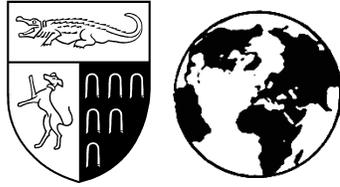


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FROM THE AZTECS TO THE KALAHARI BUSHMEN: CONSERVATIVE JUSTICES' CITATION OF FOREIGN SOURCES: CONSISTENCY, INCONSISTENCY, OR EVOLUTION?

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I. INTRODUCTION

On April 28, 2015, there were few surprises at the Supreme Court. During oral argument in *Obergefell v. Hodges*, counsel for each side mostly rehearsed the usual marriage equality arguments around rights, dignity, fairness, love, procreation, family, tradition, religion, and slippery slopes.¹ Almost two months later, on the

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1. Transcripts of the two questions presented in *Obergefell* are available separately. Transcript of Oral Argument, *Obergefell v. Hodges*, 192 L. Ed. 2d 609 (U.S. 2015) (No. 14-556), http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-556q1_6k47.pdf; *Id.*, http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-556q2_8m58.pdf.

historic day of June 26,² the Supreme Court announced its decision in *Obergefell*.³ The 5-4 majority opinion held that the Fourteenth Amendment requires states both to license marriages between two people of the same sex and to recognize such marriages if lawfully licensed and performed out-of-state.⁴

What stands out as different in the reasoning of *Obergefell* is that members of the Court's conservative wing invoked foreign law in a constitutional case about a domestic matter. By doing so, the Court's conservatives appeared to contradict their own previous statements about the role of foreign law in interpreting the U.S. Constitution. Besides legalizing marriage equality, *Obergefell* may therefore also set an important precedent as to the appropriateness of citing foreign sources in constitutional decisions.

II. CONSERVATIVE JUSTICES' STATEMENTS ON CITING FOREIGN LAW IN CONSTITUTIONAL CASES

In the past, each of the four current conservative justices has expressed opposition to citing foreign law in constitutional cases.⁵ In 2002, Justice Clarence Thomas argued, reacting to Justice Stephen Breyer's invocation of a foreign court, that the Supreme Court "should not impose foreign moods, fads, or fashions on Americans."⁶ Three years later, at his confirmation hearing, Chief Justice John Roberts criticized such citations to foreign law as cherry-picking arguments, analogizing the phenomenon to "looking out over a crowd and picking out your friends."⁷ The following year, Justice Samuel

2. Two other Supreme Court cases involving gay rights were also decided on June 26 of their respective years. *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating anti-sodomy laws) and *United States v. Windsor*, 133 S. Ct. 2675 (2013) (invalidating Section 3 of the Defense of Marriage Act that defined marriage as a legal union between one man and one woman as husband and wife) were decided that day in 2003 and 2013, respectively.

3. *Obergefell v. Hodges*, 192 L. Ed. 2d 609 (U.S. 2015), http://www.supremecourt.gov/opinions/14pdf/14556_3204.pdf.

4. *Id.*, at 614.

5. While Chief Justice Roberts is typically grouped with Justices Alito, Scalia, and Thomas in constituting the Court's conservative wing, some have begun to question whether that characterization is accurate. For analysis of whether Chief Justice Roberts is shifting to the left, see, for example, Brianne J. Gorod, *Is John Roberts Drifting Left?*, NEW REPUBLIC (Apr. 30, 2015), <http://www.newrepublic.com/article/121681/chief-justice-john-roberts-has-become-less-predictably-conservative>. For analysis of why he may be doing so, see, for example, Adam Winkler, *Why Is John Roberts Siding With the Supreme Court's Liberals?*, SLATE (June 11, 2015, 2:10 PM), http://www.slate.com/articles/news_and_politics/politics/2015/06/john_roberts_isn_t_a_reliable_conservative_vote_the_chief_justice_is_siding.html.

6. *Foster v. Florida*, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring in denial of certiorari).

7. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 201 (2005) (statement of Chief Justice John G. Roberts, Jr.).

Alito stated at his own confirmation hearing: “I don’t think that it’s appropriate or useful to look to foreign law in interpreting the provisions of our Constitution.”⁸

Justice Antonin Scalia is perhaps the most vocal critic of citing foreign law in Supreme Court decisions, himself declaring: “No one is more opposed to the use of foreign law than I am.”⁹ In his dissenting opinion in the 2003 case of *Lawrence v. Texas*, which struck down a statute criminalizing same-sex sodomy, Justice Scalia (joined by Chief Justice William Rehnquist and Justice Thomas) argued that citation to foreign law in the majority opinion was “meaningless dicta”¹⁰ and “[d]angerous dicta,”¹¹ after which he quoted Justice Thomas’s aforementioned statement.¹² Indeed, in various opinions since 1988, Justice Scalia had denounced the citation of foreign law, characterizing it as “totally inappropriate,”¹³ “[f]eeble,”¹⁴ and “irrelevant.”¹⁵

III. CONSERVATIVE JUSTICES’ CITATION OF FOREIGN SOURCES IN *OBERGEFELL V. HODGES*

What is so significant about this discussion of foreign law isn’t just that the topic dominated the beginning of oral argument and key portions of written dissents in *Obergefell*. What is so significant is that the conservative justices—all four of them—even raised it.¹⁶

Just a few minutes into oral argument on April 28, Justice Alito asked, referring in part to ancient Greece: “[H]ow do you account for the fact that, as far as I’m aware, until the end of the 20th century, there never was a nation or a culture that recognized marriage between two people of the same sex?”¹⁷ Justice Scalia then inquired: “Do you know of any society, prior to the Netherlands in 2001, that permitted same-sex marriage?”¹⁸

8. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 471 (2006) (statement of Justice Samuel A. Alito, Jr.).

9. Charles Lane, *Scalia Tells Congress to Mind Its Own Business*, WASH. POST, May 19, 2006, at A19 (quoting Justice Scalia).

10. 539 U.S. 558, 598 (2003) (Scalia, J., dissenting).

11. *Id.*

12. *Id.* (quoting *Foster*, 537 U.S. at 990 n.*).

13. *Thompson v. Oklahoma*, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting).

14. *Atkins v. Virginia*, 536 U.S. 304, 347 (2002) (Scalia, J., dissenting).

15. *Id.* at 347.

16. And the conservative justices did so as much or more than the liberal justices. For example, Justice Anthony Kennedy’s majority opinion in *Obergefell* refers to foreign law, in part, when it states: “The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations.” *Obergefell v. Hodges*, 192 L. Ed. 2d 609, 619 (U.S. 2015).

17. Transcript of Oral Argument at 9,14, *Obergefell*, 192 L. Ed. 2d 609 (No. 14-556).

18. *Id.* at 12.

In his dissent, Justice Thomas (joined by Justice Scalia) echoed Justice Alito's oral argument comment about antiquity by citing an amicus brief "explaining that several famous ancient Greeks wrote approvingly of the traditional definition of marriage, though same-sex sexual relations were common in Greece at the time."¹⁹ Justice Thomas also made the broader point that "[t]he traditional definition of marriage has prevailed in every society that has recognized marriage throughout history."²⁰ And in his separate dissent, Justice Alito (joined by Justices Scalia and Thomas) reiterated Justice Scalia's oral argument statement about the Netherlands.²¹ In addition, Justice Alito argued that it is beyond the Supreme Court's authority "to say that a State may not adhere to the understanding of marriage that has long prevailed, not just in this country and others with similar cultural roots, but also in a great variety of countries and cultures all around the globe."²²

Chief Justice Roberts's dissent (joined by Justices Scalia and Thomas) relied in part on citations to cultures around the world and throughout the ages. He declared: "[A] State's decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational."²³ The cultures Chief Justice Roberts then referenced included "the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs."²⁴ He also cited "deep roots in some cultures around the world" in questioning why the majority distinguished same-sex marriages of two people from plural unions.²⁵

IV. IMPLICATIONS

It is noteworthy that conservative justices invoked Greek, Dutch, Kalahari, Chinese, Carthaginian, Aztec, and other foreign sources so

19. *Obergefell*, 192 L. Ed. 2d at 666 n.5 (Thomas, J., dissenting).

20. *Id.*

21. *Id.* at 670 (Alito, J., dissenting). Justices Alito and Scalia differed, however, on the year the Netherlands allowed same-sex couples to marry. Justice Alito wrote in his dissent that it was in 2000, *Obergefell*, 192 L. Ed. 2d at 670 (Alito J., dissenting) (quoting *U.S. v. Windsor*, 186 L. Ed. 2d 808, 851), while Justice Scalia stated at oral argument that it was in 2001, Transcript of Oral Argument, *supra* note 17. In fact, the legislation was enacted in 2000 but went into effect in 2001. See *Gay Marriage Goes Dutch*, CBSNEWS.COM, Apr. 1, 2001, <http://www.cbsnews.com/news/gay-marriage-goes-dutch/>.

22. *Obergefell*, 192 L. Ed. 2d at 672 (Alito, J., dissenting).

23. *Id.* at 639 (Roberts, C.J., dissenting).

24. *Id.* For discussion of how these four cultures are not, in fact, exemplars of "traditional" unions between men and women, see Ishaan Tharoor, *Justice Roberts Cited the Traditions of Four Cultures in His Dissent on Gay Marriage. Here's What He Didn't Mention.*, WASH. POST, June 26, 2015, <https://www.washingtonpost.com/blogs/worldviews/wp/2015/06/26/justice-roberts-cited-the-traditions-of-four-cultures-in-his-dissent-on-gay-marriage-heres-what-he-didnt-mention/>.

25. *Obergefell*, 192 L. Ed. 2d at 650 (Roberts, C.J., dissenting).

quickly and forcefully in the *Obergefell* oral argument and written dissents. The conservative justices cited these sources without clarifying whether such citations constitute a departure from their past statements and, if so, why the justices now hold a contrary view. Such citations raise questions about the strength of the conservative justices' arguments about marriage equality, when it is appropriate to cite foreign sources, and what foreign law even is.

Of course, *Obergefell*, as a single case, may be an aberration. Its citations to foreign sources might not suggest any shift in these conservative justices' approach to foreign law. The implications noted below would therefore require additional jurisprudence to evaluate and confirm.

A. *Strength of Conservative Justices' Opposition to Same-Sex Marriage*

One of the conservative justices' principal arguments against same-sex marriage rests on foreign law—that marriage is historically and universally considered to be between one man and one woman and that, in any case, other countries did not start legalizing same-sex unions until recently. Yet, even if true, these arguments are “feeble,” to quote Justice Scalia, since the United States is not bound by the decisions of other countries. In his dissent, Chief Justice Roberts rhetorically asked: “Just who do we think we are [to disagree with these foreign cultures and precedents]?”²⁶ As answered by the majority, we think we are a country that can join the Netherlands and over a dozen other countries²⁷ in marching in the vanguard of progress in adjudicating on the fundamental right of marriage.²⁸

26. *Obergefell*, 192 L. Ed. 2d at 639 (Roberts, C.J., dissenting).

27. For a description of the first countries to legalize same-sex unions and marriages, see, for example, Adam Taylor, *What Was the First Country to Legalize Gay Marriage?*, WASH. POST, June 26, 2015, <https://www.washingtonpost.com/blogs/worldviews/wp/2015/06/26/what-was-the-first-country-to-legalize-gay-marriage/>; Freedom to Marry, *The Freedom to Marry Internationally*, <http://www.freedomtomarry.org/landscape/entry/c/international> (last visited July 23, 2015).

28. Judge Richard Posner's response to this rhetorical question was more biting. He stated, in reference to the four cultures Chief Justice Roberts cited: “We're pretty sure we're not any of the above. And most of us are not convinced that what's good enough for the Bushmen, the Carthaginians, and the Aztecs should be good enough for us. Ah, the millennia! Ah, the wisdom of ages! How arrogant it would be to think we knew more than the Aztecs—we who don't even know how to cut a person's heart out of his chest while he's still alive, a maneuver they were experts at.” Richard A. Posner, *The Chief Justice's Gay Marriage Dissent is Heartless*, SLATE (June 27, 2015, 1:56 PM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2015/scotus_roundup/supreme_court_gay_marriage_john_roberts_dissent_in_obergefell_is_heartless.html.

B. *Appropriate Citation of Foreign Law*

It may be that the conservative justices now regard citations to foreign law as valid—that such invocation is no longer “inappropriate,” “totally inappropriate,” or “irrelevant,” to quote Justices Alito and Scalia. Indeed, even the Justice who declared himself the greatest opponent of foreign law citations, Antonin Scalia, has acknowledged that these citations may be appropriate in certain contexts. Four years before *Obergefell*, Justice Scalia conceded the relevance of foreign law to the interpretation of a treaty and the meaning of a U.S. statute (for example, where the statute’s purpose is to implement a treaty provision).²⁹ Justice Scalia has also argued that foreign law is only relevant to determining the meaning of the U.S. Constitution in the case of Old English law because certain constitutional phrases—such as “due process of law,” “writ of habeas corpus,” and “cruel and unusual punishment”—derive from British traditions.³⁰ As such, Justice Scalia has somewhat contradictorily claimed: “I probably consider [foreign law] relevant more often than most of my colleagues on the Supreme Court I use foreign law all the time, but it is all very old English law.”³¹

Given that Justice Scalia cited Dutch law at oral argument in *Obergefell*, that he then joined Justice Alito’s dissent in doing the same, and that he also joined both Justice Thomas’s dissent invoking ancient Greece and Chief Justice Roberts’s dissent referencing an array of foreign cultures, has Justice Scalia’s view now broadened the types of cases in which it is permissible to cite foreign law?³² If so, why, and do the other conservative justices agree?

Relatedly, Chief Justice Roberts may be correct about the traditional tendency to cherry-pick citations to foreign law in Supreme Court opinions. Liberal justices have frequently cited to foreign law when it has suited their purposes, such as in cases involving sodomy, but not often in cases where it has not, such as those concerning abortion.³³ Have the current conservative justices

29. Justice Antonin Scalia, *Outsourcing American Law: Foreign Law in Constitutional Interpretation* 1 (Am. Enter. Inst. for Pub. Policy Research, Working Paper No. 152, 2009), <http://www.aei.org/wp-content/uploads/2011/10/20090820-Chapter2.pdf>.

30. *Id.* at 2.

31. *Id.* at 1-2.

32. Moreover, citation to British law as an anomaly in constitutional interpretation is increasingly questioned. Notwithstanding Justice Scalia’s distinctions, some recent commentary suggests that the impact of Old English law, such as Magna Carta, on the U.S. Constitution may be overstated. See, e.g., Jill Lepore, *The Rule of History: Magna Carta, the Bill of Rights, and the Hold of Time*, THE NEW YORKER, Apr. 20, 2015, <http://www.newyorker.com/magazine/2015/04/20/the-rule-of-history> (noting that only four of the twenty-seven provisions of the Bill of Rights can be traced to Magna Carta); Sarah Lyall, *Magna Carta, Still Posing a Challenge at 800*, N.Y. TIMES, June 15, 2015, at A4.

33. See, e.g., Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 HARV.

become less hostile to foreign law citations, at least when seeking support from the like-minded “friends”³⁴ to which Chief Justice Roberts referred in his confirmation hearing? Or might Chief Justice Roberts (or perhaps another conservative justice) now offer an approach to avoid any cherry-picking—whether by conservative or liberal justices—in the citation to foreign sources?

C. Definition of Foreign Law

Alternatively, rather than conceding the validity of citing to foreign law, the conservative justices might view the *Obergefell* citations as distinct from foreign law, possibly based on the type or timeframe of the sources. Indeed, the conservative justices qualify most of their citations in *Obergefell* to foreign sources in language of “culture” and “tradition” as opposed to “law.”

However, the cultural traditions to which the conservative justices refer often necessarily involve law. The conservative justices’ pre-*Obergefell* statements do not clarify what, in their view, distinguishes culture and tradition from law. Is foreign law limited to laws formally passed by a legislature, issued by an executive, ruled by a court, or adopted by a public referendum? But even if the conservative justices would define foreign law as only that which is officially decreed by a governmental entity or popular vote, the 2001 Dutch law Justice Scalia cited at oral argument and which Justice Alito (joined by Justices Scalia and Thomas) cited in his written dissent would surely qualify. Moreover, the Justices’ broad statements about “culture”—such as “the meaning of marriage that has persisted in every culture throughout human history”—undoubtedly invoke foreign law, as the construct of marriage is a “legal” one in many countries worldwide.

Or does law inhere in traditions and cultures? If the conservative justices employed this broader definition of foreign law, Justice Thomas’s previously stated opposition to imposing “foreign moods, fads, or fashions on Americans” would require revision in light of his citation in *Obergefell* to ancient Greece and his joining Chief Justice Roberts’s reference to various foreign cultures.

Perhaps the conservative justices would now argue that only law—and maybe also culture and tradition—of a *particular era* qualifies as foreign sources appropriate to cite. Is there then an era after which such sources suddenly become unacceptable to reference? If so, what era and why? Invocations of ancient Greece by Justices Alito and Thomas (in dissents joined by Justice Scalia) may indicate

J.L. & PUB. POL’Y 291 (2005) (critiquing the Supreme Court’s use of foreign and international decisions to support its constitutional rulings).

³⁴ Statement of Chief Justice John G. Roberts, Jr., *supra* note 7.

that antiquity is fair game. But citations by Justices Scalia and Alito (joined by Justices Scalia and Thomas) to a 2001 Dutch law as well as Justice Alito (still joined by Justices Scalia and Thomas) to the entire historical period “until the end of the 20th century” may suggest that more contemporary foreign sources are also suitable. And references by Chief Justice Roberts to “throughout human history” and by Justice Thomas to “throughout history” may imply no temporal limitations whatsoever.

V. CONCLUSION

The conservative justices’ invocation of foreign sources in *Obergefell*, particularly without explicit justification for doing so, appears to contradict their earlier position on such citations. *Obergefell* may thus foreshadow the conservative justices’ future openness to considering the practice and views of foreign countries other than when interpreting particular treaties, statutes, and constitutional phrases. If so, such citation of foreign law as persuasive authority (rather than binding precedent) may bear on constitutional issues beyond same-sex marriage, such as the death penalty, the legality of which is governed in the United States by the Constitution’s Eighth Amendment prohibition of “cruel and unusual punishments.”³⁵ That most countries in the world have abolished capital punishment in law or practice³⁶ might—or, to be consistent, *should*—thus be more relevant to conservative justices post-*Obergefell*.³⁷

Beyond its ruling on same-sex marriage, *Obergefell* may thus set the precedent for even conservative justices invoking foreign law more frequently and consistently at oral argument and in written opinions. And that trend may both profoundly affect numerous issues that come before the Supreme Court and spur clarification about what sources qualify as foreign law and why and when it is appropriate to cite them in Supreme Court decisions.

35. U.S. CONST. amend. VIII (“nor cruel and unusual punishments inflicted”).

36. Amnesty International, *The World Moves Towards Abolition*, <http://www.amnestyusa.org/our-work/issues/death-penalty/international-death-penalty> (last visited July 23, 2015).

37. The more liberal justices already viewed such sources as relevant and appropriate to cite. For example, in *Roper v. Simmons*, which held that it is unconstitutional to impose capital punishment on offenders for crimes committed while they were under the age of eighteen, Justice Kennedy’s plurality opinion observed: “[A]t 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.’” *Roper v. Simmons*, 543 U.S. 551, 575 (citing *Trop v. Dulles*, 356 U.S. 86, 102-03 (1948) (plurality opinion)).