Yes Please, I'd Love to Talk With You.

The court has learned from the rest of the world before. It should continue to do so.

BY VICKI JACKSON

CHIEF JUSTICE WILLIAM REHNQUIST INTRODUCED A CONference on comparative constitutional law in 1999 by telling the story of how, a decade before, the justices of Canada's Supreme Court said to him, "We cite your Constitution; why don't you cite ours?" The chief justice explained that at the time of that question, the Canadian Charter of Rights and Freedoms was only seven years old. But time had passed, he said, and by 1999 it was "less defensible to say that we're not familiar with it."

"It's time," he wrote, that "the U.S. courts began looking to the decisions of other constitutional courts to aid in their own deliberative process."

In recent years, a number of United States Supreme Court justices have referred, in limited ways, to foreign or international legal sources while resolving constitutional questions. Of the current nine justices, at least six—Chief Justice Rehnquist, and Justices John Paul Stevens, Antonin Scalia, Anthony Kennedy, Ruth Bader Ginsburg, and Stephen Breyer—have done so since 1992. Critics argue that such references to foreign law are an illegitimate, antidemocratic judicial usurpation of authority, or an effort to obscure the absence of solid grounding in U.S. law for a result based on "foreign fads" rather than "American conceptions" of law.

These critiques are off the mark and often counterproductive. Understanding references to foreign law in their legal and historic context should defuse unwarranted criticisms, highlight the benefits of well-informed uses of foreign and international legal sources, and focus attention on some genuinely difficult questions. While care must be taken in making legal comparisons, consideration of foreign legal decisions can contribute to our understanding of our own distinctiveness as a nation, illuminate common concepts, and challenge us to think more clearly about our own legal questions. Understanding foreign legal practice can also shed light on the justifications for government action—on which U.S. constitutional law will often turn—and on the possible consequences of different choices for the interpretation of our fundamental law.

It's important to note that the court's recent references to foreign decisions and practice do not treat them as binding. International law may be binding, as when Congress ratifies and implements a treaty. But that's a separate question from whether the Supreme Court should cite foreign or international sources merely as sources that are relevant and only if they have persuasive value, positive or negative. In this sense, foreign legal authority (or nonbinding international norms) shares characteristics of other forms of persuasive authority used in Supreme Court decisions. These include the rulings of lower federal courts and of state courts (even when interpreting their own state constitutions), law review articles, and even works of fiction by Shakespeare, Mark Twain, or George Orwell.

But critics could argue that state courts, even when interpreting distinct provisions of distinct state constitutions, do so within the tradition of U.S. constitutionalism in a way that is not true of foreign or international tribunals. And no one thinks that a work of fiction is a binding legal precedent, even when the court quotes from *Othello* on the importance of preserving the reputation of one's name. Does the Supreme Court's citation of a decision by a foreign court, not bound by United States law, imply that greater weight is being given to the decision than is warranted because it was made by a court? If that court is interpreting different provisions in a different legal tradition, why is its decision relevant at all? And what relevance could international covenants, not ratified by or binding in the U.S., have to U.S. constitutional questions?

LET US GO BACK TO THE BEGINNING. FAR FROM BEING GENerally hostile to foreign countries' views or laws, the founding generation had what the signers of the Declaration of Independence described as a "decent Respect to the Opinions of Mankind." Federalist No. 63 explained:

> An attention to the judgment of other nations is important to every government.... [I]ndependently of the merits of any particular... measure, it is desirable... that it should appear to other nations as the offspring of a wise and honorable policy..., [and] in doubtful cases, particularly where the national councils may be warped by... passion or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can be followed.

While this passage was not directed to legal judgments of courts, the founding generation showed concern for how adjudication in our courts would affect other countries' regard for the United States. As the early Supreme Court noted, the judicial power of the United States was intended to include cases "in the correct adjudication of which foreign nations are deeply interested... [and in] which the principles of the law and comity of nations often form an essential inquiry."

In many early cases, the court referred to the "law of nations" (today called "international law") or other countries' practices. In 1804, Chief Justice John Marshall wrote in *Murray v. Schooner Charming Betsy* that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction" exists. In 1812, in *The Schooner Exchange v. McFaddon*, the court relied on "the usages and received obligations of the civilized world" to hold that a foreign sovereign's vessel in a U.S. port was immune from judicial jurisdiction. And in determining three years later what the law of nations was in *Thirty Hogsheads of Sugar v. Boyle*, a case governed by that law, the court commented that "[t]he decisions of the Courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect."

In addition to its cases grounded in the law of nations, the early court also referred on occasion to foreign or international practices in interpreting the U.S. Constitution. In *Worcester v. Georgia* (1832), the court considered the law of nations in defining the status of Indian tribes and state authority under the U.S. Constitution. In some early constitutional cases, the law of nations was referred to by way of contrast to account for constitutional text. In *Prigg v. Pennsylvania* (1842) the court explained that the "fugitive slave clause," which mandated the return of escaped slaves who crossed into other states, was necessary because otherwise the law of nations would not have required a free state to return an escaped slave.

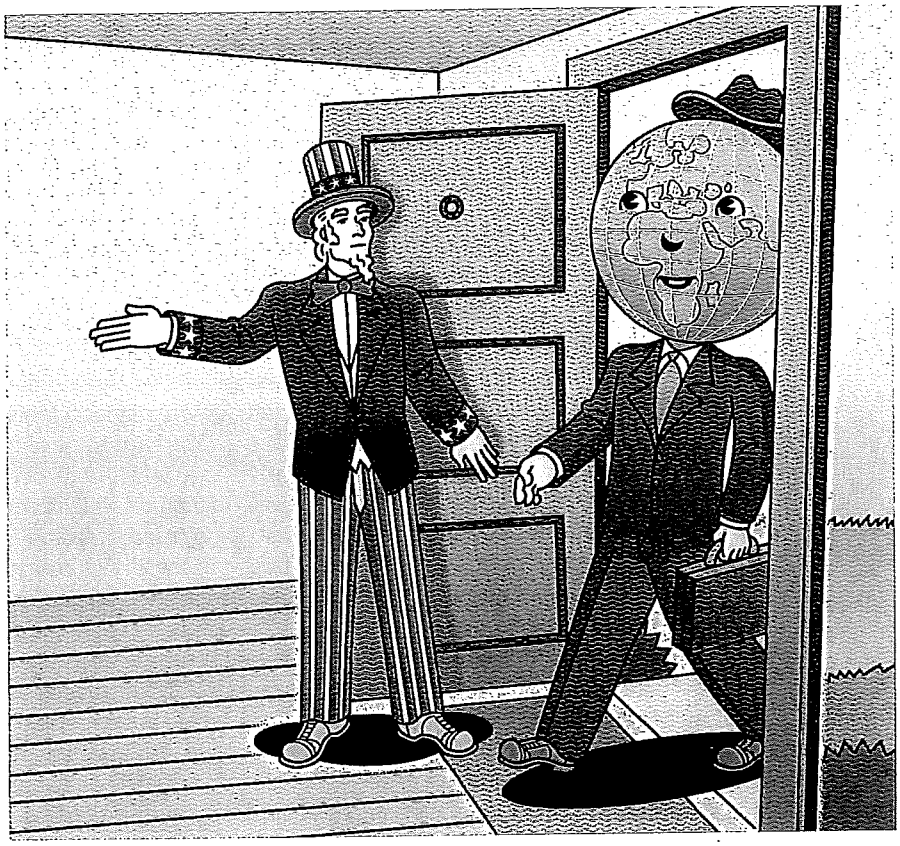
In other cases, the practices of other nations were invoked both to support and to oppose particular interpretations of the Constitution. In the notorious 1857 *Dred Scott* decision, the majority cited discriminatory practices of European nations at the time of America's founding to support the view that the Constitution precluded national citizenship for African-Americans, while a dissent argued in favor of Scott's free status in part by relying on contemporary European practice and international law. In *Fong Yue Ting v. United States* (1893), the majority relied on foreign practice, the law of nations, and the inherent rights of sovereignty to support a broad national power to deport Chinese laborers. The dissent vigorously countered that the United States "takes nothing" from the practices of other countries that expelled people due to their religion or ethnicity.

In *Fong Yue Ting* and elsewhere, justices have demonstrated that they can draw on foreign practice as "negative" authority, just as they may find other foreign authority to be a positive support. In the *Youngstown Steel* case in 1952, the court held that President Harry Truman lacked constitutional power to take over the steel companies in anticipation of a strike. Justices Felix Frankfurter and Robert Jackson, in separate opinions, alluded to the dangers of dictatorship that other countries had recently experienced, with Jackson explaining features of the Weimar Constitution in Germany that allowed Adolf Hitler to assume dictatorial powers. He contrasted Germany's legal practice to that of France and Great Britain, where legislative authorization was required for the exercise of emergency powers, to support the conclusion that without more specific Congressional authorization the president could not take private property.

Foreign or international examples, both negative and positive, can also inform the court's determination of appropriate measures to protect U.S. constitutional rights. In *Miranda v. Arizona* (1966), canvassing examples of other countries' protections against abusive interrogation of suspects held in custody, the court urged that we should provide "at least as much" protection as countries such as England, Scotland, or India provided, because the United States has "a specific requirement of the

Fifth Amendment of the Constitution, whereas other jurisdictions arrived at their conclusions on the basis of principles of justice not so specifically defined." On another issue, affirmative action, Justice Ginsburg, concurring in *Grutter v. Bollinger* (2003), noted the provisions for "temporary special measures" to combat race or gender discrimination in two widely adopted international covenants. She did this in connection with the court's conclusion that individualized consideration of race in law school admissions was permissible under established U.S. law, but only for a limited period of time.

Foreign practice and decisions can also be helpful in evaluating the justifications for government action. In *Washington v. Glucksberg* (1997), the court had to decide whether a state's prohibition on physician-assisted euthanasia was "reasonably related" to "legitimate" state interests. In concluding that the statute in question was constitutional, Chief Justice Rehnquist's opinion noted the debate in other countries, including the Netherlands' experience with physician-assisted suicides and the rejection of euthanasia in Canada and Britain. Foreign law can also help illustrate the possible consequences of different interpretive choices. In *McIntyre v. Ohio Elections Commission* (1995), Justice Scalia's dissent, arguing in favor of the constitutionality of a ban on anonymous pamphleteering, relied in part on practices of "foreign democracies" to conclude that such a ban "is effective in protecting and enhancing democratic elections." Caution is important before reasoning from foreign legal practices to draw any conclusions about U.S. law, since each foreign system differs in important ways. But caution need not mean wholesale avoidance.



ONE OF THE MOST DEBATED RECENT REFERENCES TO FOREIGN law was made in *Lawrence v. Texas* (2003). In 1986, in *Bowers v. Hardwick*, a narrowly divided 5-4 court rejected a challenge to a Georgia law making sodomy a crime as applied to homosexual conduct. Chief Justice Warren Burger was part of the majority and wrote separately to argue, among other things, that "throughout the history of Western civilization" homosexual sodomy was subject to prohibition. In *Lawrence*, the court overruled *Bowers*, concluding that *Bowers* failed to appreciate the nature of the liberty interest at stake.

As part of its ruling, the court made two distinct uses of foreign legal sources. First, it relied on them to clarify and correct misimpressions on which the earlier opinion had been based: "The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction." As Burger's opinion illustrates, jurists may believe they know something of the laws of other countries, something that is incomplete, or erroneous, but that nonetheless influences their understanding of U.S. law; candid references have the advantage of allowing for correction of such partial or incorrect understandings.

Lawrence's second use of foreign materials was more positive, suggesting that European conceptions of "human freedom" could inform understandings of liberty in the United States. This use was the more controversial, provoking a dissenting justice to argue that the court " 'should not impose foreign moods ... on Americans.' " Similar concerns have arisen in connection with challenges to the death penalty. To the extent that constitutional rights rest upon the people's consent to the specific intent of constitutional framers and ratifiers, and are embedded in a broader institutional framework of U.S. law, the reasoning and decisions of foreign tribunals about foreign law may be of quite limited value.

But international human rights are so named because they are considered rights that attach to all persons by virtue of being human. Legal instruments that protect these rights have drawn inspiration from the U. S. Constitution—drafted, after all, to provide governance for a people who, in declaring their independence, invoked universal understandings of "unalienable rights." Many of our constitutional rights and values—liberty, equal protection of the law, due process, freedom of expression—reflect not only specific decisions made in the United States, but also widely shared commitments of many Western democracies.

Where courts in other nations, in decisions meant to bind their own governments, have reflected on similar practices affecting human rights, well-informed American jurists, knowledgeable of these decisions, can decide whether they help in evaluating the best understanding of similar concepts in U.S. law. Decisions concerning "constitutional relatives"—international or foreign texts inspired or influenced by the United States—may be of particular interest. As Judge Guido Calabresi of the Second Circuit has said, in referring to U.S. courts learning from constitutional court decisions in Europe: "Wise parents do not hesitate to learn from their children."

An outside perspective can facilitate our examinations of emotionally charged domestic issues, such as abortion, gay rights, and the death penalty.

It is of course important for U.S. decisions to be rooted in American understandings and traditions, and it is likewise important for courts to be open to understanding the Constitution differently from how it was understood in the past. Reasoned consideration of matters of principle is an important part of our constitutional tradition, one without which the road from *Plessy v. Ferguson* (1896) to *Brown v. Board of Education* (1954) would have been a more difficult one to travel. Particularly with emotionally charged issues of social controversy such as abortion, gay rights, and the death penalty, looking at our own system from an outside perspective can facilitate examination of whether existing constitutional doctrine is consistent with our deepest values.

NOTWITHSTANDING THE LONG HISTORY OF THE SUPREME Court's referring to foreign legal practices and its willingness to note the views of other courts, Justices Antonin Scalia and Clarence Thomas have both asserted that nonbinding contemporary foreign or international legal sources are usually not relevant to constitutional decisions: It is "American conceptions of decency" that are controlling in deciding whether a punishment is "cruel and unusual," for example. European conceptions are, in Scalia's words, "thankfully" not ours, and foreign authorities may be relevant to "making" but not to "interpreting" a constitution once made. Thomas has suggested that citation of foreign authorities is a sign of weakness, an admission that the position for which the foreign authority is cited lacks support in U.S. legal sources. And Chief Justice Rehnquist has raised federalism concerns about using foreign law to interpret constitutional provisions that would limit the states.

To some extent, these objections rest on the proposition that foreign law should be cited only if it bears on the original meaning or specific intentions of the framers of constitutional text—a view that treats originalism as the sole legitimate method of interpreting the Constitution. But accepting that approach might exclude essential constitutional developments, as sociolegal understandings of traditional distinctions and practices shift. The law of gender equality, for example, has been developed from the Fourteenth Amendment's equal protection clause, even though other words in that amendment favored male over female voters, and its framers were not seeking to advance gender equality. A narrowly originalist view is inconsistent with the court's tradition of relying on a variety of sources to interpret the Constitution—including the original intentions of the framers, the text and structure of the Constitution, the court's own precedents, constitutional practice in other branches, and the consequences of different interpretations.

Some of the objections to the citation of non–U.S. sources can be understood as part of a more general challenge to the authority of U.S. courts to invalidate actions taken by current majorities at the state or federal level in the name of the Constitution. These objections are entwined with a concern about increasing judicial "discretion" in constitutional interpretation. Any limitations on democratic decision-making are acceptable, one argument goes, only if they are expressly stated in America's fundamental law. Yet many constitutional rules must be interpreted through legal analysis, not read mechanically off the page. And the notion that U.S. judges would reach results inconsistent with U.S. traditions because of their knowledge of, or citation to, nonbinding international or foreign law seems far-fetched.

Perhaps some objections also reflect concern that using foreign law to help identify the best reading of U.S. law will divert attention away from U.S. sources and morph into treating foreign law as binding. But the Supreme Court has been able to view state court authority as sometimes helpful in formulating a federal rule, and sometimes not. There is little reason to doubt its capacity to do the same with respect to nonbinding international or foreign law.

A more difficult challenge, however, is to be knowledgeable about what to compare. Some issues may be more amenable to comparison than others; some lines of U.S. precedent are well established and quite distinct from the rulings of other nations. Legal education is just beginning to recognize the importance of offering training in understanding foreign and international law.

Although there are limitations in making comparisons, legal reasoning in the United States is often based on analogies, providing jurists and lawyers with training in how to examine conflicting approaches and sort out what is most relevant and persuasive. Cautious but explicit consideration is perhaps the best response to our increased awareness of the practices of foreign governments, since what we think we know—as with Chief Justice Burger's opinion in *Bowers*—may already inform, or misinform, our understanding of U.S. constitutionalism.

Decisions of U.S. constitutional law are always about our law. But no justice should cut off knowledge and analysis of foreign law if it can help the court reach a better understanding of our own. ■

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