

Conservatives, Often Wary of Foreign Law, Embrace It in Census Case

By Adam Liptak

WASHINGTON — Two years ago, at his confirmation hearings, Justice Neil M. Gorsuch said that what happens abroad should not influence American judges in constitutional cases.

“We have our own tradition and our own history,” he said, “and I do not know why we would look to the experience of other countries rather than to our own.”

But last week, during arguments over whether the Trump administration may add a question on citizenship to the 2020 census, Justice Gorsuch did not hesitate to consider what he called “the evidence of practice around the world.”

“Virtually every English-speaking country and a great many others besides ask this question in their censuses,” he said.

Justice Brett M. Kavanaugh has also been skeptical about the use of foreign and international law by American judges in at least some kinds of cases. In 2010, when he was an appeals court judge, he wrote in a concurring opinion about a Guantánamo detainee that “international-law norms are not domestic U.S. law.”

But he was curious about those norms in the census case. “The United Nations recommends that countries ask a citizenship question on the census,” he said. “And a number of other countries do it. Spain, Germany, Canada, Australia, Ireland, Mexico ask a citizenship question.”

“It’s a very common question internationally,” he added.

The seeming tension in the justices’ stances illuminated a debate that has been unfolding for about two decades over whether the Supreme Court should look abroad for points of comparison.

Supreme Court opinions have occasionally taken account of the decisions of foreign and international tribunals in constitutional cases. Justice Anthony M. Kennedy, who retired last year, cited decisions limiting the death penalty and other harsh punishments for juvenile offenders and expanding gay rights.

Those citations prompted a political uproar that failed to distinguish between useful comparisons and treating foreign rulings as binding precedents.

The questions Justices Gorsuch and Kavanaugh asked may help clarify matters. They did not say that the Supreme Court was required to follow international practice. Their inquiry was, instead, a modest one. If other developed democracies think it useful to ask about citizenship, they suggested, it might be worthwhile to consider why the United States should not do so, too.

The counterargument, articulated by Chief Justice John G. Roberts Jr. at his 2005 confirmation hearings, is that **considering foreign law is bound to be selective and opportunistic.**

“In foreign law, you can find anything you want,” Chief Justice Roberts said. “Looking at foreign law for support is like looking out over a crowd and picking out your friends.”

Justice Antonin Scalia, who died in 2016, made the same point but more forcefully in a 2005 dissent. “To invoke alien law when it agrees with one’s own thinking, and ignore it otherwise,” he wrote, “is not reasoned decision making, but sophistry.”

The court’s **more liberal justices have said they are open to considering the experiences of other legal systems.**

“I’m in favor of good ideas coming from wherever you can get them,” Justice Elena Kagan said at her 2010 confirmation hearings, whether the source was a law review article, a state court ruling or a decision of a foreign court.

The rulings of foreign tribunals, Justice Ruth Bader Ginsburg said in a 2006 address to the Constitutional Court of South Africa, “can add to the store of knowledge relevant to the solution of trying questions.”

Justice Stephen G. Breyer wrote an entire book, “The Court and the World,” on the ways the American legal system does and should interact with the international community.

But none of the court’s four liberal justices asked about the apparently widespread international practice of asking about citizenship on censuses.

Unfortunately, the briefs in the case, *Department of Commerce v. New York*, No. 18-966, did not really explore how the experiences of other nations compare to the American one.

A brief from the Trump administration noted that “other major democracies inquire about citizenship on their census, including Australia, Canada, France, Germany, Indonesia, Ireland, Mexico, Spain and the United Kingdom, to name a few.” The brief

added that “the United Nations also recommends asking about citizenship on a census,” citing a 2017 United Nations document.

The document itself, in a passage not quoted in the brief, warned that “it is advisable to avoid topics that could increase the burden on respondents and those that are likely to arouse fear, local prejudice or superstition or that might be used to deliberately promote political or sectarian causes as these are likely to have a detrimental effect on response rates and support for the census.”

During the arguments, Barbara D. Underwood, New York’s solicitor general, urged the court not to allow the question. She acknowledged that information about citizenship “is certainly useful for a country to have.”

But she said obtaining it through the main census form does not make sense everywhere. **The Constitution requires an “actual enumeration” that counts everyone living in the United States, and that provision does not have a counterpart in every other country’s foundational laws.** And other countries may not experience the drop in participation that government experts have said would result from adding the citizenship question in the United States.

“It may be,” Ms. Underwood said, “that those countries either haven’t examined or don’t have the problem that has been identified — the problem of depressing the enumeration that the United States has.”