, and in much different circumstances. Therefore, even if they contain *identical language* to the American Constitution, an originalist has no reason to think they contain identical values.

With this divide as background, Larsen's article reveals a clear preference for Scalia's originalism-grounded skepticism of foreign law. As she explains, originalism is simply incompatible with the idea that foreign and domestic courts are searching for the same single answer to a moral question: Even if we "assume that the Framers believed in natural law," she writes, "we still do not know the *content* of the natural law to be applied as domestic constitutional law." Those on Breyer's side of the argument "would have us believe that foreign and international law, particularly in the field of international human rights, should supply that content." But as Larsen convincingly responds, "If we are being originalists, why is it not the natural law precepts that the Framers and ratifiers themselves embraced that are binding?"

Finding little historical evidence that the Framers intended to leave the contours of our constitutional rights open to international debate, Larsen concludes that until a more convincing justification is offered, "it seems we are better off to abandon this particular use of foreign and international law." Larsen ends her paper by quoting Justice Scalia himself (for whom she

once clerked), from his dissent in *Thompson v. Oklahoma*: "It is, after all, 'a Constitution for the United States of America that we are expounding.'"

The death of Justice Scalia not only created a vacancy on the Supreme Court; it also deprived Justice Breyer of his longtime sparring partner in the public debate over foreign law and, more broadly, originalism itself. If Justice Larsen does indeed find her way to the Court, she may be destined to inherit Justice Scalia's charge in more ways than one.

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