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Global developments in domestic constitutionalism and international human rights law have engendered a new set of dynamic relationships between and among legal systems. Scholars and jurists have taken note of "transnational judicial conversations," "dialogue" or "transjudicial communication" about human rights,[1] of a rise in "world constitutionalism,"[2] of a global "community of law,"[3] of the possibilities of "comparative constitutional law"[4] and for "comparative reasoning,"[5] and of the globalization not only of

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1. *See* Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499, 527–30 (2000); Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 21–23 (1998); Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH L. REV. 99, 103–12 (1994).

2. Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997).

3. Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 366–73 (1997).

4. Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999); *see also* David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539 (2001).

5. Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409 (2003).

constitutional interpretation,[6] but also of judging and judiciaries.[7] Focusing on developments in gender equality, this Article explores distinctive features of the new transnational legal discourse and its relationship to domestic constitutional law (with special attention to the United States).

Gender equality is a particularly fruitful area in which to explore transnational judicial discourse. First, there have been enormous legal changes in the last half century on gender equality, reflected in large numbers of national and transnational legal sources and a broad area of at least formal agreement among many countries on core values. Gender equality claims under both national and international legal sources are being heard in national courts,[8] transnational legal bodies[9] and international human rights tribunals.[10] Second, there

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6. *See* Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 821 (1999).

7. *See* Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1103–04 (2000) [hereinafter Slaughter, *Globalization*]; *see also* Helfer & Slaughter, *supra* note 3, at 370–73; Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 202–04 (2003) [hereinafter Slaughter, *Global Community*].

8. *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996); Benner v. Canada, [1997] 1 S.C.R. 358; *see also* Vriend v. Alberta, [1998] 1 S.C.R. 493; Lawrence v. Texas, 123 S. Ct. 2472 (2003). For a helpful discussion of gender equality cases in Colombia, see Martha I. Morgan, *Taking* Machismo *to Court: The Gender Jurisprudence of the Colombian Constitutional Court*, 30 U. MIAMI INTER-AM. L. REV. 253, 283–85, 294–97 (1999) (describing decisions finding equal protection violations in laws providing lesser penalties for marital rapes than others and due process violations in exclusion of gay student from military school).

9. The European Court of Justice has decided a number of gender equality cases. *See, e.g.*, Case C-158/97, Badeck & Others v. Germany, 2000 E.C.R. I-1875, [2001] 2 C.M.L.R. 6 (2000) (affirmative action for women in employment); Case C-409/95, Marschall v. Land Nordrhein-Westfalen, 1997 E.C.R. I-6363, [1998]; Case C-285/98, Kreil v. Bundesrepublik Deutschland, 2000 E.C.R. I-69 (invalidating law prohibiting military service by women); Dory v. Germany, 2003 ECJ LEXIS 99 (April 2003) (upholding limitation of compulsory military service to men); Case C-273/97, Sirdar v. Army Board, 1999 E.C.R. I-7403, [1999] 3 C.M.L.R. 559 (1999) (upholding exclusion of women from Royal Marines); Case C-109/100, Tele Danmark A/S v. Handels, 2001 E.C.R. I-06993, (precluding dismissal of pregnant workers for failing to disclose pregnancy when being hired for limited term contracts). So, too, has the European Court of Human Rights. *See, e.g.*, Willis v. United Kingdom, App. No. 36042/97 (2002) (finding denial of widow's pension to widower violated European Convention's prohibition on gender discrimination); *cf.*,

remains significant opposition to the idea of full gender equality, reflected not only in wide departures in practice from the stated norm

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e.g., Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) (1981) (prohibition of sodomy violated privacy rights); Norris v. Ireland, 142 Eur. Ct. H.R. (ser. A) (1988) (same); Modinos v. Cyprus, 259 Eur. Ct. H.R. (ser. A) (1993) (same). Other regional human rights bodies have also addressed issues of gender equality. *See, e.g.*, Inter-American Court of Human Rights, *Amendments to the Naturalization Provisions of the Constitution of Costa Rica/Advisory Opinion, reprinted in* 5 HUMAN RTS. L.J. 161, 163, 171–75 (1984) (gender distinctions found to violate articles twenty-four and seventeen of the American Convention).

10. *See, e.g.*, Aumeeruddy-Cziffra v. Mauritius, U.N. CCPR Hum. Rts. Comm., 12th Sess., U.N. Doc. CCPR/C/12/D/35/1978 (1981) (constitutional provisions discriminating between foreign male and female spouses concerning application for residence violate International Covenant on Civil and Political Rights (ICCPR)); Avellanal v. Peru, U.N. CCPR Hum. Rts. Comm., 34th Sess., U.N. Doc. CCPR/C/34/D/202/1986 (1988) (matrimonial property laws discriminating against women violated ICCPR); Zwaan-de Vries v. The Netherlands, U.N. CCPR Hum. Rts. Comm., 29th Sess., U.N. Doc. CCPR/C/29/D/182/1984 (1987) (denying women, but not men, unemployment benefits based on marital status violates ICCPR); Brooks v. The Netherlands, U.N. CCPR Hum. Rts. Comm. 29th Sess., U.N. Doc. CCPR/C/29/D/172/1984 (1987) (requiring women, but not men, to prove that they were the breadwinners in order to receive unemployment benefits violates ICCPR); Vos v. The Netherlands, U.N. CCPR Hum. Rts. Comm., 34th Sess., U.N. Doc. CCPR/C/35/D/218/1986 (1989) (rejecting challenge to law that in some cases had the effect of giving a disabled widow less in the way of pension than a disabled widower). *Cf.* Toonen v. Australia, U.N. CCPR Hum. Rts. Comm., 50th Sess., U.N. Doc. CCPR/C/5/D/488/1992 (1994), (finding Tazmanian sodomy law in violation of ICCPR); Lovelace v. Canada, U.N. CCPR Hum. Rts. Comm., 13th Sess., CCPR/C/13/D/24/1977 (finding violation of indigenous peoples rights in statute excluding female Indian married to a non-Indian from status and rights as Indian), discussed in Anne F. Bayefsky, *The Human Rights Committee and the Case of Sandra Lovelace*, 20 CANADIAN Y.B. INT'L L. 244, 263 (1982) (suggesting that Lovelace was in essence a gender discrimination case even though decided under Article 27, dealing with cultural minority groups). The Optional Protocol of the Convention on the Elimination of Discrimination Against Women ("CEDAW") was opened for signature in December 1999. As of September 26, 2003, there are 56 parties and 75 signatories to the Optional Protocol. *See* www.un.org/womenwatch/daw/cedaw/sigop.htm (last visited Oct. 22, 2003). Under the Optional Protocol, individual complainants may now file complaints before the CEDAW committee, in a procedure analogous to that which has long been available before the U.N. Human Rights Committee, the monitoring body of the International Convention on Civil and Political Rights. For helpful description of different sources and categories of transnational gender equality law, see Judith Resnik, *Categorical Federalism: Jurisdiction, Gender and the Globe*, 111 YALE L.J. 619, 656–64 (2001).

but also in articulated defenses of discriminatory practices.[11] A rich context thus exists in which to explore the possibilities for transnational consideration of decisions on seemingly universalized norms together with the limitations imposed by deep differences in institutional, historical and cultural context and by disagreement over the content and enforceability of international human rights norms.[12]

Transnational legal sources are often discussed as tools for the development of domestic enforcement and advancement of gender equality.[13] Since World War II there has been a dramatic shift in international legal sources towards formal endorsement of gender equality rights.[14] The U.N. Charter and the Universal Declaration of

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11. *See* text accompanying notes 275-291, 294-306 (discussing cases upholding gender classifications in the United States, Bangladesh, Pakistan, and South Africa).

12. It is worth noting that gender equality was not a central concern of the "constitutional moment" of the world community in the 1940s, though a *formal* commitment to gender equality in public life begins to emerge at this point in documents like the U.N. Charter and Universal Declaration. *See infra* note 15. For discussion of contemporary development of transnational consensus around some gender equality norms (opposition to violence against women) rather than others, see MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 160–98 (1998).

13. *See, e.g.*, Anne F. Bayefsky, *General Approaches to Domestic Application of Women's International Human Rights Law*, *in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 351, 353 (Rebecca J. Cook ed. 1994); *see also* Andrew Byrnes, *Using International Human Rights Law and Procedures to Advance Women's Human Rights*, *in* 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 189, 190 (Kelly D. Askin & Dorean M. Koenig, eds., 2000). By "transnational" I mean to include international law and legal sources, regional human rights law and sources, and national constitutional law being considered by other countries' domestic courts.

14. Although New Zealand extended the vote to women in 1893, women were not guaranteed the right to vote in Britain or the United States until the end of World War I; in France not until near the end of World War II; and in Switzerland not until 1990 were women allowed to vote in all elections. (On April 30, 1989, the canton of Appenzell Ausserrhoden gave women the vote and Appennzell Innerrhoden finally allowed women to vote on November 27, 1990). *See* LEE ANN BANASZAK, WHY MOVEMENTS SUCCEED OR FAIL: OPPORTUNITY, CULTURE AND THE STRUGGLE FOR WOMAN SUFFRAGE 3–4 (1996). The participation of women as voters in plebiscites on territorial status following World War I was a milestone, but did not lead immediately to domestic constitutions allowing women to continue to exercise the vote. *See* KAREN KNOP, DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW

Human Rights named women as well as men as rights holders,[15] as did the two major international human rights conventions of 1966, the International Covenant on Civil and Political Rights (ICCPR)[16] and the International Covenant on Economic, Social and Cultural Rights.[17] In 1979, the General Assembly of the United Nations approved and opened for signature the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[18] which obligates state parties to take measures to end discrimination against women and assure treatment on an equal basis with men.[19] Its substantive provisions target not only intentional acts

277–309 (2002) [hereinafter KNOP, DIVERSITY AND SELF-DETERMINATION]. Today, women are formally allowed to vote in all but a small handful of countries in the world. (In the United Arab Emirates, neither men nor women vote; in Kuwait, women are excluded from the franchise exercised by men. *See* Website of the International Organization of Parliaments *at* http://www/ipu.org/wmn-e/suffrage.htm (last visited Oct. 22, 2003).

15. The U.N. Charter's Preamble grounds its existence in a belief "in the equal rights of men and women and of nations large and small." U.N. CHARTER pmbl. *See also* U.N. CHARTER art. 55 (calling for "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion"). The Universal Declaration of Human Rights' preamble affirms "the dignity and worth of the human person and . . . the equal rights of men and women . . . ." G.A. Res. 217A (III), U.N. Doc., 1/810. at 71 (1948). It includes both a general anti-discrimination principle (declaring that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." *id.* at Art. 2, and special emphasis on equality rights in marriage. *Id.* at art. 16. ("[m]en and women of full age . . . are entitled to equal rights as to marriage, during marriage and at its dissolution[;]" marriage requires "the free and full consent of the intending spouses.").

16. G.A. Res. 2200A (XXI), art. 3, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) (state parties "undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant").

17. G.A. Res. 2200A (XXI), art. 3, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966).

18. G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979) (entered into force 1981) [hereinafter CEDAW].

19. CEDAW broadly defines discrimination as ". . .any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." CEDAW, *supra* note 18, at art. 1.

of discrimination but acts which effect substantive inequalities; they reach both private and state conduct; and they obligate states not merely to refrain from discrimination but actively to seek to redress and remedy private discrimination against women.[20] More than ninety-percent of the U.N. members are parties to CEDAW; the United States has signed but not ratified the convention.[21] Moreover, a number of regional human rights conventions also are explicit in declaring rights to be free from gender discrimination.[22] Looking

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The Convention also specifically addresses equality rights in, e.g. education (art. 10), employment (art. 11), health (art. 12), law (art. 15), family (art. 5), political life and government positions (art. 7), and citizenship and nationality (art. 9).

20. *See id.* at art. 2(e) (state parties shall "take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise."); *id.* at art. 5 ("State Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women"). CEDAW reaches into deeply entrenched gendered views of family relations. For example, Article 5(b) requires state parties "[t]o ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children." *Id.* at art. 5. Article 16, to which a number of parties have reservations, requires states to "take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations." *See id.* at art. 16.

21. According to the U.N. website, 174 countries are parties to CEDAW. *See* United Nation's Division for the Advancement of Women, *at* http://www.un.org/womenwatch/daw/cedaw/states.htm (last visited Oct.22, 2003). CEDAW has more parties than any other U.N. human rights convention, with the exception of the Convention on the Rights of the Child. See ANNE F. BAYEFSKY, THE U.N. HUMAN RIGHTS TREATY SYSTEM: UNIVERSALITY AT THE CROSSROADS 21 (Martinus Nijhof, 2001) [hereinafter BAYEFSKY, UNIVERSALITY].

22. *See, e.g.*, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 14, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter European Convention on Human Rights] ("The enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race colour . . . ."); American Convention on Human Rights, art. 1, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (1978) (undertaking "to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language . . ."); Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June

outward to these transnational legal sources to encourage domestic adoption of and compliance with gender equality rights is an obvious legal strategy.[23]

Yet looking beyond national borders is fraught with normative and strategic questions. Many CEDAW ratifications are accompanied by significant reservations to central substantive provisions,[24] reflecting what the U.N. Special Rapporteur for Violence Against Women has called an "ideological resistance to human rights for women."[25] Some argue that international human rights law, such as CEDAW, is ineffective, or worse, may actually obstruct advances toward gender equality in developing countries, through perceptions of hegemonic western imposition of values on

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9, 1944, art. 5, 33 I.L.M. 1534, 1536 ("Every woman is entitled to the free and full exercise of her civil, political, economic, social and cultural rights . . . [and signatories] recognize that violence against women prevents and nullifies the exercise of these rights."); African Charter on Human and Peoples' Rights, art. 2, 21 I.L.M. 58 (1982) ("Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language. . .").

23. *See* Bayefsky, *supra* note 13, at 353. A rights-based strategy grounded in international law is subject to the critique of rights as, inter alia, a misrepresentation of women's social experiences, a distraction from substantive focus on material improvement in women's lives, and a strategy that to the extent it provides legitimacy to other rights, such as to religious freedom, may oppress women. For a discussion, see, e.g., Hilary Charlesworth, *What Are "Women's International Human Rights,? in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 58, 60–63 (Rebecca J. Cook, ed., 1994); Adetoun O. Ilumoka, *African Women's Economic, Social and Cultural Rights, in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 307, 319–23; Johanna E. Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations*, 52 EMORY L.J. 71, 79–89 (2003). For a different perspective, see Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT'L L. & POL. 501, 505–07,525–35 (2000) (viewing international law, like comparative law, as opportunity for different domestic court's interpretations and constructions of meanings).

24. *See* Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1425–27 (2003); Bayefsky, *supra* note 13, at 352–53.

25. Radhika Coomaraswamy, *To Bellow Like a Cow: Women, Ethnicity and the Discourse of Rights, in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 39 (Rebecca J. Cook ed., 1994) (suggesting that "it would be wrong to assume that the values contained in the Universal Declaration of Human Rights are truly universal."). *Id.* at 41.

the less powerful.[26] And, like many international human rights regimes, CEDAW is a "softer" form of law at the enforcement level—there is no adjudicator with binding authority in most cases to rule on whether practices or conditions are in compliance or to assess sanctions for noncompliance.[27]

CEDAW's widespread adoption—but with reservations— and its reliance on reporting as a way to encourage but not coerce compliance stands in sharp contrast with important understandings of domestic constitutional law as judicially enforceable constraints that "bind" governments.[28] As such, CEDAW is in some ways emblematic of broader differences between international human rights law and domestic law in litigation in national courts. Like other international human rights conventions, CEDAW (even where not clearly made binding as law for courts to enforce) is at times invoked in national constitutional decisions interpreting and enforcing internal constitutional norms favoring gender equality.[29]

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26. For discussion of this concern generally about international law, see Knop, *supra* note 23, at 522, 527–30; *see also* Frederick Schauer, *The Politics and Incentives of Legal Transplantation*, *in* GOVERNANCE IN A GLOBALIZING WORLD 253 (Joseph S. Nye Jr. & John D. Donahue eds., Visions of Governance for the 21st Century 2000).

27. Article 29 of CEDAW, which has never been invoked, does authorize state parties to bring disputes about CEDAW to the International Court of Justice. *See* CEDAW, *supra* note 18, at art. 29. *See also* Andrew Byrnes & Jane Connors, *Enforcing the Human Rights of Women: A Complaints Procedure for the Women's Convention? Draft Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, 21 BROOK. J. INT'L L. 679 (1996) But the basic model of CEDAW enforcement is a report, discuss, and recommend model, similar to those employed in other human rights conventions. For discussion of CEDAW's Optional Protocol, see text accompanying note 10. For concerns about the efficacy of the optional protocol of the ICCPR, see BAYEFSKY, UNIVERSALITY, *supra* note 21, at 33–35.

28. Of the regional human rights regimes, the European Convention has become the subject of regular judicial interpretation by the Court of Human Rights and fairly consistent compliance by member nations. The ECHR's gender equality decisions are of importance not only in Europe but around the world. *See* Slaughter, *Globalization*, *supra* note 7, at 1109–12.

29. It is unlikely that an international Convention like CEDAW would come into force without a substantial number of countries in the world already prepared internally to endorse gender equality as at least a formal norm. The mobilizations needed to persuade decision-makers to endorse such a move would necessarily occur at many national levels in order to obtain international approval and national approval. Indeed, absent existing domestic commitments

So, too, are decisions of other national courts or regional bodies on similar issues.

What is the role of judicial references to these outside sources, which may occur even when the sources are not regarded as legally binding? Are they mere window dressing or even an unwarranted diversion from more locally grounded reasoning? Many post-World War II constitutions have equality provisions that address or could be read to encompass gender equality, but gender equality regimes in different countries differ across a number of vectors;[30] international commitments to gender equality may rightly be regarded as more formal than real in many places. And yet, multi-layered and decentralized development of gender equality as a norm (including disagreements about its scope and implementation) seems to be

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to such a norm, countries might well be reluctant to ratify. *Cf.* Oona A. Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821 (2003) (explaining expected compliance costs as component of decision-making on joining international treaties).

30. Some constitutions specify or authorize affirmative measures based on gender to redress historic discrimination or qualify equality clauses by reservations to permit "special provision for women and children." INDIA CONST., art. 15(3); *see also, e.g.*, CAN. CONST. (Constitution Act, 1982) pt. I, (Canadian Charter of Rights and Freedoms), § 15(2) (anti-discrimination clause "does not preclude any law . . . that has as its object the amelioration of conditions of disadvantaged individuals or groups including those . . . disadvantaged because of . . . sex); *cf.* European Community Directive on Equal Treatment, Council Directive 76/207/EEC of 9 February 1976, art. 2 (3) (anti-discrimination rules to operate "without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity"). A number of countries' domestic constitutions require reserved seats for women in government bodies. *See, e.g.*, BANGL. CONST., pt. V, ch. I, §65 (3); PAK. CONST., pt. III, ch. II, §51(4); *see also, e.g.*, Noëlle Lenoir, *The Representation of Women in Politics: From Quotas to Parity in Elections*, 50 INT'L & COMP. L.Q. 217 (2001) (noting amendment of French Constitution to permit legislation requiring "parité" on electoral list between women and men). Other countries, like the United States, have elaborated constitutional rules against gender discrimination from more general equality clauses, extending the reach of the antidiscrimination principle to public employment, family law, education, and eligibility for public benefits. *See generally* Kathleen M. Sullivan, *Constitutionalizing Women's Equality*, 90 CAL. L. REV. 735, 747–62 (2002) (discussing choices in constitutional design around gender issues including generality or specificity of clauses, whether rights are positive or negative, whether the measure of equality is formal or substantive, whether rights apply against private parties or only against the state, and whether to prohibit classifications using sex or instead protect the class of women, which relates to whether special measures based on gender are authorized).

providing the foundations for an increasingly self-aware transnational discourse among a number of countries. Why would nondomestic sources be considered relevant in resolving domestic questions of gender equality?

Although this Article cannot answer all of these questions, it makes a beginning by first, trying more fully to describe what is occurring in the cases and second, by considering some objections to transnational judicial discourse about equality rights. Part I explores the developing practice in human rights cases, sometimes expressed as an obligation, to consider a wide range of legal sources that are not "binding" in any conventional legal sense,[31] offers some reason for this development and suggests a vocabulary for describing it. Although it is common to refer to nonbinding sources of law as "persuasive authority," this phrase may not fully capture the sense of joint venturing or even of obligation to consider other courts' decisions that informs some of this conversation.[32] There is a connectivity of human rights discourse suggesting that there are mutually shared interests in defining the content of national, transnational and international norms, perhaps captured by the phrase, "relational authority,"[33] reflecting nonhierarchical judicial

31. Professor Slaughter has drawn attention to the rise in use of persuasive authority in several valuable articles. *See* Slaughter, *Global Community*, *supra* note 7, at 193, 199–202; *see also* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 158 (The Free Press, 1991) (noting the "brisk international traffic in ideas about rights," in which "national law is increasingly caught up in a process of cross-fertilization among legal systems.").

32. "Persuasive authority" is also misleading as a description for thoughtful consideration of the jurisprudence of other nations that are then distinguished, as in the South African Constitutional Court's treatment of U.S. and Indian approaches to the death penalty, *see infra* note 54, or more generally, for the treatment of other constitutional systems as "negative precedents". *See* Choudhry, *supra* note 6, at 851–55; Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, 2 INT'L J. CONST'L L. (I·CON) 1 (forthcoming Jan. 2004) [hereinafter Choudhry, *The Lochner Era*].

33. The relational quality of domestic courts' discourse on constitutional issues may be a byproduct or a part of the broader transnational legal processes Professor Koh has described. *See, e.g.*, Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2394–98 (1991) (noting benefits of dialogue between U.S. courts engaged in transnational public litigation and law-declaring international bodies over content of international law); Harold Honguu Koh, *Review Essay: Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2645–58 (1997) (arguing that international law becomes seen

relationships experienced as shared locations of the authority to interpret the law.[34] Reasons for this development include the post-World War II reaction against gross human rights abuses, judicial self-conceptions as protectors of rights, the influence of international and regional conventions on domestic constitutional drafting, and increased awareness of the possibilities of judges' decisions influencing understandings of law beyond borders.

In Part II, I consider arguments that resort to foreign or international law as nonbinding authority in resolving questions of domestic constitutional law is inconsistent with commitments to democratic self-rule and with the role and competence of the courts. Originally made without the participation of women and itself thus in some tension with norms of democratic self-rule,[35] the U.S. Constitution, like older constitutions more generally, may benefit from the insights of courts interpreting newer constitutions that have integrated commitments to gender equality at the same time as other rights. Being aware of other legal regimes' approaches, however, does not necessarily mean following them; comparison may provide the basis for reasoned disagreement with fundamental assumptions or greater awareness of contextual particularities; the question is how to interpret one's own domestic norms, in the light of experience elsewhere.[36] Consulting transnational legal sources has the capacity to improve the quality of judicial reasoning, a basic aspect of judicial legitimacy and accountability.[37] But doing so also raises questions of training, expertise and competence in understanding international and foreign sources. There are, no doubt, differences between the

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as norms to be obeyed through repeated processes of interaction, interpretation, and internalization which reconstitute nations' understandings of their identity and interest).

34. *See* Slaughter, *Globalization*, *supra* note 7, at 1112–15.

35. For related discussion, see Deborah Cass & Kim Rubenstein, *Representation of Women in the Australian Constitutional System*, 17 ADEL. L. REV. 3, 28–39 (1995).

36. Thus, in a sense, the decision to treat another system's authority as helpful is itself grounded in domestic norms. *See* Bayefsky, *supra* note 13, at 359.

37. This paper will focus primarily on national courts' resolution of domestic constitutional issues which refer to transnational human rights legal materials. *See supra* note 13.

persuasive value of different sources on different issues.[38] But on many issues of gender, to which jurists may bring deeply entrenched senses of the "natural," comparative awareness may provide helpful perspectives from which to test initial reactions to legal challenges.

I. FROM POSITIVE LAW TO OVERLAPPING CONSENSUS: "RELATIONAL" AUTHORITY

As Professor Slaughter observes, there has been apparent growth in recent years in references to "persuasive rather than coercive authority" by courts around the world.[39] The functions of these references are many. Thus, it has been argued, some courts rely on other courts' decisions in order to enhance their own legitimacy,[40] avoid adverse reputations in international or transnational communities,[41] or even to reflect shifting political relationships between countries.[42] Consideration of foreign or international law may be part of a more expressive project of constitutionalism, in which references may help establish that a country is breaking from a

38. *See infra* text at notes 167–68, 248–53 (discussing differences between settled and new issues and between standards in international conventions and adjudicated judgments of domestic courts in other countries on similar questions).

39. *See* Slaughter, *supra* note 1, at 122.

40. For a sophisticated description of the mutually legitimating references between the two major European courts, and of their "wooing" national courts, see Helfer & Slaughter, *supra* note 3, at 308, 323–28. Transnational discourse can be found in lower national courts as well as in transnational courts and the highest national courts. *See e.g. infra* note 99 (referring to lower court decision in Tanzania), text at notes 112–13 (discussing lower court decision in New Zealand). An interesting project, not undertaken here, would be a comparative study of the use of transnational sources by judges at different levels within national judicial hierarchies.

41. *See* Reem Bahdi, *Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts*, 34 GEO. WASH. INT'L L. REV. 555, 590–95 (2002)

42. *See* G.L. Davies & M.P. Cowen, *The Persuasive Force of Decisions of United States Courts in Australia*, 15 AUSTL. B. REV., 1996 ABR Lexis 27, *8 (suggesting that Australia's interest in independence made it "more open to influence" from countries other than the U.K., including the U.S.). Professor Schauer proposes that "the transnational . . . spread of law and legal ideas is not . . . largely a matter of the power and value of the ideas themselves but may instead be substantially dependent, both on the supply side and on the demand side, on political and symbolic factors. . ." Schauer, *supra* note 26, at 254.

troubled past,[43] or is concerned with appearing to comply with international human rights law (or contrariwise, that a country's view of binding law is highly exceptionalist and excludes international norms absent domestic implementing legislation). Citations to foreign authorities may also reflect a national court's effort to distinguish itself from countries or legal norms with which it disagrees,[44] an important form of comparison not foreshadowed by the term "persuasive authority."

References to transnational sources may relate not only to the place of the court's nation in the community of nations, but also to the status and relationship of courts to each other in the development of law, thus fostering an autonomous professionalism of independent courts (to which end the display of knowledge alone may have some perceived value) and/or the autonomous content of law under the interpretive control of judges.[45] Recognizing the dignity and authority of other decision-makers may add to their legitimacy within their own legal orders,[46] or confer it on others.[47] This kind of recognition may go beyond interests in establishing the autonomy and professionalism of courts, insofar as it focuses on the dignitary sense that all national courts and transnational tribunals may have something to contribute to transnational discourse.[48] Interests in

43. *See* Bahdi, *supra* note 41, at 587–90; Schauer, *supra* note 26, at 254–55 (noting incentives of countries emerging from colonial control to manifest autochthonous constitutional choices).

44. *See* Choudhry, *supra* note 6; Heinz Klug, *Model and Anti-Model: The United States Constitution and the "Rise of World Constitutionalism,"* 2000 WIS. L. REV. 597, 601–02 (2000).

45. *See* McCrudden, *supra* note 1, at 512–16; Slaughter, *supra* note 1, at 114–17; *see also* Slaughter, *Global Community*, *supra* note 7, at 200–02. Judicial commitments to human rights may also be reinforced by judges' concern for judicial independence in adjudication which, like human rights, requires a certain tolerance for disagreement in politico-legal culture.

46. *See supra* text accompanying notes 40–42.

47. *See, e.g.*, Beth Lyon, *Discourse in Development: A Post Colonial "Agenda" for the United Nations Committee on Economic, Social and Cultural Rights Through the Post-Colonial Lens*, 10 AM. U. J. GENDER SOC. POL'Y & L. 535, 578 n.235 (2002) (noting the South African Constitutional Court's citation to the work of the U.N. Committee on Economic, Social and Cultural Rights as a potentially important "source of recognition" for the authority of that committee's work).

48. *See* Slaughter, *Global Community*, *supra* note 7 at 194, 205–10. (emphasizing comity among courts as well as among legal systems); *see also* Hilton v. Guyot, 159 U.S. 113, 163–64 (1895). For exploration of the concept

recognizing the dignity of other courts can be seen as an embodiment in the practice of judicial discourse of normative commitments to values of participation and equal dignity of national courts.[49]

In addition to dignitary forms of citation designed to recognize or enhance the stature of particular courts or countries, a related function of transnational citations may be that of expressing agreement with the content of decisions of other courts in ways that tend to enhance the precedential value of a decision.[50] This function may be linked to the idea of the autonomous development of law. However, the ideological or substantive values of the decisions may be the most important factor rather than their autonomous

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of the dignity of sovereigns or political groups, with particular emphasis on dignity as part of the "political vocabulary" of indigenous peoples and other "marginalized groups," see Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1941–46 (2003).

49. Dignitary interests, for example, may be particularly at stake in reversing the "one way" direction of constitutional influence that U.S. constitutional law was seen, until the early 1990s, as having. *See* Peter McCormick, *The Supreme Court of Canada and American Citations, 1945–1994: A Statistical Overview*, 8 (2d) S.CT. REV. 527 (1997); Davies & Cowen, *supra* note 42 at *8; *cf.* Bahdi, *supra* note 41, at 599–601 (urging that western courts consider decisions from non-western cultures, to send a message that international human rights law constitutes a shared undertaking and to afford "due recognition" to rebut concerns that international human rights law is imperialist). Note that even critical references to another nation's or tribunal's judicial decisions might convey respect for their dignity; conversely, even if positive, references may be seen as condescending. *Cf. infra* text at notes 67–72 (discussing the U.S. Supreme Court's mid-twentieth century references to foreign practices).

50. *See, e.g.*, Knight v. Florida, 528 U.S. 990, 995–97 (1999) (Breyer, J., dissenting from denial of certiorari) (discussing decisions by courts that otherwise "accept or assume the lawfulness of the death penalty" concluding that long delays in carrying out a death sentence "renders ultimate execution an inhuman, degrading or unusually cruel" and prohibited practice, including a Privy Council decision for Jamaica, and decisions of the Supreme Courts of India and Zimbabwe and of the European Court of Human Rights; noting that each faced a "roughly comparable" issue in a roughly comparable context). *But see id.* at 990 (Thomas, J., concurring) (if there were any American authority, "it would be unnecessary for proponents of the claim to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council"). For more recent iterations of the disagreement between the Justices on the relevance of foreign law on issues relating to the death penalty, see, e.g., Foster v. Florida, 537 U.S. 990 (2002); Atkins v. Virginia, 536 U.S. 304 (2002).

development by courts as such. For example, when the Canadian Supreme Court held in *Vriend v. Alberta*[51] that it violated the Charter of Rights and Freedoms to discriminate against a person in employment because of his homosexuality, it quoted with approval from the U.S. Supreme Court decision in *Romer v. Evans*,[52] but did not refer to *Bowers v. Hardwick*.[53] By contrast, the South African Constitutional Court canvassed constitutional decisions both affirming and rejecting the validity of the death penalty in the *State v. Makwanyane*[54] decision, exploring their reasoning before deciding that in South Africa the death penalty was barred by its Constitution.[55] Ignoring contrary authority may be consistent with some uses of foreign authority, for example, to demonstrate that a court is not alone in holding views, or to align oneself with or against the views based on the country they emanate from, but it is open to

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51. [1998] 1 S.C.R. 493.

52. *Id.* at 549 (citing Romer v. Evans, 517 U.S. 620 (1996) (invalidating a state constitutional amendment prohibiting extension of anti-discrimination protections for gays and lesbians)).

53. 478 U.S. 186 (1986) (rejecting constitutional challenge to criminal prohibition of homosexual sodomy), *overruled by* Lawrence v. Texas, 123 S. Ct. 2472, 2484 (2003). Consider also Justice Breyer's reference to the commandeering practices of Germany, Switzerland and the E.U., as relevant to the constitutionality of a federal statute that required state officials to perform background checks on gun purchasers in Printz v. United States, 521 U.S. 898, 976 (1997) (Breyer, J., dissenting). Neither Justice Breyer, nor the majority opinion, which disagreed with Breyer on the relevance of comparative constitutional law, cited Canadian authority (probably far less well known and more ambiguous than *Printz*) that seems to look in different directions. *Compare* Reg'l Municipality of Peel v. MacKenzie, [1982] 2 S.C.R. 9 (treating federal mandate to municipalities to spend money on particular kind of juvenile detention facility as beyond federal constitutional power over criminal law) *with* Reference re Goods and Services Tax, [1992] 2 S.C.R. 445, 482–85 (upholding application to provinces of obligations for suppliers of goods to collect a federal consumption tax and distinguishing *Peel*).

54. State v. Makwanyane, 1995 (6) BCLR 665 (CC), 1995 SACLR LEXIS 218; *see also* Knight v. Florida, 528 U.S. at 996 (Breyer, J., dissenting from denial of certiorari) (recognizing that "[n]ot all foreign authority reaches the same conclusion" on lawfulness of delay in carrying out death sentence); *cf.* South Africa v. Grootboom, 2000 (11) BCLR 1169 (CC), 2000 SACLR LEXIS 126 (discussing the International Covenant on Economic, Social and Cultural Rights, distinguishing its text from that of South Africa's Constitution, and distinguishing institutional competence of domestic court from that of the U.N. Human Rights Committee).

55. *See Makwanyane*, 1995 (6) BCLR 665(CC), 1995 SACLR LEXIS at *64, *70–81.

claims either that such selective use of foreign sources reflects an increase in the unconstrained discretion of judges to decide in accord with preferences rather than law, or that foreign authority is mere after-the-fact decoration.[56]

Transnational judicial discourse may also reflect a more open, deliberative judicial decision process, one that draws on a broader range of sources for challenge and critique of analytical assumptions, both for elaboration of common normative values in different institutional settings and for developing understandings of national distinctiveness. Scholars have noted the rise in "constitutional cross-fertilization," a sharing of knowledge and possible innovation sparked by greater familiarity with other countries' practices, a knowledge not necessarily reflected in citations.[57] Sometimes citations reflect acknowledgment that the decision of another court has been helpful because it is analyzing a similar problem in a similar context,[58] or because the subject area has some universal quality to it,[59] or because one polity's approach helps illuminate the consequences of a particular interpretive choice.[60] Consideration of the reasoning of other constitutional courts, whether referred to in

56. *See* McCrudden, *supra* note 1, at 527–29; Pradyumna K. Tripathi, *Foreign Precedents and Constitutional Law*, 57 COLUM. L. REV. 319, 322, 328–29 (1957); Fontana, *supra* note 4, at 557 n.81. For discussion, see text accompanying notes 240–45 infra.

57. *See* Slaughter, *Global Community*, *supra* note 7, at 193, 194–204; *see also* Michael Kirby, *Think Globally*, 4 GREEN BAG 2D. 287 (Spring 2001).

58. *Cf.* Tushnet, *supra* note 4, at 1238–69 (exploring functionalism while expressing skepticism about empirical and theoretical bases for useful functional comparison). Additionally, where an international instrument is binding in a country its courts might refer to decisions by courts of another country concerning the same instrument, even though the interpretive decision is not binding.

59. *See* Donald P. Kommers, *The Value of Comparative Constitutional Law*, 9 J. MARSHALL J. PRAC. & PROC. 685, 692 (1976) (noting capacity of comparative study to identify "constitutional values and ideas about man and his relationship to the state [that] are commonly shared across national boundaries . . .[as part of] a search for principles of justice and political obligation that transcend . . . a particular political community"); Bahdi, *supra* note 41, at 568–69 (discussing the "universalistic impulse" in cases involving torture and gender discrimination).

60. *See* Printz v. United States, 521 U.S. 898, 976 (1997) (Breyer, J., dissenting); *see also* Tushnet, *supra* note 4, at 1229–30; *cf.* Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245 (2002) (discussing role of consequentialism in constitutional interpretation).

citations or not, may reflect efforts to improve the quality of judicial reasoning by eliciting more complete understanding of differences between systems and of the reasons for one or another approach to similar issues.[61]

A. Persuasive Authority, Then and Now: Separated Sovereignties to Relational References

The phrase "persuasive authority" is invoked to describe all of these practices of courts in considering materials that are not binding within the positive hierarchy of controlling legal norms. In contrast to the hierarchic obligation to apply "binding" law,[62] Professor Glenn treats "persuasive authority" as "authority which attracts adherence as opposed to obliging it" and which is consulted primarily because of its persuasiveness, in a quest to find better answers or solutions to legal issues.[63] But the range of reasons for transnational references extend well beyond those suggested by such a definition; the phrase

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61. *Compare* Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue,* 21 CARDOZO L. REV. 253, 261–81 (1999) (describing status of affirmative action in the U.S., India, and European Union) *with* Grutter v. Bollinger, 123 S. Ct. 2325, 2347 (2003) (Ginsburg, J., concurring) (discussing international covenants contemplating temporary affirmative measures); Gratz v. Bollinger, 123 S. Ct. 2411, 2442 (2003) (Ginsburg, J., dissenting). Neither of Justice Ginsburg's written opinions referred to foreign national practices, such as those in India described in her paper, although she asked at oral argument in *Gratz* about constitutional experience in other countries:

> General Olson—we're part of a world, and this problem is a global problem. Other countries operating under the same equality norm have confronted it. Our neighbor to the north, Canada, has, the European Union, South Africa, and they have all approved this kind of, they call it positive discrimination. Do we—they have rejected what you recited as the ills that follow from this. Should we shut that from our view at all or should we consider what judges in other places have said on this subject?

See Official Transcript Proceedings Before the Supreme Court of the United States, *Gratz v. Bollinger, 123 S. Ct. 2411 (2003) (No. 02-516)*, at 24-25, *at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-516.pdf.

62. *See* McCrudden, *supra* note 1, at 502. For a helpful discussion of precedent, see Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994).

63. *See* H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261, 263 (1987); *see also id.* at 263–64, 268, 272, 277; Fontana, *supra* note 4, at 557–59.

"persuasive authority," when used to cover the multitude of functions described above, may obscure some of their distinctive aspects. There are important "negative" use of foreign precedents (i.e., as "aversive" rather than "persuasive" authority),[64] as well as "dialogic" references, in which a foreign source may be persuasive within its system but distinguishable from the other.[65] Such uses fit well within Professor McCrudden's broader definition of persuasive authority as any "material . . . regarded as relevant to the decision which has to be made by the judge, but . . . not binding on the judge under the hierarchical rules of the national system determining authoritative sources."[66]

In some of the current transnational discourse of rights, there is a qualitatively new tone to references to nonbinding authority, consisting of an implicit assumption of relationality. A contrast may help illustrate what I mean. In the mid-twentieth century, the U.S. Supreme Court's occasional references to constitutional practices of nations proceeded on the basis that "they" and "we" were entirely separate polities.[67] One note accompanying some comparative references is that of exceptionalism, or superiority. In *Miranda v. Arizona*,[68] after canvassing foreign practices concerning warnings for or limitations on the admissibility of custodial statements, the Court wrote:

> [I]t is consistent with our legal system that we give *at least as much* protection to these rights as is given in the jurisdictions described. We deal in our country with rights

64. *See supra* text accompanying note 44; Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT'L J. CONST'L L. (I·CON) 296 (2003); *see also* Klug, *supra* note 44, at 605–07 (noting that the U.S. served as a negative model for India, which declined to include a due process clause to avoid Lochnerization, and South Africa, that drafted a clause protecting property so as to distinguish carefully between expropriations and regulations); Choudhry, *The Lochner Era, supra* note 32 (*Lochner* as negative model in Canada).

65. *See* Choudhry, *supra* note 6, at 835–38, 855–65.

66. McCrudden, *supra* note 1, at 502–03.

67. There may have been more use of foreign law on constitutional issues in the 1940s–60s than in more recent decades. *See* McCrudden, *supra* note 1, at 509–10 (noting decline in usage of foreign law after Frankfurter left the Court).

68. 384 U.S. 436 (1966).

> grounded in 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.[69]

In other words, given that the United States has a written constitution, one with "specific requirement[s]," it should do at least as well as those other jurisdictions. Oblique references to the dangers of Nazism or fascism (from which the U.S. Constitution protected) in the Court's decisions in cases such as *Youngstown Sheet & Tube Co. v. Sawyer*,[70] represent a second kind of reference to other nations, here as a basis for sharper differentiation. In Justice Frankfurter's reference to Canadian decisions on intergovernmental tax immunity,[71] we see a third use, this time of other countries'

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69. *Id.* at 489–90 (emphasis added). In addition to the competitive overtones in the text quoted above, the Court made a more functional argument, relying on experience in England, Scotland, Ceylon, and Canada to suggest that the dangers to law enforcement of requiring warnings had been overstated. *Miranda*'s use of foreign authority seems to build on Frankfurter's opinion in *Culombe v. Connecticut*, 367 U.S. 568 (1961). In discussing the relationship between custodial confessions and the personal liberty protected by the Fourteenth Amendment, Frankfurter engaged in a wide-ranging treatment of other systems' approach and of state and federal statutory law about custody and interrogations, which, he concluded, demonstrated a broad consensus of concern about custodial interrogations with considerable difference on details. *See id.* at 576–602 (discussing English and continental practice and contrasting Scottish rule with English, Canadian, and inquisitorial systems).

70. 343 U.S. 579, 593–94 (1952) (Frankfurter, J., concurring) (implicitly referring to fascist government as reason to enforce separation of powers even though it "is absurd to see a dictator" in Harry Truman); *see id.* at 641 (Jackson, J.) (noting "instruction from our own times" in dangers of "totalitarian" government); *see also* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641–42 (1943); Terminiello v. Chicago, 337 U.S. 1, 4–5 (1949) (referring to what sets the United States apart from totalitarian regimes); Griswold v. Connecticut, 381 U.S. 479, 497 (1965) (distinguishing totalitarian regimes that limit family size); United States v. Am. Library Ass'n, 123 S. Ct. 2297, 2322 (2003) (Souter, J., dissenting) (noting the impact of European fascism on resistance to library censorship).

71. *See* United States v. Allegheny Co., 322 U.S. 174, 198 (1944) (Frankfurter, J., dissenting) ("In respect to the problem we are considering, the constitutional relation of the Dominion of Canada to its constituent Provinces *is the same* as that of the United States to the States. A recent decision of the Supreme Court of Canada is therefore pertinent. In *City of Vancouver v. Attorney-General of Canada*, [1944] S.C.R. 23, that Court denied the Dominion's claim to immunity *in a situation precisely like this*, as I believe we

constitutional decisions as "persuasive authority" based on an assumed similarity in the details of domestic constitutional allocations of functions. Notwithstanding Frankfurter's references to "English federalisms,"[72] many of these mid-century forms of usage proceeded on the basis of a world of entirely separate and distinct national states generating their own sovereign law.

There is beneath the surface of some of the more contemporary transnational constitutional discourse, particularly outside the United States, a different sense of "persuasive authority," a broad sense of a common venture,[73] of related national entities, captured in Justice Albie Sachs' phrase of a "world jurisprudence."[74] In many countries courts with jurisdiction over constitutional questions—both those acting with and those acting without explicit constitutional permission to consider foreign or international law—invoke international human rights conventions and the decisions of other national courts as an interwoven part of the interpretive fabric of decision-making.

1. Constitutional authorization to consider foreign authority

Some constitutions specifically or implicitly authorize consideration of foreign or international law in the resolution of constitutional rights questions.[75] The South African Constitution

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should deny the claim of the Government.") (emphasis added); *see also* Graves v. New York (*ex rel* O'Keefe), 306 U.S. 466, 491 (1939) (Frankfurter, J., concurring) (noting that despite the gravitational pull of the U.S. constitution on the other great "English federalisms," Canada and Australia, those systems had shifted view on the intergovernmental tax immunity issue before the Court).

72. *See Graves*, 306 U.S. at 490–91 (Frankfurter, J., concurring) (referring to Canada and Australia as the "two other great English federalisms"). "Genetic" uses of English materials, that are designed to reflect on original understandings of U.S. constitutional provisions, are distinct from other uses of comparative materials. For discussion, see Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up The Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST'L L. 583, 588 n.25 (1999) [hereinafter Jackson, *Ambivalent Resistance*].

73. *See* Slaughter, *supra* note 1, at 122; Slaughter, *Global Community supra* note 7, at 193 (referring to sense of "common judicial enterprise").

74. Albie Sachs, *Social and Economic Rights: Can They Be Made Justiciable?*, 53 SMU L. REV. 1381, 1388 (2000).

75. A number of constitutions, for example, specifically authorize interpretation of rights in light of the Universal Declaration of Human Rights.

specifically provides that "When interpreting the Bill of Rights, a court . . . must consider international law; and . . . may consider foreign law,"[76] and the South African Court has done both on a number of occasions.[77] The Constitutional Court has repeatedly held that the constitutional mandate to consider international human rights law "would include nonbinding as well as binding law," an interpretation by no means obvious though apparently accepted as correct.[78] In addition to provisions specifically authorizing the

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See Hurst Hannum, *The Status and Future of the Customary International Law of Human Rights: The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 313 (Fall 1995/Winter 1996) (citing provisions in Portuguese, Romanian, and Spanish constitutions); *see also id.* at 377–91 (listing domestic decisions in twenty-eight countries citing the Universal Declaration of Human Rights).

76. *See* S. AFR. CONST., § 39 (1997); *see also* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, Vol. XVI (Gisbert H. Flanz, ed., 1997). Section 35 of the predecessor Interim Constitution of South Africa also required consideration of international law and authorized consideration of foreign law. Separate provisions of the South African Constitution govern when international law applies of its own force. *See id.* §§ 231–32.

77. *See, e.g.*, State v. Makwanyane, 1995 (6) BCLR 665 (CC), 1995 SACLR LEXIS 218, *53–56 (citing foreign approaches to role of legislative history in constitutional interpretation); *Id.* at *64, *70–81 (discussing international and foreign comparative law on substantive issues relating to the death penalty); South Africa v. Grootboom, 2000 (11) BCLR 1169 (CC), 2000 SACLR LEXIS 126, *47–57 (discussing international law bearing on interpretation of constitutional right to housing, including International Covenant on Economic, Social and Cultural Rights).

78. *See Makwanyane*, 1995 SACLR LEXIS at *73, quoted with approval *Grootboom*, 2000 SACLR LEXIS 126 at *49; *see generally* John Dugard, *International Human Rights, in* RIGHTS AND CONSTITUTIONALISM: THE NEW SOUTH AFRICAN LEGAL ORDER 191–95 (Dawid van Wyk et al. eds., 1996) (noting that because the South African bill of rights was inspired by international human rights conventions, drawing on their language and structure, even without the direction to consider international law "there can be little doubt" that the courts "would have been obliged to turn to international human rights law for guidance"). *Id.* at 193. Dugard also argued from the language of other provisions of the then interim constitution that the intention was plain to require consideration of sources of international law to which South Africa was not a party; "it would be ridiculous to limit [consideration of human rights treaties] to those to which South Africa is a party (or may become a party) as this would prevent a court from considering the jurisprudence of the European Commission and Court of Human Rights, which provides the most valuable source of international human rights law." *Id.* at 194. Dugard points out as an advantage of this approach that courts may consider sources of international law, without having to determine "whether a

consideration of foreign law, clauses like Canadian Charter Section 1, permitting only those limitations of rights demonstrably justified in a "free and democratic" society, implicitly invite consideration of the practices of other democratic nations.[79] Similar language is found in some provisions of the ICCPR and of the regional human rights conventions.[80]

2. Other consideration of international or foreign law for constitutional interpretation

Yet the felt need to consider foreign and international authority is not limited to settings with these forms of constitutional authorization. The Chief Justice of Norway in 1998 wrote of "the duty of national courts—and especially in the highest court in a small country—to introduce new legal ideas from the outside world into national judicial decisions."[81] There appear to be a number of cases in domestic national courts (whose constitutions do not expressly

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particular principle . . . is backed by sufficient practice (*usus*) and *opinio juris* to qualify as a customary rule binding on South Africa [under another constitutional provision]." *Id.*

79. *See also* Lorraine Weinrib, *Canada's Constitutional Revolution: From Legislative to Constitutional State*, 33 ISR. L. REV. 13, 30 (1999) (discussing how Charter language by which rights could be restricted only in manner justified in a "free and democratic society" "tie[s] the limitation analysis to the post-war international and national rights-protecting systems"); *cf.* Mary Ann Glendon, A Beau Mentir Qui Vient De Loin: *The 1988 Canadian Abortion Decision in Comparative Perspective*, 83 NW. U.L. REV. 569, 579 (1989) (noting uses of foreign cases to illustrate "more than one vision of . . . a free and democratic society").

80. *See e.g.*, ICCPR, *supra* note 10, at art. 22(2) (prohibiting restrictions on freedom of association right except for "those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, . . . the protection of public health or morals or the protection of the rights and freedoms of others"); European Convention of Human Rights, art. 8 (prohibiting "any interference" with privacy right "except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or . . . economic well being . . . for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others"); *id.* at art. 9 ("Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others").

81. Carsten Smith, *The Supreme Court in Present-Day Society*, *in* THE SUPREME COURT OF NORWAY 96, 145 (Stephan Tschudi-Madsen ed., 1998).

authorize resort to foreign or international law for interpretive purposes) that refer to foreign decisions or international human rights sources not yet legislatively incorporated into domestic law. In India, for example, the Supreme Court in *Vishaka v. State of Rajasthan*,[82] concluded that the state's failure to prevent rape and sexual harassment violated equality provisions of the Indian Constitution as well as CEDAW. Although the status of treaties as internal law is unclear from India's constitutional text,[83] in *Vishaka*, the Court wrote that "[a]ny international convention not inconsistent with the fundamental rights [of the Indian Constitution] and in harmony with its spirit *must* be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee."[84] In the same opinion the Court relied on an Australian

82. A.I.R. 1997 S.C. 3011, *reprinted in* 3 Butterworths Human Rights Cases 261 (1997).

83. *See* AM. SOC'Y INT'L LAW, NATIONAL TREATY LAW AND PRACTICE, STUDIES IN TRANSNATIONAL LEGAL POLICY NO. 27 85-86, 91-92 (Monroe Leigh & R. Blakeslee eds., 1995). India became a party to CEDAW in 1993 but evidently no implementing legislation existed at the time of the *Vishaka* decision. Article 51 of the Indian Constitution provides that "[t]he State shall endeavor to . . . foster respect for international law and treaty obligations in the dealings of organised peoples with one another," while article 19(2) authorizes *restrictions* on rights in order to preserve friendly relations with foreign states. *See* INDIA CONST., arts. 19(2), 51, *in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, Vol. VIII (Gilbert H. Flanz, ed., Oceana Publications, 1997). In Article 253, the constitution also specifically empowers "Parliament . . . to make any law . . . for implementing any treaty. . . ." *See* AM. SOC'Y INT'L LAW, *supra* at 106. According to commenters,

> There is no provision in the Indian Constitution similar to Article VI(2) of the United States Constitution, which proclaims treaties the supreme law of the land. Article 253 of the Indian Constitution, which confers legislative powers on Parliament, does not give clear direction as to whether enactment by Parliament is required for the implementation of treaties and agreements . . . . The question whether a particular treaty or agreement calls for implementing legislation depends very much upon its subject matter.

See id. at 91–92. In *Vishaka,* decided two years after this commentary, the Court held that it was "implicit" in Article 51 and the enabling power of Parliament that treaties not inconsistent with the Constitution should be "read into it" so as to enlarge its guarantees, "[i]n the absence of domestic law occupying the field." *Vishaka v. Rajasthan*, 3 Butterworths Human Rights Cases 261, 264 (India, 1997).

84. *Vishaka*, 3 Butterworths Human Rights Cases at 264 (emphasis added). The Court uses several formulations to describe the relationship between international norms and domestic constitution. *See id.* (constitutional

decision to support reading "international conventions and norms" into judicial understandings of fundamental constitutional rights.[85] In the United States, Justice Ginsburg has invoked both CEDAW and the Covenant Against Race Discrimination in support of the idea that "affirmative action" measures should be for a temporally limited period of time—even though the United States has not ratified CEDAW, and ratified the Race Covenant with a reservation that it was not self-executing.[86]

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provisions "permit" use of "international conventions and norms" in judicial interpretation "in the absence of domestic law occupying the field"); *id.* at 265 (international norms on gender equality are of "great significance"); *id.* at 266 (referring to an "accepted rule of judicial construction" to consider international law). *See also* Hariharan v. Reserve Bank of India, 1 LRI 353, *8 (India, 1999) (stating that domestic courts "are under an obligation to give due regard to international conventions and norms for construing domestic laws when there is no inconsistency between them," referring to CEDAW and interpreting guardianship law to allow mothers as well as fathers to serve). For other Indian Supreme Court cases in which judges invoked international law or foreign decisions as interpretive aids in resolving constitutional questions, see for example, Shri D.K. Basu v. State of West Bengal, (1996) S.C.C. 416 (India) (addressing custodial violence as human rights violation); Madhu Kishwar v. State of Bihar, (1996) 5 S.C.C. 125 (India) (Judgment of Ramaswamy, J.) (citing CEDAW as well as Indian constitutional provisions to challenge customary inheritance rules that disfavored women). According to the Women's Rights Resource Center, the outcome of the latter case was that women who were dependent on the land could not be removed from the land but did not inherit, while the right of male succession was in "suspended animation"; Ramaswamy's dissenting opinion would have recognized greater rights for the female heirs. *See* Bora Laskin Law Library, University of Toronto, Women's Human Rights Resources Web Page, at http://eir.library.utoronto.ca/whrr (type "madhu kishwar" in search box) (last visited Oct. 20, 2003) [hereinafter *WHRR Web Page*].

85. *See Vishaka*, 3 Butterworths Human Rights Cases at 266 (citing Minister of Immigration & Ethnic Affairs v. Teoh, (1995) 183 CLR 273 (Austl.)).

86. *See* Grutter v. Bollinger, 123 S.Ct. 2325, 2347–48 (2003) (Ginsburg, J., concurring) (noting that the Court's view that affirmative action measures should be temporally limited "accords with the international understanding of the office of affirmative action" and expressing hope, but not "firm[] forecast," that within a generation such measures would not be needed). Justice Ginsburg relied first on the International Convention on the Elimination of All Forms of Racial Discrimination, *id.* at 2347, which the United States has ratified but with a reservation that it was not self-executing. *See* U.S. Senate Resolution of Advice and Consent Ratification of the International Convention on the Elimination of All Forms of Racial Discrimination, 103d Cong., 2d Sess., 140 CONG. REC. S7634 (daily ed. June 24, 1994). She then cited and

International human rights norms and comparative constitutional decisions may both be referred to, reflecting a "blurring of international law into comparative [constitutional] law."[87] Justice Breyer, in the United States, has invoked the constitutional experience of "roughly comparable" countries on the death penalty, and has noted that the United States' reservation to the ICCPR on the death penalty might not extend to claims that delay in carrying out the death penalty because they violate prohibitions on cruel punishments,[88] in a context suggesting that the ICCPR supports a reading of the U.S. Constitution to prohibit such delayed executions.[89] In *Quilter v. Attorney-General*,[90] New Zealand Court

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quoted from CEDAW, *see Grutter*, 123 S.Ct. at 2347, which the United States has signed but not yet ratified.

87. *Knop, supra* note 23, at 525.

88. *See* Knight v. Florida, 528 U.S. 990, 996–97 (1999) (Breyer, J., dissenting from denial of certiorari) (discussing decisions of European Court of Human Rights, the Privy Council on the Jamaican death penalty, the Indian, Zimbabwean and Canadian Supreme Courts, the views of the U.N. Human Rights Committee, and U.S. reservations to the ICCPR). *See also* Foster v. Florida, 537 U.S. 990, 992–93 (2002) (Breyer, J., dissenting from denial of certiorari) (referring to decisions of other countries on effects of delay in constitutionality of carrying out death penalty); Patterson v. Texas, 536 U.S. 984, 985 (2002) (Stevens, J. dissenting from denial of certiorari) (referring to a consensus among states and the international community against the death penalty for juveniles).

89. Alternatively Justice Breyer may have been suggesting that the ICCPR directly applied to prohibit such executions, notwithstanding that the U.S. ratification of the ICCPR specified that it was not self-executing. *See Knight v. Florida,* 528 U.S. at 996–97; *see also* U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil And Political Rights, 102d Cong., 2d Sess., 138 CONG. REC. S4781 (daily ed. Apr. 2, 1992); *see generally* Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1593 n.177 (2003) (compilation of recent ratifications of treaties specified by the Senate as non-self-executing). At the outset of his opinion Justice Breyer identified the issue in the case as one of U.S. constitutional law alone. *See Knight*, 528 U.S. at 993 (Breyer, J., dissenting from denial of certiorari). I thus think it is fair to read his discussion of the ICCPR as bearing on interpretation of the constitutional question.

90. [1998] 1 N.Z.L.R. 523, 1997 NZLR LEXIS 644 (three justices, Richardson, Keith and Gault, finding that the Marriage Act, limiting marriage to a union between a man and a woman, did not breach the anti-discrimination provision of Section 19 the 1990 New Zealand Bill of Rights Act). Justice Thomas, by contrast, found that the Marriage Act was in violation of Section 19 of the Bill of Rights Act, *id.* at 528, 1997 NZLR LEXIS at *13-15, while

of Appeals justices with differing perspectives on a challenge to the exclusion of gay marriages from the statutory definition of marriage referred extensively to other courts' constitutional decisions and international sources.[91]

In *Unity Dow v. Botswana*,[92] the Botswanan High Court and Court of Appeals struck down a statutory discrimination against female citizens' capacities to pass on citizenship to their children and rejected a reading of the Botswana Constitution as excluding protection from gender discrimination. They did so even though the Constitution's equality clause defined discrimination by reference to prohibited classifications which did not include gender[93] and the

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Justice Tipping found an apparent discrimination that was at least arguably justifiable. *Id.* at 571, 577, 1997 NZLR LEXIS at *136, *153. Section 19 of the Bill of Rights in effect applies to discrimination based on sex and sexual orientation, but while the Bill of Rights Act requires the interpretation of other statutes in a manner consistent with the rights set forth if possible, it does not permit the Court to invalidate legislation on that basis. *See* Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 728–29 (2001); Paul Rishworth, *Review: Human Rights*, 2003 N.Z. L. REV. 261, 273–74 (2003).

91. *See* Quilter v. Attorney-General, [1998] 1 N.Z.L.R. at 528, 531, 545, 1997 NZLR LEXIS at *14–15, *21–22, *62–63 (Thomas, J.) (citing, inter alia, Canadian, United States and Hawaii cases); *see also id.* at 566, 1997 NZLR LEXIS at *122–23 (Keith, J.) (noting both *Romer* and *Bowers*). For a discussion of CEDAW and the ICCPR, see *id.* at 550, 1997 NZLR LEXIS at *76–86 (Thomas, J.). The justices disagreed on whether international law could be relied on to contract, as well as to expand, the meaning of the rights protected under the New Zealand Bill of Rights. *Compare id.* at 552-54, 1997 NZLR LEXIS at *82–89 (Thomas, J.) (rejecting argument that limited reach of ICCPR equality provisions should limit scope of equality provisions of Section 19 of New Zealand Bill of Rights), *with id.* at 560-63, 1997 NZLR LEXIS at *105–13 (Keith, J.) (relying on understandings that ICCPR would not require gay marriage to limit scope of equality clause).

92. *See* Unity Dow v. Att'y Gen., *reprinted in* 15 HUM. RTS Q. 614 (Bots. High Ct. 1991), *affirmed in relevant part*, Unity Dow v. Att'y Gen., 103 I.L.R. 128, (Bots. Ct. App. 1992) (1996).

93. Section 15(1) of the Botswana Constitution provided, with some qualifications, that "no law shall make any provision that is discriminatory either of itself or in its effect." *Unity Dow*, 103 I.L.R. at 149 (Amissah, J.). Section 15(3) stated "In this section, the expression 'discriminatory' means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed. . . ." *Id.* Section 15(4) went on to exclude from the application of Section(15)1 certain laws, including "personal law[s]" relating to adoption, marriage and so forth. *See id.* (Amissah, J.). The government argued that the

original Constitution itself included a gender distinction in citizenship.[94] Both courts relied in part on international and transnational legal sources, including the African Charter on Human and Peoples' Rights ban on sex discrimination,[95] even though the African Charter had not been made enforceable by domestic legislation.[96] The Botswanan opinions also invoked the Universal

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purpose of excluding gender from Section 15 was to preserve the "patrilineal" character of Botswanan society. *Id.* at 136 (Amissah, J.), 188 (Bizosja, J.). The majority judges, although noting the "difficulty" of the question, concluded in light of Section 3 of the Constitution as well as international law's commitment to gender equality that the listing of categories in Section 15 was illustrative, not comprehensive. *Id.* at 161 (Amissah, J.) (justifying use of international human rights materials "in the interpretation of what no doubt are some difficult provisions of the Constitution"). Section 3 of the Constitution stated in part:

> Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political question, colour, creed or sex . . . to each and all of the following, namely—(a) life, liberty, security of the person and the protection of law; (b) freedom of conscience . . . (c) protection for the privacy of his home. . .and from deprivation of property without compensation . . . .

Id. at 140 (Amissah, J.P.).

94. *See id.* at 158 (Amissah, J.P.); *id.* at 192 (Schreiner, J., dissenting). The government's argument in support of the statute rested not only on the omission of gender as a prohibited ground of discrimination in Section 15 of the Constitution but also on the fact that another chapter of the original constitution had explicitly provided one citizenship rule more favorable for men than for women. The latter point, Justice Schreiner said in dissent, was a "very fair indication" that Section 15 was not intended to prohibit discrimination against women. *Id.* The significance of the international materials relied on looms larger in the face of domestic legal support for a contrary interpretation.

95. *See Unity Dow*, 13 Hum. Rts. Q. at 623; *Unity Dow*, 103 I.L.R. at 161.

96. *See Unity Dow*, 13 Hum. Rts. Q. at 623 ("I bear in mind that signing the Convention does not give it the power of law in Botswana but the effect of the adherence by Botswana to the Convention must show that a construction" of Section 15 should extend, "in harmony with the convention" to ban sex discrimination); *Unity Dow*, 103 I.L.R. at 161 (Assimah, J.P.) (assuming that Universal Declaration and African Charter "do not confer enforceable rights on individuals," they may still be referred to as aids in interpreting the constitution). Moreover, one Court of Appeals justice relied on the reasoning of a New Zealand judge that "[a]n international treaty, even one not acceded to by New Zealand, can be looked at by the court on the basis that in the absence of express words Parliament would not have wanted a decision-maker to act contrary to such a treaty." *Id.* at 178 (Aguda, J.), citing Birds Galore Ltd v. Attorney General, [1989] LRC (Const.) 928, 939, *reprinted in* 90 I.L.R. 567,

Declaration of Human Rights, Privy Council decisions reviewing cases from Zimbabwe and Australia and referring to the "comity of civilised nations," the U.N. Declaration on the Elimination of Discrimination Against Women (1967) and CEDAW.[97] *Unity Dow*, in turn, has been invoked by the Supreme Court of Zimbabwe[98] along with decisions of the European Court of Human Rights and the Human Rights Committee of the U.N.[99]

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578 (N.Z. High Ct. 1988) (1992); *see also Unity Dow*, 103 I.L.R. at 159 (Amissah, J.P.) (relying on statutory Interpretation Act 1984 authorizing "regard to . . . any relevant international treaty, agreement or convention" as an aid to "construction of the enactment . . . including the pre-existing Constitution where its provisions were not clear"). *But cf. id.* at 202 (Puckrin, J., dissenting) (suggesting danger to national sovereignty in relying on international declarations where the Constitution sought to be interpreted is unambiguous).

97. *See Unity Dow*, 103 I.L.R. at 159–61 (Amissah, J.P.) (referring to African Charter, Declaration on Elimination of Discrimination Against Women; discussing Lord Wilberforce's opinion concerning the constitution of Bermuda, framed in light of the European Convention and the Universal Declaration of Human Rights, and stating that Botswana's Constitution had the same antecedents "with regard to the imperatives of the international community;" describing Botswana as "member of a comity of civilized nations"), 177–78 (Aguda, J.) (CEDAW and African Charter on Human and People's Rights). *See also id.* at 139 (Assimah, J.) (referring to decisions in Canada, Nigeria, Namibia and the United States); *Unity Dow*, 13 Hum Rts Q. at 617–19, 623–24, 626 (discussing African Charter, European Convention, Declaration on Elimination of Discrimination Against Women, as well as Lord Wilberforce's Bermuda constitution opinion, Zimbabwe and Australian decisions).

98. *Rattigan v. Immigration Office*, 103 I.L.R. 224, 228, 1995 (2) SA 182, 185 (Zimb. 1994) (referring to *Unity Dow*); *see also* 103 I.L.R.. at 231, 1995 (2) SA at 188 (citing U.S. Supreme Court decisions). *Rattigan* found a violation of the constitutional right to freedom of movement where the law provided that a foreign born husband of a Zimbabwe citizen, unlike a foreign born wife, was not entitled to stay in the country.

99. See *Rattigan*, 103 I.L.R. at 232-33, 1995 (2) SA at 189–90 (discussing Aumeeruddy-Cziffa v. Mauritius decision of the Human Rights Committee and Abdulaziz Cabales v. United Kingdom decision of the ECHR). For other references to international norms in resolving gender disputes in African countries, see Longwe v. Intercontinental Hotels, [1993] 4 LRC 221, 227–31 (Zambia High Ct. 1992) (concluding that a private hotel's refusal to serve women in its bar violated the Constitution, referring to both the African Charter and CEDAW); Ephrahim v. Pastory, [1990] LRC 757, *reprinted in* 87 I.L.R. 106, 110 (Tanz. High Ct. 1990) (referring both to the Universal Declaration and to CEDAW to conclude that a sex discriminatory bar on women's selling clan land was condemned by Tanzanian constitution). Note

A caveat: I do not mean to suggest that all of the constitutional courts of the world are involved in this kind of discourse,[100] nor that those which do refer on occasion to transnational sources do so consistently or for the same reasons, or generally act in accordance with international human rights law or with equality rights-protecting foreign constitutional court decisions, in resolving domestic constitutional challenges.[101] There are cases in which domestic courts note international legal norms but conclude, sometimes with evident reluctance, that conflicting domestic norms control.[102] There

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that the African Charter has been invoked not only to reject but on occasion to uphold gender discrimination. *See* Magaya v. Magaya, [1999] 3 LRC 35, 49 (Zimb.) (referring to scholarly discussion of preamble to African Charter on Human and People's Rights and its emphasis on the virtues of African "historical tradition" in course of upholding customary inheritance law discriminating in favor of male progeny).

100. Perhaps because of the common British colonial influence and patterns of comparison in Privy Council review, many of the decisions noted come from Commonwealth nations. *See also infra* note 130. My ability to read cases is limited by their availability in English, a limitation which itself may result in over-attention to decisions of Commonwealth or former Commonwealth countries, albeit in different parts of the world. But even among countries sharing a Commonwealth legal background, there are vast differences, and some appear more likely to engage in transnational references than others. *See also infra* note 130.

101. *See, e.g.*, Sharifan v. Fed'n of Pakistan, P.L.D. 1998 Lahore 59, 50 All Pak. Legal Decisions 59, 62–63 (1997) (Lahore) (rejecting challenge to gender discrimination in citizenship law, noting sources from the U.S. and Privy Council in nineteenth and early twentieth centuries, India in the mid-1970s and "private international law" of the mid-twentieth century); Magaya v. Magaya, [1999] 3 L.R.C. 35 (Zimb. Sup. Ct.) (rejecting challenge to discrimination against women in customary inheritance rights); *see also* Knop, *supra* note 23, at 524–25 ("domestic interpretation of international law is not everywhere the same nor, indeed, everywhere good or everywhere bad"); McCrudden, *supra* note 1, at 507 (noting concerns about inconsistency in courts' consideration of foreign cases); *cf.* Hannum, *supra* note 75, at 312 (noting that "mere recitation" of human rights values "may not necessarily reflect an honest intention to adhere to them"); Mumbi Mathangani, *Women's Rights in Kenya: A Review of Government Policy*, 8 HARV. HUM. RTS. J. 179, 191 (1995) (describing violations of CEDAW by legislative, executive and judicial branches of government and asserting that in practice, courts in Kenya have "completely disregarded" CEDAW).

102. *See, e.g.*, Bahdi, *supra* note 41, at 581–82 (discussing Dunghana v. Nepal decision, refusing to strike down a law conditioning daughters' rights to inherit on being unmarried at age 35); UNIFEM, BRINGING EQUALITY HOME 22–23 (Ilana Landsburg-Lewis ed., 1998) (describing decision in Dhungana v. Nepal, Writ No. 3392 (1993)(SC)(unreported and unofficial). Although

are also instances in which a court appears interested in using international human rights law as an aid to interpretation on some issues, but rejects them on others.[103] What interpretive principles

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CEDAW had domestic status in Nepal, the Court declined to invalidate the law; according to Bahdi and UNIFEM, the Nepalese court ordered discussions in the political arena concerning the impact of the legislation on equality rights, thus arguably invoking a dialogical model of rights definition. *Cf.* Quilter v. Attorney Gen., [1998] 1 N.Z.L.R. 523, 528-30, 1997 NZLR LEXIS 644, at *13–18 (Thomas, J.) (finding discrimination but agreeing that under New Zealand Bill of Rights court lacked power to invalidate statute). *See also Magaya*, 3 LRC at 49 (arguing that it is for the legislature, not the court, to address gender inequality in customary inheritance law); Kishwar v. State of Bihar, (1996) 5 S.C.C. 125 (Punchhi, J.) (India) (expressing concern for judicial activism and need for legislation to deal with intricacies of change in customary land inheritance). For discussion of the benefits of a "dialogic" model in mediating competing currents in Muslim countries on gender equality, secularism and religious identity, see Sunder, *supra* note 24, at 1433–41.

103. Thus, notwithstanding its *Rattigan* decision, *supra* notes 98–99, the Zimbabwe Supreme Court later upheld customary laws that deny daughters inheritance rights. *See Magaya*, 3 L.R.C. at 41–2 (treating customary law as exempt from constitutional gender equality challenge because Section 23 (which, like Section 15 of the Botswana Constitution discussed in *Unity Dow*, forbids discrimintation but does not specifically include gender as a prohibited basis) has an explicit exception for laws relating to "devolution of property on death" or the application of African customary law). The *Magaya* court treated the customary law basis for the gender discrimination as having overriding force in constitutional interpretation. *See id.* at 41 (relying on Section 23(3) of the Constitution as an exception to the gender equality norm for the application of African customary law in cases involving Africans). Although in *Rattigan* (which rested on the right to freedom of movement) the Court held that Section 11 of the Zimbabwe Constitution (which, like Section 3 of the Botswana Constitution discussed above, guarantees "fundamental rights and freedoms" to each individual "whatever his race, tribe. . .or sex") was not merely preambulatory but was meant to establish substantive rights, in *Magaya* the Court expressed some doubt whether the Constitution forbade discrimination based on sex, but noted that it might be construed to do so "on account of Zimbabwe's adherence to gender equality enshrined in international human rights instruments." *Id.* at 41. Nonetheless, the Court accepted that "allowing female children to inherit in a broadly patrilineal society . . . would disrupt the African customary laws" which had been constitutionally protected in Section 23(3). *Id.* at 44; *cf.* Bayefsky, *supra* note 10, at 247–48 (describing Canadian defense in 1980 of gender discrimination in Indian status law based on patrilineality). Furthermore, the *Magaya* court found it "prudent to pursue a pragmatic and gradual change which would win long term acceptance" through appeals to the legislature "rather than legal revolution initiated by the courts." *Id.* at 49. For critique, see J. Oloka-Onyango, *Human Rights and Sustainable Development in Contemporary Africa: A New Dawn, or Retreating Horizons?*,

influence what transnational authorities are considered and for what purposes is not always made clear.[104] In some instances, courts rely on international human rights law, constitutional decisions of other courts and their own constitutional provisions to reach a decision, as if these different materials were an entirely congruent body of overlapping legal sources.[105] At other times, international legal conventions are discussed separately and treated as having force in the interpretation of domestic constitutional law, even if not yet implemented by domestic legislation.[106] These divergent and at times inconsistent practices, however, should not obscure the

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6 BUFF. HUM. RTS. L. REV. 39, 64–66 (2000) (criticizing *Magaya*'s deference to customary law and absence of concern for international law including CEDAW). Courts in other African nations have found, to the contrary, that gender discrimination in customary law is trumped by constitutional and international gender equality norms. *See* Ephrahim v. Pastory, 1990 LRC 757, *reprinted in* 87 I.L.R. 106, 110 (Tanz. High Ct. 1990) (discussing CEDAW).

104. *Compare Magaya*, 3 L.R.C. at 44, 49 (discussing African Charter as suggesting the importance of traditional African values, apparently including women's status as a "junior male") with *Unity Dow v. Attorney General*, 103 I.L.R. 128, 161 (Bots. Ct. App. 1992) (1996) (Amissah, J.P.) (discussing African Charter's commitments to gender equality). It has been suggested that commitments to gender equality are inconsistent with other international law guarantees of the right of peoples to self-governance and to the preservation of their cultural heritage. *See, e.g.*, David M. Bigge & Amélie von Briesen, Note, *Conflict in the Zimbabwean Courts: Women's Rights and Indigenous Self-Determination in* Magaya v. Magaya, 13 HARV. HUM. RTS. J. 289, 296–99 (2000). This position depends on contestable claims about the authenticity and stability of that which we call culture, but bears mention because such claims point out the complexity and arguable tensions within the domain of international human rights law.

105. *See, e.g.*, *Unity Dow*, 13 HUM. RTS. Q. at 616–25 (1991); Rattigan v. Chief Immigration Officer, 1995 (2) SA 182, 186–90 (Zimb.) (discussing European Court of Human Rights, U.S., Botswanan, and UN Human Rights Commission decisions). For discussion, see Bahdi, *supra* note 41, at 586 (noting instances in which "judges invoke international and comparative legal sources as a package; they bundle together legally binding sources such as ratified treaties with sources that cannot give rise to legal obligations such as the national constitutions of other states and instruments from regional systems that do not apply to the state in question"); Knop, *supra* note 23, at 525–33 (noting advantages of blurring of distinctions between international and foreign law in the interpretive processes of domestic courts).

106. *See, e.g.*, Vishaka v. Rajasthan, A.I.R. 1997 S.C. 3011, *reprinted in* 3 Butterworths Human Rights Cases 261 (India 1997); *see also* Knight v. Florida, 528 U.S. 990, 996–97 (1999) (Breyer, J., dissenting from denial of certiorari).

increasingly common phenomenon of judicial reference to transnational sources of international and foreign constitutional law.

3. Obligations to consider nonbinding law?

The simultaneous acknowledgment of the nonbinding character of external sources of law and an obligatory sense that they must be considered, displayed in some instances of transnational constitutional discourse, is especially noteworthy.[107] Courts not only are citing to international materials which (if not presently binding) are potentially binding in the future on their legal orders, but they are also citing to (and at times even distinguishing) plainly nonbinding authority consisting of the decisions of other national courts—in India, New Zealand, South Africa, and Canada.[108] In some of these cases the challenged discrimination is upheld: In *President of the Republic of South Africa v. Hugo*,[109] the Constitutional Court of South Africa rejected a challenge to a law authorizing the President to extend pardons to incarcerated mothers of young children but not

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107. *See* Mirna E. Adjami, *African Courts, International Law and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?*, 24 MICH. J. INT'L L. 103, 108–13, 147 (2002) (noting that African courts draw on nonbinding international sources without explicit constitutional approval, and do not give greater deference to binding international instruments, such as African Charter, than to nonbinding law, like the European Convention); *see also supra* note 105.

108. *See e,.g.*, *Vishaka*, 3 Butterworths Human Rights Cases at 266 (citing Australian High Court decision); Quilter v. Attorney Gen., [1998] 1 N.Z.L.R. 523, 528, 545, 1997 NZLR LEXIS 644, *14-15, *62-63 (Thomas, J.) (citing Canadian and U.S. Supreme Court decisions); State v. Makwanyane, 1995 (6) BCLR 665, 1995 SACLR LEXIS 218, at *77–102, 107–15 (distinguishing, *inter alia*, U.S. and Indian death penalty cases in reaching conclusion that death penalty violated South African constitution); R. v. Keegstra, [1990] 3 S.C.R. 697, 738–45, 749–55 (Can.) (citing and discussing U.S. First Amendment caselaw, European Convention, ICCPR, and other international instruments); R. v. Butler, [1992] 1 S.C.R. 452, 503 (Can.) (discussing U.S. First Amendment law on obscenity in challenge to anti-pornography statute). For a discussion of these Canadian cases, see Vicki C. Jackson, *Gender and Transnational Legal Discourse*, 14 YALE J.L. & FEMINISM 377, 381–85 (2002) [hereinafter Jackson, *Transnational Legal Discourse*]; *see also* Slaughter, *Global Community*, *supra* note 7, at 199 (noting "rise in persuasive authority"); Slaughter, *Globalization*, *supra* note 7, at 1116–17 (noting many citations to nonbinding authority); McCrudden, *supra* note 1, at 512 (noting that courts are distinguishing cases that are plainly not binding).

109. 1997 (6) BCLR 708 (CC), 1997 SACLR LEXIS 91.

to incarcerated fathers. Both the majority and the dissent cited and discussed foreign constitutional caselaw:[110] the majority concluded that, while there was a gender discrimination, it was not an "unfair" one in light of differences in the situations of mothers and fathers of young children, and the dissent concluded that the distinction reinforced stereotypes and assumptions that underlay women's subordination and was prohibited by the South African Constitution.[111] What is of interest here is the number of judges in courts around the world that feel impelled to acknowledge the decisions of others.

New Zealand cases have particularly advanced the idea that courts have an obligation to consult international human rights law in resolving domestic legal questions. In 1977 in *Van Gorkom v. Attorney-General*,[112] a challenge to an administrative policy that discriminated with regard to payment of moving expenses for male and female teachers, the lower court wrote:

> The Universal Declaration of Human Rights . . . [and] The Declaration on Elimination of Discrimination against Women . . . [are not] part of our domestic law[,] [t]hey represent goals towards which members of the United Nations are expected to work . . . [and thus] might influence the courts in the interpretation of statute law[.] . . . [C]omparatively new [legal powers] . . . should not without compelling reason be taken to allow the introduction of a

110. *See id.* at *66–69 (Goldstone, J.) (discussing Canadian case law on equality); *id.* at *106–07 nn.87, 89 (Kriegler, J., dissenting) (discussing Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) and Canadian caselaw). The majority opinion spent more time discussing comparative law on pardons than on gender equality and, interestingly, did not discuss CEDAW, even though it had been ratified by South Africa in 1995. (Justice Kriegler, in dissent, commented that the case was "hard" because "it seems mean spirited in the extreme to scrutinise closely the validity of an act of clemency by the newly inaugerated President aimed at enabling a few hundred women prisoners, sentenced for less reprehensible crimes, to care for their young children." *Id.* at *89–90 n.80.)

111. *Id.* at *64 (majority) (noting also that women bore much more of the burden of childrearing and that there were far fewer women in prison than men); *id.* at *106 (Kriegler, J., dissenting) (condemning the gender discrimination here as stemming from a view that is a "relic and a feature of the patriarchy which the Constitution so vehemently condemns")

112. [1977] 1 N.Z.L.R. 535, 1977 NZLR LEXIS 609 (N.Z. Sup. Ct. Wellington).

policy conflicting with the spirit of international standards proclaimed by the United Nations documents.[113]

In *Tavita v. Minister of Immigration*,[114] a foreigner married to a New Zealander sought to obtain legal residency in New Zealand, and invoked the ICCPR and the Convention on the Rights of the Child, in interpreting New Zealand's Bill of Rights Act (which, despite its statutory character, is treated as requiring unusually broad remedial interpretation).[115] The government's argument that the international obligations were unenforceable was, according to the court, an "unattractive argument" suggesting that international obligations were "at least partly window-dressing."[116] Even though the Human Rights Committee's decisions on individual complaints are not, as a formal matter, binding judgments on New Zealand as a matter of

113. *Id.* at 542-43, 1977 NZLR LEXIS at *23-25 (internal quotations omitted). The court also took note of the International Labor Organization's ("ILO") Equal Remuneration Convention, and of the fact that it was not then ratified in New Zealand. *See* Sir Kenneth Keith K.B.E, *The Application of International Human Rights Law in New Zealand*, 32 TEX. INT'L L.J. 401, 408 (1997) (treating *Van Gorkom* as an instance of an unincorporated treaty being relied upon as evidence of public policy or as an aid to the interpretation of a statute). According to Keith, New Zealand follows most Commonwealth countries in the practice that treaties do not automatically become judicially enforceable law; "[I]f a change in rights and duties under the law is required then there must be appropriate legislative action." *Id.* at 406.

114. [1994] 2 N.Z.L.R. 257 (C.A.), 1993 NZLR LEXIS 634.

115. *See, e.g., id.* at 260, 1993 NZLR LEXIS at *11–12; Coburn v. Human Rights Commission, [1994] 3 N.Z.L.R. 323, 333-34, 1994 NZLR LEXIS 626, *33–34 (N.Z. High Ct. Auckland) (citing other New Zealand precedent); N. Reg'l Health Auth. v. Human Rights Comm'n [1998] 2 N.Z.L.R. 218, 234-35, 1997 NZLR LEXIS 659, *44–48 (N.Z. High Ct. Auckland). (For a brief description of the distinctive quasi-constitutional approach to the protection of human rights in New Zealand, see *supra* note 90.) As the New Zealand courts have frequently noted, the ICCPR inspired the New Zealand Bill of Rights act. *See, e.g., N. Reg'l Health Auth.*, [1998] 2 N.Z.L.R. at 232–33, 1997 NZLR LEXIS at *39–41. Here, as in many other post-World War II constitutional and human rights documents, the model for enactment invites recourse to comparative and international sources in subsequent interpretation.

116. Tavita v. Minister of Organization, [1994] 2 N.Z.L.R. 257, 265–66, 1993 NZLR LEXIS 47, *28–29. Reem Bahdi characterizes this form of reasoning as invoking the rule of law, the idea that, even where treaty obligations have not been made domestically enforceable, "the state must be held accountable for its promises made in international instruments." Bahdi, *supra* note 41, at 560.

international law,[117] its decisions have nonetheless become important (and in a sense obligatory) to consider: New Zealand having acceded to the Optional Protocol of the ICCPR, the United Nations Human Rights Committee was "in a sense part of this country's judicial structure, in that individuals subject to New Zealand jurisdiction have direct rights of recourse to it."[118]

What is different here is the sense of joint purpose, of being embedded not only in a community of nations making decisions about similar issues under similar domestic constitutional instruments, but of an overarching legal order of internationally recognized human rights norms that, whether or not domestically incorporated, provides reason to strive to meet the international standard and to be mindful of other interpretations in doing so.[119] This sense of connectedness seems new, and is in part reflected in

117. *See* Steven R. Ratner, *New Democracies, Old Atrocities: An Inquiry In International Law*, 87 GEO L.J. 707, 724–25 (1999).

118. *Tavita*, [1994] 2 N.Z.L.R. at 266, 1993 NZLR LEXIS 47, *30–31. The court also commented that a "failure to give practical effect to international instruments . . . may attract criticism," *id.*, and noted the Balliol Statement's reference "to the duty of the judiciary to interpret and apply national constitutions, ordinary legislation and the common law in light of the universality of human rights." *Id.* at *28–29. The *Tavita* court did not decide exactly what bearing international human rights law had on domestic law, but suggested a reconsideration by the Minister in light of the international human rights implications. *See also N. Reg'l Health Auth.* 2 N.Z.L.R. at 233-34, 1997 NZLR LEXIS 659, *42–44 (referring to General Comments of the UN Human Rights Committee); *Tavita*, [1994] 2 N.Z.L.R. at 262-63, 1993 NZLR LEXIS 47, *17–21 (discussing caselaw of the European Court of Human Rights); *cf.* Atty-Gen'l v. Refugee Council of New Zealand, Inc., [2003] 2 N.Z.L.R. 577, Para. 103 (2003) (discussing difference between a duty to "give effect" to an international obligation and duty to "have regard" for it).

119. Professor Slaughter has emphasized the increasing role of courts as institutions engaging in dialogue and relationships with each other both in adjudicatory decisions and in nonadjudicatory collegial settings. *See* Slaughter, *supra* note 1, at 1120–23; Slaughter, *Global Community*, *supra* note 7, at 193–95; McCrudden, *supra* note 1, at 506. The sense of obligation to consider nonbinding legal sources that I have described is written about by judges as much (if not more) as an obligation to the law than as a relationship to other tribunals, though these two phenomena appear to be closely related and mutually reinforcing. *Compare Tavita*, [1994] 2 N.Z.L.R. at 266, 1993 NZLR LEXIS 47, *30–31 (discussing the UN Human Rights Committee and a relationship with that tribunal as a result of the optional protocol), *with Van Gorkom*, [1977] 1 N.Z.L.R. at 542-43, 1977 NZLR LEXIS at *24-25 (discussing the Universal Declaration as a source of law).

the almost casual admixture of international sources and sources based on the domestic law of other nations found in some decisions.[120]

But at the same time New Zealand judges assert that comments of the Human Rights Committee "and similar statements emerging from other committees monitoring U.N. human rights instruments,"[121] can provide assistance (as can comparative constitutional interpretation), they may also assert that they are not binding in New Zealand courts.[122] Why, then, *must* they be considered? Why *must* the Indian Constitution's equality provisions be read in light of CEDAW?[123] Why *must* the South African constitutional court consider international human rights law in interpreting domestic constitutional rights, even when that international law is not binding?[124] Is there a new kind of "stickiness" or attraction of international and comparative human rights precedents, that create a sense of obligation to consider even if not to follow?

120. *See also Tavita*, [1994] 2 N.Z.L.R. at 266,1993 NZLR LEXIS 47, *28–29 (referring to the Balliol and Bloemfontein statements developed at meetings of judges of Commonwealth nations encouraging resort to international human rights law in the interpretation of domestic constitutions, statutory and common law). *But cf.* Longwe v. Intercontinental Hotels, [1993] 4 L.R.C. 221, 233 (Zambia High Court) (distinguishing appropriate effect of Bangalore principles, as mere resolution of a jurists' meeting, from international conventions entered into by Zambia).

121. *See, e.g.*, N. Reg'l Health Auth. v. Human Rights Comm'n, [1998] 2 N.Z.L.R. 218, 235, 1997 NZLR LEXIS 659, *46–47 (1997) (N.Z. High Ct. Auckland) ("[n]one of the principles or statements are binding" though they should be considered); Quilter v. Attorney General, [1998] N.Z.L.R. 523, 531, 1997 NZLR LEXIS 644, *21 (Thomas, J.).

122. *See e.g.*, *Quilter*, [1998] N.Z.L.R. at 531, 1997 NZLR LEXIS 644, *21 (Thomas, J.); N. Reg'l Health Auth. v. Human Rights Comm'n, [1998] 2 N.Z.L.R. 218, 235, 1997 NZLR LEXIS 659, *46–47. The judge in *Northern Regional* wrote: "Any analysis of policy which may . . . discriminate *must be done* in the light of the international principles and experience as stated in the relevant conventions and covenants and, where appropriate, assistance may be drawn from overseas cases, whether directed at domestic issues or emanating from statements of international committees or colloquia. Any such assistance as can be derived is just that: assistance. *None of the principles or statements are binding on New Zealand Courts.*" (emphasis added).

123. *See supra* note 84 and accompanying text.

124. *See* S. AFR. CONST., § 39(1)(b) (1997); *supra* note 78.

B. Some Explanations

Cross-references in individual rights cases today must be understood in a different light than those of earlier times. First, the very concept of human rights is in tension with commitments to strongly positive and particularist notions of law. Gerald Neuman has referred to the "suprapositive" aspect of human rights,[125] a word that resonates with a sense that rights have existence outside of positive law, a moral force derived from the nature of human beings.[126] The founding of the United Nations, the promulgation of the Universal Declaration of Human Rights,[127] and the growth in the

125. Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1868–69 (2003). The universality of human rights, both in general and with respect to particular norms, including gender equality, has been challenged. *See, e.g.*, Sunder, *supra* note 24, at 1413 & n.56; Abdullahi Ahmed An-Na'im, *State Responsibility to Change Religious and Customary Laws*, *in* HUMAN RIGHTS OF WOMEN, *supra* note 23, at 172 (explaining that international human rights are not universally accepted but urging "high standard of proof" for those who would challenge their applicability). *See also infra* note 128.

126. *See* Vicki C. Jackson, *Narratives of Federalism: of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 272–73 n.207 (2001) [hereinafter *Narratives*].

127. U.S. Supreme Court Justices have, on occasion, acknowledged the U.N. Charter in their reasoning. *See, e.g.*, Oyama v. California, 332 U.S. 633, 650 n.4 (1948) (Black, J. concurring, in case invalidating application of state laws that discriminated against U.S. citizens of Japanese descent); *cf.* Re Drummond Wren, [1945] O.R. 778, 781–84, 1945 Ont. Rep. LEXIS 36, *7–13. *But cf.* Sei Fujii v. State, 242 P.2d 617, 619–22, 630 (Cal. 1952) (holding that U.N. Charter is not self-executing and thus does not provide basis for invalidating law discriminating against aliens in land ownership but finding that the state law violated the Fourteenth Amendment). The U.N. Charter was noted as a possible basis to support federal voting rights legislation, but one the Court need not reach, in Katzenbach v. Morgan, 384 U.S. 641, 647 n.5 (1965). *See also* Hurd v. Hodge, 334 U.S. 24, 28 n.4 (1948) (noting but not deciding claim that enforcement of racially restrictive covenants would violate the UN Charter); United States v. Alvaraz-Machain, 504 U.S. 655, 678–79 n.20 (1992) (Stevens, J., dissenting). References to the Universal Declaration of Human Rights are found on occasion in opinions for the Court. *See* Zemel v. Rusk, 381 U.S. 1, 15, n.13 (1965); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 161 n.16 (1963); Dandridge v. Williams, 397 U.S. 471, 521 n.14 (1970) (Marshall, J., dissenting); Int'l Assn. of Machinists v. Street, 367 U.S. 740, 776–77 (1961) (Douglas, J., concurring) (citing debate concerning the Declaration). After 1970 the Universal Declaration of Human Rights was not cited in the Supreme Court again until Justice Breyer's dissent from denial of certiorari in Knight v. Florida, 528 U.S. 990, 996 (1999) (Breyer, J., dissenting).

formal levels of adherence to major human rights covenants—including but not limited to CEDAW and the ICCPR—cast in a new light domestic courts' references to international human rights norms or comparative constitutional law. In the wake of gross violations of human rights in World War II, the world community experienced something akin to a post-war constitutional moment leading to commitments that, insofar as they seek to protect individual rights, feel unmistakeably legal as well as political in character.[128] The courts in many nations recognize the legal content of these international human rights commitments and treat them as ones that should be considered even if not legally binding.[129] Cross-references may reflect how at least some significant actors in the international community[130] are moving away from highly positivist notions of law,

128. The post-World War II founding moment and world commitment to the idea of human rights occurred over a number of years and perhaps primarily among a set of governing elites; moreover, like some constitutional moments in U.S. history, it was limited by the absence of independent participation from many countries, then still in the status of colonies. On constitutional moments in the U.S., see BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 6-7, 266-88 (1991) (identifying more specific political parameters of "mobilized deliberation" that define U.S. constitutional moments). For critique of the claimed universality of the Universal Declaration, see, for example, Adamantia Pollis and Peter Schwab, *Human Rights: A Western Construct with Limited Applicability*, *in* HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES 4 (Adamantia Pollis and Peter Schwab eds. 1979) (noting that Charter and Universal Declaration were adopted "at a time when most Third World countries were still under colonial rule"); *see also supra* note 125. Nonetheless, adoption of the Universal Declaration constituted an important moment of significant change beginning in basic conceptions of sovereignty and rights leading to subsequently adopted human rights conventions. *See generally* LOUIS HENKIN ET AL., HUMAN RIGHTS 286 (1999) (describing significance of Universal Declaration).

129. *See* Michael Kirby, *The Role of the Judge in Advancing Human Rights By Reference to International Human Rights Norms*, 62 AUSTL. L.J. 514, 516 (1988) [hereinafter Kirby, *Role of the Judge*].

130. As noted above, *supra* note 100, countries differ significantly in their participation in transnational discourse, and many of the cases discussed in this article are from present or former Commonwealth members. This apparent over-attention to their decisions may reflect not only their relatively easy accessibility in English but also the influence of Commonwealth legal institutions on receptivity to comparative analysis. Different national histories, legal structures and traditions, political institutions, languages and alliances may all affect national courts' willingness or capacity to look beyond their own borders at foreign or international law, as well as the likelihood that a particular national court's decisions will be considered or referred to by others.

less worried about particular sources and their authority, and more concerned with the coalescence of domestic, and international sources, around core normative ideas. This new normativity of human rights law is reflected in the way references to other constitutional courts' decisions are often accompanied by references to international legal norms as well. The sense of distinctive sovereignties is diminished, as is the strong distinction between domestic constitutional law and international legal norms in areas of human rights.[131]

The concept of human rights, moreover, has become a source of self-identification for the role of judges in many countries around the world. Justices in Australia, Canada, Israel, and South Africa have

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Though not the focus of this article, differential interest in transnational discourse surely warrants study. For one interesting treatment of differential receptivity to comparative analysis of constitutional questions, see Harding, *supra* note 5.

131. *Cf.* Oscar M. Garibaldi, *General Limitations on Human Rights: The Principle of Legality*, 17 HARV. INT'L L.J. 503, 517 (1976) (asserting that the criterion determining the "boundaries of human rights is not law (especially written law) but justice"). One manifestation of the internationalization of domestic law (as well as of the significant position of the U.S.) is the interest that other countries and international organizations have taken in the development of U.S. constitutional law. Nguyen v. INS, 533 U.S. 53 (2001) involved a constitutional challenge to a gender discrimination in the capacity of unwed mothers and unwed fathers to pass on U.S. citizenship eligibility to children born abroad. One amicus brief was filed by a group including the International Commission of Jurists, the International Federation of Women Jurists, the Argentine Association of Women Judges, and the Ethiopian Women Judges Association, as well as Equality Now's Women's Action Network (which, according to the statement of interest in the amicus brief, consists "of more than 5,000 groups and individuals in more than 100 countries around the world including the United States, [who] have written to United States government officials, urging them to work for the adoption of the same legal standard, based on equality, for U.S. citizen fathers and mothers to transmit citizenship to their children born abroad and out-of-wedlock"). *See* Brief of Equality Now et al. as Amici Curiae in Support of Petitioners, at ii, Nguyen v. INS, 533 U.S. 53 (2001) (No. 99-2071) [hereafter "Brief of Equality Now"]. International participation as amicus curiae also occurred in McCarver v. North Carolina, 533 U.S. 975 (2001) (dismissing certiorari as improvidently granted). *See* Brief of Amicus Curiae The European Union in Support of Petitioner, McCarver v. North Carolina, 533 U.S. 975 (2001) (No. 00-8727); Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (citing the EU's *McCarver* Amicus Brief); *see also* Brief of Mary Robinson et al. as Amicus Curiae, Lawrence v. Texas, 123 S. Ct. 2472 (2003) (No. 02-102) [hereinafter Robinson Brief].

published extrajudicial accounts of this kind of self-understanding.[132] These descriptions should not be dismissed as merely the specialized account of a small and unusually privileged group of justices from a small and limited group of nations, for they are reflected, as well, in statements of self-description by international associations of judges. Thus, the International Commission of Jurists describes itself as "dedicated to the primacy, coherence and implementation of international law and principles that advance human rights."[133] The International Association of Judges describes itself as having as its "main aim . . . to safeguard the independence of the judiciary, as an essential requirement of the judicial function and guarantee of human rights and freedom."[134] These organizational statements of identity reinforce Professor Slaughter's claim that judges in a number of countries around the world have developed a "particular self-conception" of their task as including the protection of human rights vis-à-vis governments.[135] This self-conception is also reflected in statements of principle concerning the judicial role in using international human rights law in domestic adjudication, formed in meetings of judges, for example, of the Commonwealth nations,[136] and of the LAWASIA region.[137]

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132. *See, e.g.*, Kirby, *Role of the Judge*, *supra* note 129, at 525–31; L'Heureux-Dubé, *supra* note 1; Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 20–21, 26 (2002); Beverley McLachlin, *The Civilization of Difference*, The Fourth Annual LaFontaine-Baldwin Lecture, (March 7, 2003) *available at* http://www.operation-dialogue.com/lafontaine-baldwin/e/2003_speech_1.html (last visited Oct. 20, 2003); Sachs, *supra* note 74, at 1387-88; *see also* Smith, *supra* note 81, at 110-11 (emphasizing, as Chief Justice of Norway, importance of courts protecting "civil and political rights").

133. *See* International Commission of Jurists, *at* http://www.icj.org (last visited Sept. 17, 2003).

134. *See* International Association of Judges, *at* http://www.iaj-uim.org/ENG/mainframe.html (last visited Sept. 17, 2003).

135. *See* Slaughter, *supra* note 1, at 128; *see also id.* at 128–29 (describing judicial "awareness of the similarity or commonality of the judicial enterprise across countries, an awareness bolstered in turn by a mutual recognition of a common judicial identity and an openness to persuasive authority").

136. *See* "Report of Judicial Colloquium on the Domestic Application of International Human Rights Norms, Bangalore, India", reproduced as Appendix in Kirby, *Role of the Judge*, *supra* note 129, at 531–32 (stating that "[f]undamental human rights and freedoms are inherent in all humankind and find expression in constitutions. . . throughout the world;" that "international human rights instruments provide important guidance in cases concerning

Third, international legal instruments have influenced the formation of many post-World War II bills of rights in national laws and in regional conventions.[138] Lord Wilberforce in an oft-quoted passage notes the influence of the Universal Declaration on the drafting of the European Convention on Human Rights.[139] New Zealand's statutory Bill of Rights Act is understood as intended to carry forward the spirit of the ICCPR, though its language differs in

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fundamental human rights;" and praising the "growing tendency for national courts to have regard to" international norms in cases where "domestic law—whether constitutional, statute or common law – is uncertain or incomplete"); *see also* Michael Kirby, *The Road from Bangalore: The First Ten Years of the Bangalore Principles on The Domestic Application of International Human Rights Norms, at www.lawfoundation.net.au/resources/kirby/papers/19981226_html* (last visited Sept. 12, 2003) [hereinafter Kirby, *Road from Bangalore*]. The Bangalore Principles encourage use of international human rights law on open interpretive questions in domestic law and have been cited in support of the practice of consulting international law in national constitutional decisions. *See, e.g.*, Unity Dow v. Attorney Gen., 103 I.L.R. 128, 176 (Bots. Ct. App., 1992) (1996) (Aguda, J., concurring). These principles were intended as a "new approach" to the use of international law in domestic courts and were formulated at a meeting in 1988 in Bangalore, called by the Commonwealth Secretariat, and attended *inter alia* by former Indian Chief Justice P.N Bhagwati, Michael Kirby, Anthony Lester of Britain, then Judge Ruth Bader Ginsburg and judges from Maritius and Zimbabwe. For further description of Bangalore and subsequent meetings and statements at Harare, Zimbabwe, Balliol College, England, and Bloemfontain, South Africa, see Adjami, *supra* note 107, at 125–29. For reliance on the Balliol and Bloemfontain statements, see for example, Tavita v. Minister of Immigration, [1994] 2 N.Z.L.R. 257, 266, 1993 N.Z.L.R. LEXIS 634, *29 (N.Z., Ct. App.); N. Reg'l. Health Auth. v. Human Rights Comm'n, [1998] 2 N.Z.L.R. 218, 235, 1997 NZLR LEXIS 659, *46–47 (N.Z., High Ct, Auckland). *But cf.* Longwe v. Intercontinental Hotels, [1993] 4 LRC 221, 233 (Zambia, High Ct, 1992) (doubting effect to be given to the Bangalore Principle as a mere resolution of a meeting of jurists).

137. *See* Vishaka v. State of Rajasthan, A.I.R. 1997 S.C. 3011, *reprinted in* 3 Butterworths Human Rights Cases 261, 265 (India, 1997) (quoting from the provision of the Beijing Statement of the chief judges of the LAWASIA region on the judicial function aspiring "to promote. . . the observance and the attainment of human rights").

138. *See* Slaughter, *supra* note 1, at 131–32; McCrudden, *supra* note 1, at 500–01; Hannum, *supra* note 75, at 298–300 (noting influence of Universal Declaration on constitutions in Canada and India).

139. *See* Minister of Home Affairs v. Fisher, 1980 App. Cas. 319, 328–29 (P.C. 1979) (appeal taken from Bermuda).

some respects from ICCPR provisions.[140] The German Basic Law, the Italian Constitution, and the Indian Constitution, all reflect a common store of awareness of basic rights, as well as some marked variations.[141] The rights commitments expressed in the U.N. Charter and the Universal Declaration of Human Rights had influence well before the 1966 Covenants,[142] as is illustrated by the many references to "human dignity" that begin to appear in constitutions in the post-war period and in U.S. constitutional decisions.[143] The United States' Bill of Rights was influential in the formulation of some of these international covenants (which in turn have entered, albeit in

140. *See* New Zealand Bill of Rights Act, 1990, Preamble, *available at* http://www.oefre.unibe.ch/law/icl/nz01000_.html (last visited Oct. 20, 2003) (stating Act's purposes as including "affirm[ing] New Zealand's commitment to the International Covenant on Civil and Political Rights"); *see also* Quilter v. Attorney-General, [1998] 1 N.Z.L.R. 523, 530, 1997 NZLR LEXIS 644, at *18 (quoting purpose of 1993 Human Rights Act as being "to provide better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions").

141. *See, e.g.*, GERMAN BASIC LAW, articles 1–19; ITALY CONST. arts. 2, 3, 9 and pt. I (Rights and Duties of Citizens); INDIA CONST. pt. III (Fundamental Rights). Each of these, for example, includes some explicit guarantee of freedom of movement. *See* ITALY CONST., art. 16; GERMAN BASIC LAW, art. 11; INDIA CONST., art. 19(d). Each includes guarantees of equality, with some particularities, see, for example, INDIA CONST., art. 15(2)(b) (equality provision names "caste" as prohibited basis and specifically prohibits discrimination in access to "the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public"); ITALY CONST. art. 3 (declaring equal "social status" and equality before law and declaring "duty" of state to remove social and economic obstacles to full individual development); GERMAN BASIC LAW, art. 3(2) (state supports effective realization of equality of women and men).

142. *See* McLachlin, *supra* note 132, at 8 (noting provincial development of bills of rights that "dove-tailed with the momentum building at the international level around the adoption of the Universal Declaration of Human Rights"); Hannum, *supra* note 75, at 318 (Universal Declaration, according to Eleanor Roosevelt, would "serve as a common standard of achievement for all peoples of all nations").

143. *See e.g.*, DONALD KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 312–13 (2d ed. 1997) (discussing role of human dignity in German Basic Law); *see also* Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, MONT. L. REV. (forthcoming Jan. 2004) [hereinafter Jackson, *Constitutional Dialogue and Human Dignity*]; *cf.* Resnik & Suk, *supra* note 48, at 1934–41 (noting appearance of term "human dignity" in U.S. reports starting in World War II).

limited fashion, U.S. judicial discourse about constitutional rights).[144] And the regional human rights covenants borrow from U.N. rights' statements. These "genetic" relationships among rights provisions provides a basis for shared learning by all generations still participating in their elaboration and enforcement.[145]

Finally, the development of this web of international human rights obligations—whatever their precise status in international law as ratified or unratified treaties, customary international law or in some cases as *jus cogens*—emphasizes the increased likelihood that international law will be implicated by the conduct of a nation's government to its own people (and even if not binding now may become so in the future).[146] Constitutional courts may be more aware of their own role, however small, in developing the body of legalized practices in "civilized nations" which can influence recognition of principles of international law.[147] And international legal actors are aware as well of the influence of some domestic constitutional courts in shaping understandings of international

144. *See* Louis Henkin, *Introduction, in* CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 1, 2 (Louis Henkin & Albert J. Rosenthal eds., 1990); *supra* note 127; Resnik & Suk, *supra* note 48 at 1934–41; Jackson, *Constitutional Dialogue and Human Dignity*, *supra* note 143, at n. 92 (identifying state court decisions referring to transnational human rights sources).

145. *See* Henkin, *supra* note 144, at 2, 12-15; Louis Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, 14 CARDOZO L. REV. 533, 536–37 (1993); *see also* Choudhry, *supra* note 6, at 866–85 (distinguishing "genetic" and "genealogical" influences); U.S v. Then, 56 F.3d 464, 469 (2d. Cir. 1995) (Calabresi, J., concurring) ("[w]ise parents do not hesitate to learn from their children").

146. *See* Dugard, *supra* note 78, at 189 (noting "potential" application of international conventions to South Africa) For discussion of international human rights influence in Australia, see Anthony Mason, *The Influence of International and Transnational Law in Australian Municipal Law*, 7 PUB. L.R. 20 (1996).

147. *See* Arthur M. Weisburd, *The Significance and Determination of Customary International Human Rights Law: The Effect of Treaties and Other Formal International Acts on the Customary Law of Human Rights*, 25 GA. J. INT'L & COMP. L. 99, 104 (1996)("all states are eligible at all times to take part in the creation of customary international law . . . [A]ny act of a state, including a violation of an existing rule of law, may contribute to the development of a new rule of law."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 701, n.2 (1987).

law.[148] Thus, the developing sense of "relational" authority—of an obligation to consider, even if not to follow, decisions on similar human rights issues by other tribunals—may also be informed by some recognition that the legal actions of the domestic national courts of the world have a role to play in defining the content of customary international law with respect to rights protected in the major international human rights documents.[149] Given the relatively weak channels of international human rights enforcement,[150] the content of these rights is to some extent up for grabs between the multitude of state signatories, the U.N. monitoring bodies, the regional human rights tribunals that interpret often similar provisions in their regional human rights documents, and the various national courts that may have occasion to refer to those norms. On this view, national courts' participation as international actors influences not only what happens in their own countries but the status of norms in international legal understandings.[151]

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148. Non-domestic actors have concern over domestic law not only in the sense of ideological conviction, or in the sense of identification with the discriminations suffered by particular rights-asserters, *see supra* note 131, but also in some cases by a concern that domestic law will have an impact on international understandings. Thus, in I.N.S. v. Aguirre-Aguirre, 526 U.S. 415 (1999), the U.N. High Commissioner for Refugees filed an amicus brief explaining that "[r]esolution of this case is likely to affect not only the interpretation by the United States of the provisions of the Convention relating to who is and who is not entitled to the internationally protected status of refugee, but also the manner in which other countries interpret those provisions. The United Nations High Commissioner for Refugees (UNHCR), therefore, has a direct interest in ensuring that this Court's ruling is consistent with its own interpretation of the Convention." Brief of Office of the United Nations High Commissioner for Refugees as Amicus Curiae at 1, INS v. Aguirre-Aguirre, 526 U.S. 415 (1999) (No. 97-1754).

149. *See* Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, T.S. No. 993 (court in deciding disputes in accord with international law is to apply international conventions, international custom, "general principles of law recognized by civilized nations," and, as subsidiary means for determining rules of law, "judicial decisions" and teachings of scholars).

150. *See* text at note 117, *supra*; BAYEFSKY, UNIVERSALITY, *supra* note 21, at 7 (discussing "shortfalls" in implementation scheme of human rights treaties)

151. *Cf.* U.S. v. Burns, [2001] 1 S.C.R. 283, 287 (characterizing Canada's position as an international leader in opposition to the death penalty). Courts also occasionally become objects of transnational legal attention, including filing of amicus briefs, because of the impact of domestic judicial

What vocabulary can help describe this shifting sense of a relationship among courts and tribunals in the elaboration of human rights norms? The existing distinction between "binding" precedent and "persuasive authority" could be used to identify most, if not all, of the above uses. But, as noted earlier, the idea of "persuasive authority" may be quite broad and includes a number of distinctive categories.[152] The sense of an obligation to consider legal material which may not be binding and the aspiration to constitute overarching law through a fabric of nonbinding decisions reflect what I would call the "relational authority" of human rights norms so interestingly at work in these more recent cases.[153]

In their important article in 1997, Professors Helfer and Slaughter described the development of "overlapping networks of national, regional, and global tribunals" that could engage in "collective deliberation about common legal questions," thereby "reinforc[ing the courts'] legitimacy and independence from political interference," and "promot[ing] a global conception of the rule of law."[154] The sense of connection, of "relational authority" in the increased use of persuasive precedent, is perhaps one example of this webbed set of relationships amongst tribunals anticipated by Helfer and Slaughter. These connected relationships may, indeed, be part of a broader trend in the reconception of public law—both constitutional law and international human rights law—to be less concerned with the hierarchy of law's commands and more concerned with participation, discussion and negotiation across a wide range of actors, public and private,[155] as a basis for both rights articulation and implementation.[156]

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understandings of international human rights obligations. *See supra* notes 131, 148 (describing amicus filings by international organizations in U.S. courts).

152. *See supra* text accompanying notes 39–61 (noting *inter alia* negative precedents, precedents cited for reasons unrelated to their deliberative assistance in deciding the case (e.g., national legitimacy, political alliances), precedents cited because they analyze comparable problems in comparable contexts, and precedents cited because additionally they are addressing comparable problems in a binding (or potentially binding) international legal order).

153. *See supra* notes 105, 107.

154. Helfer & Slaughter, *supra* note 3, at 282.

155. In a separate paper I am exploring this possible trend in public law, which might be described as one more interested in coordinated relationships than in hierarchy; more concerned with wide participation in decision-making

than speed of decision; in tentative rather than final decisions; and in discussion and negotiation rather than judgment, in a variety of settings. Examples might be found (1) in the implementation process for CEDAW and other human rights treaties, processes that involve reporting, information sharing and recommendations by the monitoring committee, rather than judgments or sanctions; (2) in the development of constitutional theories of democratic experimentalism, with an emphasis on "learning by monitoring" and on decentralized implementation and shaping of common norms, *see* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875 (2003); (3) in decisions like Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 220, holding that, in the event of clear vote on a clear majority in favor of secession in one province, the rest of the country would have a duty to discuss possible secession and negotiate in accordance with values of rule of law, democracy, federalism and protection of minority rights; (4) in new arrangements for courts to interpret constitutional rights in a way that legislatures can overcome or disagree with, *see* Gardbaum, *supra* note 90, at 746 (arguing that Commonwealth models of protecting rights subject to legislative derogations may replace "judicial monopoly and monologue on . . . constitutional rights" with "inter-institutional dialogue between courts and legislatures that would improve the quality and dimensions of constitutional analysis"); (5) in emerging international norms requiring democratic participation in constitution making, described by Vivien Hart, *Democratic Constitution Making*, 107 U.S. INST. OF PEACE 1, (2003), *available at* www.usip.org/pubs/specialreports/sr107.html; and (6) in the reconstruction of the international law of self determination in light of competing claims of identity and participation, described in KNOP, DIVERSITY AND SELF-DETERMINATION, *supra* note 14 at 380–81 (noting as well broader implications for legal interpretation in plural societies). *See generally* Harding, *supra* note 5, and especially at 462–65 (distinguishing "dialogic" and "enforcement" models of judicial reasoning and noting relationships of global influences to local processes of interpreting law in "dialogic" model).

156. The connection between a court's decision and its implementation cannot be assumed. After *Unity Dow*, Botswana amended its citizenship statutes to eliminate the gender discrimination condemned by the court; after *Rattigan*, however, the Constitution of Zimbabwe was amended to authorize the citizenship discrimination the court had condemned. *See* Adjami, *supra* note 107 at 157–58. *But cf.* Karen Knop & Christine Chinkin, *Remembering Chrystal MacMillan: Woman's Equality and Nationality in International Law*, 22 MICH. J. INT'L L. 523, 533 (2001) (indicating that the Zimbabwe Court had resisted so interpreting the constitutional change). Implementation and enforcement are important questions in both international and domestic rights protection, which are the subject of increasing literature, see *infra* note 205; I note here only that, even when a country has ratified conventions and adopted rights-protecting constitutions and issued judgments upholding human rights, those judgments will not necessarily be given effect.

Professor Slaughter's "transjudicialism" is reflected in a particular kind of "persuasive authority"—authority that courts in some sense "must" consider, although it is not binding upon them, because of its relationship to their court and their work.[157] The suggestions that these "transjudicial" exchanges reflect a new community of judging (not for all countries or all courts, to be sure) related to an increasingly global (though not universal) community of law, capture important aspects of these exchanges.[158] But it is not only a community of judges, for its participants include nonadjudicatory fora like the U.N. human rights committees as well as NGOs, grassroots activists and legal scholars.[159] Nor is it only a community of shared law—for the scope of the felt obligation to consider external sources is not limited to those areas in which the external sources are positively binding in accord with domestic norms. Perhaps we might also see the relationships underlying these judicial exchanges as reflecting shared legal values and historic experience, born of a very specific moment in the wake of World War II, which engendered a reaction against human rights abuses, including but not limited to racism and other forms of discrimination, with the understanding that those shared values may be expressed in

157. *See* Slaughter, *Globalization*, *supra* note 7, at 1109–12 (discussing influence of decisions of the European Court of Human Rights on courts outside of Europe).

158. *Id.* at 1122–24 (noting increasing judicial meetings to promote dialogue among judges of different courts).

159. Although some of the U.N. human rights committees may be assuming a role closer to those of courts, their judgments are not generally viewed as binding and enforceable under international law, and some still do not have well-functioning individual complaint procedures. *See* Ratner, *supra* note 117, at 724–25; *cf.* Helfer & Slaughter, *supra* note 3 at 366–85 (suggesting changes in procedure to move U.N. Human Rights Committee closer to role of European courts); BAYEFSKY, UNIVERSALITY, *supra* note 21 at ii–iii (urging changes in role of the U.N. High Commissioner for Human Rights and consolidation of the different UN human rights committees). *But cf.* Henkin, *supra* note 128, at 504-05 (raising question whether committee's views should be seen as legally binding). On sociological reasons for possible further convergences, see Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749 (2003) (describing sociological processes of institutional isomorphism, not necessarily reflecting basic values or functional similarity, but nonetheless resulting in the convergence of basic elements of governmental design).

very different legal ways—a community of legal values born of shared experience, if not a community of law.

Notwithstanding each of these descriptions' emphasis on some form of global community (of judging, of law, or of shared experiences and values),[160] national states will continue for the foreseeable future to be a primary location for the enforcement of human rights,[161] including rights of gender equality. It is thus important to consider the objections that have arisen to domestic courts even considering such foreign and international sources.

II. NONBINDING TRANSNATIONAL AUTHORITY, CONSTITUTIONAL LAW AND GENDER EQUALITY

Many of the references discussed above involved challenges under national constitutions, which in some respects might be particularly hostile locations for the emergence of a deeply comparative methodology, since national constitutions are often understood as expressions of national particularity.[162] National

160. *See, e.g.*, Quilter v. Attorney-General, [1998] 1 N.Z.L.R. 523, 531, 1997 NZLR LEXIS 644, *22 (Thomas, J.) (referring to "basic values"); *id.* at 559-60, 1997 NZLR LEXIS at *103–05 (Keith, J.); *cf.* Kirby, *Role of the Judge*, *supra* note 129, at 530 ("in the world after Hiroshima, all educated people have a responsibility to . . . act as citizens of a wider world"). As noted earlier, *supra* note 12, gender equality was not a central concern in the post-war 1940s, though formal international commitments to gender equality are made at this time. *See supra* note 15.

161. Transnational judicial discourse on human rights may also be a reflection of a shift too large and ongoing to be seen clearly yet, from pre-World War II understandings of the significance of state boundaries, to a twenty-first century understanding that national sovereignty is only one of several locations for the exercise of political power, legal constraint, and communal self-expression in the world, an anticipation of a new regime in which communities of people exist in both hierarchical and nonhierarchical patterns whose connectedness, permeability, and differential allocation of functions to different levels of governance, may be overtaking the very idea of sovereignty itself. For a related discussion of a "post-sovereign" Europe, see NEIL MACCORMICK, QUESTIONING SOVEREIGNTY: LAW, STATE AND NATION IN THE EUROPEAN COMMONWEALTH 74–75, 76–78, 102–21, 123–36 (1999).

162. *See* Schauer, *supra* note 26, at 257 (noting that even in countries willing to borrow U.S. approaches to bankruptcy or corporate law, borrowing constitutional law may "suggest a loss of sovereignty, control and much of the essence of what helps to constitute a nation as a nation in the first place."). The role of other constitutions may be one of differentiation or dialogue in the project of national self-definition, however. *See supra* text at notes 44, 64–65.

constitutions serve many goals, including not only the protection of rights (many comparable to international human rights) and the definition of structures for workable governance, but also the expression of national self-understandings and the assertion of equal sovereignty in the world setting. Although the meaning of rights (such as gender equality, or freedom of speech) may be more amenable to transnational analysis than questions about nationally specific constitutional structures of governance,[163] the specific expressions of a "human right" may also vary with the broader structures and suppositions of particular national constitutional regimes.[164] Moreover, the age of a constitutional regime may matter: comparative experience may be less useful in highly developed systems of constitutional law (on issues already well worked out in stable doctrine or practices) than in newer constitutional systems. Comparative constitutional experience and international law as nonbinding sources of interpretation might offer both substantial attractions,[165] and difficulties,[166] for newly developing constitutional

163. Thus, as I have suggested elsewhere, comparative constitutional law may be less directly helpful to jurists on structural issues of federalism than on human rights questions. *See* Jackson, *Narratives*, *supra* note 126, at 272–76; Vicki C. Jackson, *Comparative Constitutional Federalism and Transnational Judicial Discourse*, 2 INT'L J. CONST. L. (I·CON) (forthcoming January, 2004) [hereinafter Jackson, *Constitutional Federalism*].

164. *Cf.* Neuman, *supra* note 125, at 1869–72 (noting "institutional" aspects of rights). For Neuman the institutional aspects of rights refer to the particular structures for enforcement of the rights. *Id.* at 1869. The broader institutional context, including general structures of governance, may also impact understandings and implementations of rights.

165. Not only may new regimes find it helpful to consider established doctrinal approaches elsewhere to similar problems, but referring to international and comparative experience may help signal, both internally and externally, abandonment of repressive practices of prior regimes and the willingness to be held to account under world standards of human rights. *See e.g.,* Schauer, *supra* note 26, at 259 (describing South Africa's resort to foreign and international law as "a reaction against South Africa's recent history as an outcast or pariah nation" by coming "into harmony with international standards," independent of their merits); *see also* McCrudden, *supra* note 1, at 500–01 (noting that citation to foreign jurisprudence may be "regarded. . . as a sign of a particular orientation towards human rights").

166. Some scholars have raised concern that considerations of foreign or international sources is inconsistent with the development of an authentically national constitutional tradition. *See* Carlos F. Rosenkrantz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 INT'L J. CONST. L. (I·CON) 269, 285–86 (2003); *see also* Schauer, *supra* note 26, at

orders.

In some kinds of cases, however, comparative and international experience is worth considering, both in those constitutional orders with highly elaborated doctrine and those with newer constitutional regimes. First, issues unforeseen by prior lawmakers are generated by new phenomena, such as the development of new technologies (for example, informational privacy issues created by new information technologies, or genetic engineering and human reproduction).[167] Deciding on constitutional approaches to such new problems may be ongoing simultaneously in a number of courts, whose deliberation could only be better informed by considering the range of approaches being taken or considered elsewhere.[168] Second, there are sets of hard issues (which sometimes overlap with "new" issues), often driven by developments in claims of rights resulting from mobilization of new understandings of individual or group identity, and presenting issues over which there is deep-seated legal, political and moral division. The presence of deep controversy over

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254–55 (suggesting that countries emerging from colonial or communist rule focus on establishing indigenous constitutional culture).

167. For illustrative discussion of one such area, see Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1440, 1460–61 (2001) (discussing database privacy in U.S. and favorably discussing E.U.'s approach); New York Times Co. v. Tasini, 533 U.S. 483, 506 n.13 (2000) (comparing other nations' copyright protection for copying of information in electronic databases). Approaches of other countries to new technology issues may directly affect constitutional adjudication. *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 205–06 (2003) (rejecting constitutional challenge to federal copyright extension, and noting legitimacy of government interest in changing U.S. law to harmonize US statute with Europe's); *id.* at 206–08 (noting, in addition to "international concerns," changes in demography, economy and technology as rational bases on which to uphold the legislation); *cf.* Amer. Ins. Assn v. Garimendi, 123 S. Ct. 2374, 2392 (2003) (expressing concern that state law would undercut German privacy policies).

168. In this setting the notion that with more deliberating bodies exchanging views on constitutional problems better solutions will emerge may have particular salience. *See* Slaughter, *Global Community*, *supra* note 7, at 193, 201; *see also* GLENDON, *supra* note 31, at 159 (criticizing U.S. "arrogance," "willful ignorance" and "unconscious insularity" of "how other high courts ha[ve] dealt with the same vexing issues"). On the other hand, it may not be reasonable to expect judicial systems with highly developed and complex jurisprudence on a well-worn field to continually be open to new ideas, both for rule of law and judicial efficiency reasons.

internal norms, as is often encountered in gender equality issues, might be itself a particular reason to look outside—not for the purpose of adopting external norms,[169] but rather to critically interrogate our own "instincts" or predispositions which, in deeply controversial cases, it is so important to become aware of before coming to judgment.[170] Third, there are issues of particular concern to legal communities beyond the country of decision—because, for example, they concern treatment of foreign nationals,[171] or the status of aliens as claimants for citizenship[172] (though the areas experienced as being of special concern may be expanding).[173] Awareness of the legal framework within which domestic decisions will be viewed, at least on some issues, may be a prudent component of constitutional interpretation.[174]

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169. *But cf.* Brian R. Opeskin, *Constitutional Modelling: The Domestic Effect of International Law in Commonwealth Countries*, 2000 PUBLIC LAW 607, 625 (suggesting that in some countries with turbulent group relations, references to "neutral" laws from beyond their own country may be helpful in resolving internal divisions).

170. See also L'Heureux-Dubé, *supra* note 1, at 39 ("considering and comparing judgments from various jurisdictions makes for stronger, more considered decisions, even if the result is the same"); *cf.* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 172–73, 176 (1921) (suggesting that greater spirit of self-searching can help judges decide cases free from "unconscious prejudices"); JEROME FRANK, LAW AND THE MODERN MIND 114, 362 (6th ed. 1949) (arguing that greater awareness of factors that influence judicial judgments will enable "sound intelligence to play a larger part in the process of judging").

171. *See, e.g.*, Breard v. Greene, 523 U.S. 371 (1998).

172. *See, e.g.*, Nguyen v. INS, 533 U.S. 53 (2001).

173. *See, e.g.*, *supra* notes 131, 148(noting EU and UN High Commissioner amicus briefs). The spread of human rights consciousness and other recent developments reflected in these amicus filings and also, e.g., in the establishment of the International Criminal Court, suggest that we may see increasing interest or concern by other countries in constitutional decisions in the United States, at least in part for reasons of principle (apart from possible political tactics in dealing with the U.S. as a world power).

174. *See* Jackson, *Narratives*, *supra* note 126, at 261–62, 266–68 (contrasting internal and external "legitimacy" as reasons sometimes supporting and sometimes cautioning against overt reference to foreign or international authority). Concern for how a decision, or its reasoning, would be viewed by its audience might be understood to involve prudential considerations. For a classic treatment of the role of prudence in constitutional adjudication, see ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 132–33 (2d ed. 1986).

Recent references to transnational legal materials have appeared in U.S. Supreme Court cases dealing with issues that are "hard" in an intensely controversial way.[175] Thus, in *Lawrence v. Texas*,[176] Justice Kennedy, writing for the U.S. Supreme Court, used the European Court of Human Rights ("ECHR") jurisprudence prohibiting laws against consensual homosexual conduct not only to rebut assumptions made by an earlier Court (and thus support the overruling of its earlier precedent)[177] but also to help understand in a substantive way the liberty protected by the U.S. Constitution.[178] In *Grutter v. Bollinger*,[179] one of the Michigan affirmative action cases, Justice Ginsburg invoked international human rights treaties apparently to reinforce the legitimacy of a constitutional rule expressly designed to be temporary—a major innovation for the U.S. Supreme Court.[180] And in *Atkins v. Virginia*[181] the Court invoked foreign practice in resolving the issue that the execution of mentally retarded convicted murderers was inconsistent with the Eighth Amendment ban on cruel and unusual punishments, returning to the Court's earlier practice of looking to other nations' approaches on Eighth Amendment issues.[182] In these cases international and comparative materials were used in three ways: first, to interrogate

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175. *See, e.g.*, Washington. v. Glucksberg, 521 U.S. 702, 734 (1997) (citing to Dutch practice on euthanasia); *id.* at 718 n.16 (referencing foreign debate on euthanasia).

176. 123 S. Ct. 2472 (2003)

177. *See id.* at 2481 (citing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. 52 (1981)). *Lawrence* overrules *Bowers v. Hardwick*, 478 U.S. 186 (1986). *See Lawrence*, 123 S. Ct. at 2484.

178. *See id.* at 2483. After noting a number of other European Court of Human Rights cases following *Dudgeon*, not *Bowers*, as well as the Amicus Brief for Mary Robinson and others, the Court wrote:

> "The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent."

Id. In so arguing the Court looked to the practices elsewhere to help identify integral aspects of human freedom and evaluate the asserted justifications for the government limitation.

179. 123 S. Ct. 2325 (2003).

180. *Id.* at 2347 (Ginsburg, J., concurring).

181. 536 U.S. 304, 316 n.1 (2002).

182. *Id.* at 317. (citing the Brief of the European Union filed in *McCarver).*

domestic assumptions or answer questions about legal facts that the Constitution or the Court's own caselaw had made relevant to the domestic constitutional question;[183] second, to help identify the scope of constitutionally protected liberty and examine the adequacy of justifications for its restriction;[184] and third, to support the legitimacy of a constitutional innovation of a time-limited power to take race into account, driven by domestic constitutional doctrine (that is, the "narrow tailoring" requirement of the "compelling interest" test).[185]

Though perhaps the start of a new trend, the three cases discussed above stand out as departures from the Court's late twentieth century ambivalence about transnational discourse.[186] In at least two significant gender equality cases in recent years, *Nguyen v. INS*[187] and *United States v. Morrison*,[188] the Court essentially ignored

183. That is, as to the universality *vel non* of legal condemnation of homosexuality, or the unusualness or cruelty of a penalty. *Cf.* Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989) (noting limited purpose for considering practices of other countries in the Eighth Amendment analysis, in determining that views of American people are not a "historical accident" but reflect what is implicit in "ordered liberty'").

184. See Lawrence v. Texas, 123 S. Ct. at 2483 (quoted *supra* note 178).

185. *See Grutter*, 123 S. Ct. at 2347 (Ginsburg, J., concurring) (noting that international human rights conventions on gender and race discrimination specifically authorize temporary measures that take race into account to redress inequality but require that such measures "'shall in no case entail . . . the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved'" (quoting U.N. GAOR 20th Sess., Annex, Supp. No. 47, U.N. Doc. A/6014 (1965)); *id.* at 2341–47 (O'Connor, J., for the Court) (emphasizing that even where there is a compelling interest in using a racial classification, the means chosen must be "narrowly tailored" and any use of race must be "limited in time").

186. For evidence of the continuing disagreement in the U.S. Court over the relevance of foreign or international law in resolving U.S. constitutional questions, compare, e.g., Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2003) (noting views of E.U., among many other sources, and stating that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved"), with *id.* at 347 (Scalia, J. dissenting) (stating that "views of . . . the 'world community'whose notions of justice are (thankfully) not always those of our people," were irrelevant to Eighth Amendment question); *id.* at 322 (Rehnquist, C.J., dissenting) (consideration of foreign law in constitutional interpretation is inconsistent with federalism).

187. 533 U.S. 53 (2001).

188. 529 U.S. 598 (2000).

efforts by amicus groups to bring transnational human rights sources to bear in resolving domestic constitutional questions.[189] The reasons for this stance are no doubt varied, and may include the relatively well-established character of U.S. constitutional jurisprudence,[190] the hesitation of the U.S. government to ratify or make fully self-executing some human rights conventions, as well as inward-looking aspects of American legal education and training.[191] But two justices have persistently objected to the legitimacy of considering transnational sources in deciding domestic constitutional questions,[192] and the Court's relative reticence in this area might reflect those concerns about the legitimacy (or perceived legitimacy) of transnational discourse on constitutional rights.[193] Debate in the

189. *See* Brief Amici Curiae on Behalf of International Law Scholars and Human Rights Experts in Support of Petitioners, United States v. Morrison, 529 U.S. 598 (2000)(Nos. 99-05, 99-29) [hereafter "Brief Amici Curiae of International Law Scholars"]; Brief of Equality Now, *supra* note 131. In two other cases raising significant questions of gender equality, the Court likewise did not address either foreign or international legal sources, though there do not appear to have been significant efforts by amicus curiae or parties to inform the Court of relevant gender equality developments. Nev. Dep't. of Human Res. v. Hibbs, 123 S. Ct. 1972 (2003); United States v. Virginia, 518 U.S. 515 (1996) (one amicus brief, by Employment Law Center et al., in one footnote referred to the ICCPR and the Race Convention, to support the idea that remedial programs for girls or women to make up for past discrimination might be permissible).

190. *See* McCrudden, *supra* note 1, at 523–24 (noting use of foreign decisions to fill vacuum left by temporary absence of indigenous law and predicting decline in use of foreign law once national jurisprudence is developed).

191. *See* Jackson, *supra* note 72, at 592–600; *see also* McCrudden, *supra* note 1, at 526.

192. *See, e.g.*, Printz v. United States, 521 U.S. 898, 921 (1997)(Scalia, J.); Knight v. Florida, 528 U.S. 990, 990–91 (1999)(Thomas, J., concurring in denial of certiori).

193. *See* also Jackson, *supra* note 126, at 263–67 (noting two kinds of legitimacy concerns, one normative and the other empirical, and discussing legitimacy in terms of the audience for the Court's decision). Note that concerns about audience may also reflect what materials lawyers present to the Court. Lawyers' perceptions of what legal materials will be regarded as helpful may have reinforced the Court's disinclinations to consider transnational sources, for it is unlikely that the Court will identify persuasive (but not binding) foreign and international sources when neither the parties nor amici bring them to the Court's attention. In light of *Lawrence*, *see supra* note 178, lawyers may feel more invited to present relevant transnational legal material to the Court.

United States has been less about whether courts *must* consider nonbinding international and transnational authority, than whether it is *permissible* to do so. I consider here two sets of objections to the use of contemporary transnational legal sources on interpretive questions under the U.S. Constitution.[194]

A. Democratic Self-Rule, the Rule of Law and Nondomestic Legal Sources

One persistent objection to reliance on non-U.S. sources of law arises from an asserted tension between democratic self-rule under the Constitution and reliance on transnational sources of law.[195] The

194. I am not here concerned with such uses of foreign or international authority as illuminating the original intent of the Constitution's drafters, as in Loving v. United States, 517 U.S. 748, 756 (1996) (debating understanding of the Framers, from English law, of scope of court martials). Nor do I further address possible objections to the use of nonbinding authority in relatively new constitutional regimes where there is concern for the development of an authentic internal form of constitutionalism, see *supra* note 166, a concern far less apposite in the United States.

195. *See, e.g.*, *Printz*, 521 U.S. at 921 n.11 (asserting that comparative constitutional law is relevant in drafting, not interpreting, constitutions); Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989) (Scalia, J. for the Court) (it is "American conceptions of decency" with which evolving law of the Eighth Amendment is concerned). However, U.S. Justices are by no means all in accord with this view. Note the differing views expressed, for example, in *Knight*, 528 U.S. at 995–97 (Breyer, J. dissenting from denial of certiorari); *Atkins*, 536 U.S. 304, 316 (2002); *id.* at 322–23 (Rehnquist, C. J., dissenting); Foster v. Florida, 537 U.S. 990, 991 (2002) (Thomas, J., on denial of certiorari); *id.* at 991–93 (Breyer, J., dissenting from denial of certiorari). In the past the Court has, at times, been more receptive to considering foreign and international sources at least on some questions. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 489–90 (1996); Trop v. Dulles, 356 U.S. 86, 102–03 (1958).

The objection to the external is analytically distinct from but reinforced by concerns over the processes of developing transnational legal norms, to the extent that universalized norms are argued to be established by loosely organized processes including both practices and reasoning of an assortment of actors, some public, and some private. *See supra* note 155 (noting possible trend towards decentralization, non-hierarchic, and negotiation approaches to public law). The U.S. Court's hesitation to consider international and foreign materials is interestingly (though not exactly) mirrored in a debate over whether other countries should consider international or foreign legal norms, in light of the asserted hegemonic influence of the United States on those norms. *See* Knop, *supra* note 23, at 522–23, 527; *see also* Schauer, *supra* note 26, at 253–54 (noting increased association of law with "indigeneity" in areas casting

tension emerges in a number of settings: the effect of international treaties on the scope of constitutional powers;[196] the self-executing character *vel non* of treaties that the U.S. has ratified and the legal significance of ratified but non-self-executing treaties;[197] and the content, status and application of customary international law.[198]

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off colonial or other forms of outside domination in Eastern Europe, former Soviet Union and South Africa).

196. For scholarly disagreement, compare e.g., Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998), and Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98 (2000) (arguing against "nationalist" view of treaty power), with, e.g., David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000). In the caselaw, compare Missouri v. Holland, 252 U.S. 416, 433–34 (1920) (treaty may provide constitutional basis for federal legislation notwithstanding the Tenth Amendment) with Reid v. Covert, 354 U.S. 1, 5–16 (1957) (Black, J., for plurality) (treaty may not authorize government conduct in violation of individual constitutional rights). Although as a formal matter binding the nation to the requirements of treaties agreed to by the Senate responds to concerns for self-rule under the Constitution, as a substantive matter some methods of binding oneself contemplate greater levels of participation and awareness than others, and arguably have greater claim to democratic legitimacy thereby.

197. *See also infra* text accompanying note 204; *compare, e.g.*, Bradley, *supra* note 89 at 1587–95 (in praise of non-self execution), Curtis A. Bradley, *Breard, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 539–43 (1999), and John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999), *with, e.g.*, Carlos Manuel Vázquez, *Breard, Printz and the Treaty Power*, 70 U. COLO. L. REV. 1317 (1999) and Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L.J 2154 (1999) (challenging claim that treaties should be presumptively non–self-executing).

198. For differing views on the status and nature of customary international law and whether it is "federal law" for purposes of the Supremacy Clause, compare, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997), with Louis Henkin, *A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 867–78 (1987) and Harold Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998). For intermediate positions, see, e.g., Alex Aleinikoff, *Ending the Debate, Beginning the Discussion: Customary International Law and Sovereignty*, AM. J. INT'L. L. (forthcoming 2003) (suggesting that customary international law today should be regarded as a form of general law applicable in federal courts but not necessarily in state courts); Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365 (2002) and Weisburd, *supra* note 147 For other settings in which international or foreign law is considered in U.S. courts, see Paul B. Stephan, *A Becoming*

Apart from objections to the binding character of international norms from democratic self-rule (and from the particular demands of democratic federalism),[199] scholars have also argued that there is tension between the U.S. institutional system of checks and balances designed to make government action more difficult and cumbersome and allowing new binding norms to be developed through customary international law outside of those structures of checks and balances.[200] All of these issues concern the priority and application of assertedly binding legal norms. But questions have also arisen

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Modesty – U.S. Litigation in the Mirror of International Law, 52 DEPAUL L. REV. 627 (2002) (looking at cases in which US courts reach to decide issues of foreign law in an effort to influence development of foreign law and identifying costs and risks of such "expressive" decisions).

199. *See, e.g., Atkins*, 536 U.S. at 322–23 (Rehnquist, C.J., dissenting) (arguing that reliance on foreign law to interpret the Eighth Amendment is inconsistent with federalism because "any 'permanent prohibition upon all units of democratic government must [be apparent] in the operative acts (laws and the application of laws) that the people have approved'" (quoting Stanford v. Kentucky, 492 U.S. 361, 377 (1989) (Scalia, J. for plurality)). The objection from federalism here draws much of its force from the more general objection from democratic self-rule. *Cf.* Young, *supra* note 198, at 403–04 (arguing that where customary international law declared by federal courts binds states, states are denied "procedural safeguards" of participation in the national legislative process). The force of the objection from democracy depends importantly on whether external sources are being treated as independently binding—in which case there are questions of self rule that must be addressed to establish the legitimacy of such bindingness. *See* Aldridge v. Booth, (1988) 80 A.L.R. 1 (upholding federal statute because, Australia having ratified CEDAW, statute prohibiting sex harassment of women came within federal external affairs power). Federalism concerns may also go to assuring the continued capabilities of the states to serve as counterbalances to central power. But it bears noting that federalism also provides opportunities for decentralized consideration and infusion of transnational legal sources through decision-making at state and local levels. For discussion, see, e.g., Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 276–80 (2001) (noting local implementation or endorsement of CEDAW in 39 cities, 17 counties, and 16 states in U.S. despite lack of Senate ratification); *see also* Jackson, *Constitutional Dialogue and Human Dignity, supra* note 143.

200. *See* Young, *supra* note 198, at 396–97; *cf.* Bradley & Goldsmith, *supra* note 198, at 861 (raising separation of powers concern that application of customary international law by the courts is inconsistent with "political branch hegemony" in foreign affairs). (The "checks and balances" in some respects themselves thwart the immediate expression of democratic will, but, one could say, if "the people" have chosen to bind themselves to more deliberative methods of lawmaking that is their democratic choice. *But cf. infra* note 211.)

about the relevance or appropriateness of considering the constitutional law of other countries or of international norms not yet having the status of binding law, in the interpretation of a domestic constitution,[201] at least in the absence of explicit constitutional authorization.[202]

There are genuine tensions between commitments to democracy and self-rule, on the one hand, and judicial enforcement of rights, on the other, a tension that is pervasive in constitutionalism.[203] This tension is magnified when the basis for judicial determinations is a source of law beyond the control of the judges' own polity.[204] Arguments that ignore the objections from self-rule risk undermining important values of democratic decision-making. Democratic participation in decision-making in smaller communities is in some respects a good in itself, and one that may be threatened by external constraints. Moreover, the efficacy of human rights norms is importantly determined by the mobilization of domestic constituencies—within the domestic polity—to effect change on the ground and by the development of a legal culture that supports the practice of rights.[205] And there is much that is attractive about the

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201. *See* Printz v. United States, 521 U.S. 898, 921 n.11 (1997).

202. *See* Tushnet, *supra* note 4, at 1270 n.215.

203. *Cf.* Bahdi, *supra* note 41, at 574 (noting a similar tension in India, where the Indian Supreme Court, in Bahdi's words, "dismissed the significance of India's reservations to the CEDAW" as an example of courts tending to "ignore rules of international law that render the right nonjusticiable" and thus one for political branches to implement, when they see rights in a universalist light). For earlier discussion of *Vishaka*, see text at notes 82–84.

204. *Cf.* Young, *supra* note 198, at 388–89 (noting concerns both for the indeterminacy and extra-territorial sources of customary international law).

205. International human rights sources may, though, help provide focus for effective mobilizations for domestic legal change. *See, e.g.*, UNIFEM, BRINGING EQUALITY HOME, *supra* note 102, at 13–14, 24–25, 33–34 (referring to views of Rebecca Cook) (discussing the women's movements' use of CEDAW in Costa Rica, Colombia and Uganda). Consider also the argument made by Sunder of the value of internal and localized engagements over gender equality issues within different religious communities including Islam. *See* Sunder, *supra* note 24, at 1434–57, 1463–64; *see also* Andra Nahal Behrouz, Note, *Transforming Islamic Family Law: State Responsibility and the Role of Internal Initiative*, 103 COLUM. L. REV. 1136 (2003). The role of international law in affecting behavior is the subject of longstanding debate among international lawyers and political scientists, though the importance of domestic governments in human rights enforcement is widely acknowledged.

epistemological humility and value pluralism behind approaches to judicial review designed to enhance the quality of participatory decision-making.[206] But the tensions between democratic self-rule and judicial rights enforcement, though real, are also very complicated, and their existence does not dictate simple answers to questions about the application or consideration of foreign or international law.

Gerald Neuman has characterized human rights as having three aspects: consensual, institutional and "suprapositive."[207] The consensual basis of rights, according to Neuman, is that they "derive their positive force from some political act that expresses the consent

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For recent disagreement about whether ratification of human rights treaties has any effect, and in what direction, and by what mechanisms, on effective protection or enforcement of rights, *compare, e.g.*, Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 2022–23 (2002) (finding that treaty ratification is associated with a decline in human rights compliance in all but the most fully democratic nations, urging more stringent enforcement mechanisms and less focus on widespread ratification); Oona A. Hathaway, *The Cost of Commitment*, 55 STAN L. REV. 1821 (2003) (suggesting that countries will take into account costs of compliance (including likelihood of compliance) in deciding whether to ratify); Linda Camp Keith, *The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?*, 36 J. PEACE RES. 95 (1999) (finding no differences in state parties behavior before and after ratification of ICCPR), *with* Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT'L L. 171 (2003) (criticizing Hathaway's empirical study); Goodman & Jinks, *supra* note 159, at 1783–85 (arguing for sociological and institutional model of compliance with international law, and favoring widespread ratification efforts because expressive functions of international human rights law are likely to promote compliance with human rights). For an interesting argument on the perverse effects of legalized enforcement of human rights, see Lawrence Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Carribean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002).

206. *See* Dorf & Sabel, *supra* note 155, at 274–83; *see also* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 580–81 (1993).

207. *See* Neuman, *supra* note 125, at 1866–72. As he argues, the "consensual" (or "positive") and "institutional" aspects of constitution rights may come into conflict with their "suprapositive" or transnational character as human rights. *Id.* at 1879–80. For an implicit challenge to efforts to demarcate "positive" U.S. law from transnational influence, see Resnik & Suk, *supra* note 48, at 1926–27, 1939–40 (emphasizing permeability of U.S. law).

of relevant political actors, or of peoples."[208] In a constitutional democracy, where "the people" are the relevant "political actors" for constitutional change, the idea is that rights, like other parts of a constitution, may legitimately obstruct later popular decision-making only if they are in some sense agreed to.

The powerful constitutional rhetoric of "We, the people" notwithstanding, the positive aspects of the rights and government structures set forth in our Constitution should not obscure some important limitations to strong claims of the Constitution's consensual character, particularly when coupled with strong forms of originalist interpretive methodology. The Constitution was written and ratified (for the most part) long ago; its extension to current generations requires some more indirect narrative of consent by acquiescence.[209] We continue to live under the positive law and thus "consent" to it because we have not changed it.[210] The general intertemporal problem of attributing the consent of past generations to new generations is compounded for those groups excluded from participation in original acts of consent. Although the 1789 Constitution was consented to, consent came from a very limited group that did not include women or slaves.[211] Extension of the vote

208. *Id.* at 1866. Neuman recognizes that "consent" can be determined not only through originalist but other interpretive methods, including more evolutionary ones focused on current understandings of rights. *Id.*

209. The literature on the more general intertemporal problem of constitutional law is vast. For a useful introduction, see JON ELSTER, ULYSSES AND THE SIRENS 36-111 (Cambridge University Press, 1979); Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1058–60 (1984).

210. And we accept significant evolution in the understanding of rights and concepts, at least in part through a process of judicial interpretation in important degree under the control of unelected and essentially unremovable and very long-serving judges. For thoughtful exploration of constitutional "construction" by nonjudicial actors, see KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999).

211. To speak of what the polity has "consented to" depends on what one takes to be the fair baseline for measuring consent or acquiescence. The *status quo ante* of the U.S. constitution is a document constructed by a polity that excluded most of the population at the time of initial framing, and excluded women until after the First World War, as numerous scholars have noted. *See, e.g.*, Sullivan, *supra* note 30, at 735–38; Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. COLO. L. REV. 975, 976–77 (1993); Akhil Reed Amar, *Foreword: The Document and the Doctrine,*

to minorities and women in the nineteenth and early twentieth centuries does not of itself provide democratic legitimacy to the very high threshold for amendment of the rest of the Constitution, in large part fixed by a polity that excluded them.[212] This Constitution still specifies a procedure for its own amendment that was enacted in 1789, a procedure that puts the Constitution's text well beyond ordinary democratic change.[213]

Relying on this difficult-to-amend Constitution to invalidate more recently enacted national laws designed to protect against

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114 HARV. L. REV. 26, 35–39 (2000); Kenneth Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 486 (1984).

212. Of course, all of the current population was excluded from the decision on the amendment process of Article V. In some respects, we are all either bound, or not bound, to respect the Constitution's amendment process as the legitimate mechanism for textual change, by virtue of living in the ongoing community constituted by it. To the extent that identifiable portions of the population were excluded, insistence on the legal text's interpretive isolation from other currents of change on grounds of democracy does not have as much persuasive force. *But cf.* Young, *supra* note 198, at 394–404 (expressing concern that use of customary international law bypasses constitutional structures including separation of powers, limits on judicial lawmaking and federalism).

213. The double super-majority voting requirements in Congress and in the states needed to change the U.S. Constitution is among the most stringent in the world. *See* Donald Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 362, 369 (1994); *cf.* Becker, *supra* note 211, at 1025–30 (noting as one basis for skepticism about binding judicial review concerns that the Constitution as a substantive matter better meets the needs of elite propertied men than of other groups and was created through a process that excluded women). Not only were women excluded at the 1787 founding but they were also excluded from voting participation in the process that produced the Reconstruction amendments, which so importantly shifted federal power and moved equality from a subordinate to a dominant constitutional norm. *Id.* at 1026–27; *see also* United States v. Virginia, 518 U.S. 515, 531–32 (1996) (noting women's exclusion from the making of the Constitution). Indeed, in some versions of what Akhil Amar calls "intratextualism," a now superseded provision of the Fourteenth Amendment could be read as approving the political exclusion of women. U.S. CONST. amend. XIV, § 2 (providing a rule privileging male voters by reducing congressional representation for states that did not permit all adult men to vote in federal elections); *see also* Ward Farnsworth, *Women under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229 (2000) (concluding that originalist view of the Fourteenth Amendment was not to disturb laws subordinating women); cf. Amar, *supra* note 211, at 52–53 (suggesting that the Fourteenth Amendment could be understood historically as an effort to extend to African-Americans the rights then enjoyed by unmarried white women).

gender-motivated violence, as in *United States v. Morrison*,[214] thus itself raises complex questions about constitutionalism and democracy.[215] The Court's invalidation of legislation to prevent violence against women was in some sense in conflict with democratic "self-rule" at the national level in a time of "ordinary politics";[216] and the constitutional limitations interpreted to bar the law were among those that became part of the Constitution before women were allowed to vote.[217] Bearing in mind the possible

214. 529 U.S. 598 (2000). The Court's interpretation was, arguably, originalist in form, looking to past understandings of limitations on national power. *See id.* at 618("we preserve one of the few principles that has been consistent since the [Commerce] Clause was adopted"); *id.* at 621 (citing 1883 cases on scope of Congress' power under the 14th amendment).

215. *Cf.* Cass Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 634–35 (1991) (arguing that entrenched pre-commitments facilitate democratic self-rule in a variety of ways); Walter Murphy, *Civil Law, Common Law and Constitutional Democracy*, 52 LA. L. REV. 91, 101–09 (1991) (emphasizing that it is commitment to human dignity that underlies both democracy and constitutionalism).

216. *But cf.* ACKERMAN, *supra* note 128, at 6–7 (distinguishing between "normal lawmaking" by government and "higher lawmaking" by the people). The "counter majoritarian difficulty" with judicial invalidation of national statutes has, of course, generated an enormous literature. Professor Ackerman's theory responds to that difficulty by conceiving of "the people" as engaged in self-rule in a two track or dualist system of law-making, so that invalidation of "ordinary politics" legislation can be seen to vindicate, rather than contradict, self-rule under the constitution adopted by the people in "constitutional moments." This view in turn depends on the nature of "the people" whose capacities to vote and participate in public decisions help legitimate giving priority to their constitutional decisions. *See also id.* at 315–16 (arguing that although women and African-Americans were excluded from the Constitution's initial creation, the institutional structure of dualist lawmaking provides a good vehicle for working towards full equality).

217. Notwithstanding amicus briefing, the Court did not even refer to the bearing of a Senate-ratified human rights convention, the ICCPR, on the scope of national power to protect against gender motivated violence. *Cf.* Concluding Observations of the Human Rights Comm.: United States of America, 03/10/95, CCPR/C/79/Add.50; A/50/40, para. 276 (noting "the position expressed by the [U.S.] delegation that, notwithstanding the non-self-executing declaration of the United States, American courts are not prevented from seeking guidance from the Covenant in interpreting American law"). One amicus brief argued that the ICCPR, to which the U.S. became a party in 1992, provided an arguable basis for upholding the Violence Against Women Act civil rights remedy. *See* Brief Amicus Curiae of International Law Scholars, *supra* note 189. The brief argued that the ICCPR had been interpreted not only to prohibit violence against women but to require state parties to take

complications of claims about the democratic character of the U.S. Constitution softens the force of objections from democratic self-rule to considering transnational sources in constitutional interpretation[218] (and notwithstanding critiques of international law as built on foundations from which women were excluded).[219]

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affirmative measures to prevent and remedy such violence. Whether the ICCPR would have provided a sufficient basis for an alternative interpretation of the scope of federal power under the Constitution as authorizing the legislation was vigorously disputed by other amici briefs. *See* Brief of Amicus Curiae Eagle Forum Education and Defense Fund in Support of Respondents, at United States v. Morrison, 529 U.S. 598 (2000); Brief of National Association of Criminal Defense Lawyers as Amicus Curiae In Support of Respondents, at United States v. Morrison, 529 U.S. 598 (2000). The Court's failure to address the issue (even though it was raised only by an amicus) before invalidating a federal statute is noteworthy. *See also infra* note 266.

218. If one were deeply committed to the idea that constitutional provisions are designed, in Justice Scalia's words, to "obstruct modernity" through originalist interpretation, see Antonin Scalia, *Modernity and the Constitution*, *in* CONSTITUTIONAL JUSTICE UNDER OLD CONSTITUTIONS 313 (Eivind Smith, ed. 1995), then the views of more contemporary majorities would be generally irrelevant. My own view is that, particularly given the difficulty of amendment and the brevity of its terms, the Constitution must be read in a way that not only gives attention to original understandings but also permits evolution of constitutional understandings, informed by (but also controlling the legality of) contemporary legislative enactments. An interpretive theory that allows for evolution may be particularly important for those whose interests were excluded from consideration in initial lawmaking. *Cf., e.g.*, L'Heureux-Dubé, *supra* note 1, at 33 (noting widespread acceptance in Canada of the "notion that the rights and other provisions in our Constitution should be interpreted, 'as a living tree capable of growth and expansion within its natural limits' in the words of Lord Sankey in a 1930 Privy Council case from Canada about whether the term 'persons' in our Constitution included women"); Adam Winkler, *A Revolution Too Soon: "Women Suffragists and the Living Constitution*," 76 N.Y.U. L. REV. 1456 (2001) (describing women's efforts to develop evolutionary approach to constitutional interpretation).

219. *See* HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 1, 195 (Manchester University Press, 2000)(critiquing international law for having been largely developed without participation from women and for privileging male experience and perspectives as shown, e.g., by international law's failure to place gender discrimination on the same plane as race discrimination for purposes of being condemned as *jus cogens*). Although this may put international human rights law at a disadvantage when compared to some more modern constitutions, the more recent development of international human rights law may have provided more opportunities for women's voices to help shape their content than in the drafting of eighteenth and nineteenth century constitutions. *Cf.* KNOP, DIVERSITY AND SELF-DETERMINATION, *supra* note

The objection from democratic self-rule to judicial imposition of outside norms is not without force,[220] even if in the field of constitutional interpretation it is complicated by the "democracy deficits" of U.S. constitutional history. Other considerations may also caution against efforts to bind the polity through judicial incorporation of international norms that have not been agreed to by more democratic internal processes.[221] Another important component of constitutionalism is the commitment to the rule of law. The stability and consistency generated by adherence to the rule of law, including the use of existing mechanisms for legal change as the vehicle for change, offer important goods to all members of the polity, even if they disadvantage portions of the population excluded from earlier moments of decision-making. "Hard" features of established law provide benefit to existing rights holders, now including women in the United States, in their ability to invoke law to protect those rights. The rule of law also facilitates democracy in

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14, at 284–300, 349–57, 358–81(describing women's participation in variety of settings involving, formation, implementation and interpretation of international norms and emphasizing importance of interpretive activities). For example, there were a small number of women representatives at the founding conference of U.N. in 1945, see Hilkka Pietilä, *Engendering the Global Agenda: The Story of Women and the United Nations*, UN-NGLS Publications, *at* http://www.unsystem.org/ngls/documents/publications.en/develop.dossier/dd.06, and involved in the creation of the Universal Declaration of Human Rights. *See* MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 35, 54, 90 (2001); Sandra Day O'Connor, *The Legal Status of Women: The Journey Toward Equality*, 15 J.L. & RELIGION 29, 33-34 (2000–2001) (noting insistence by female delegates that Universal Declaration refer to "all human beings" instead of "all men"). Customary international law, by virtue of its decentralized sources of authority, is perhaps more open to participation from groups historically excluded from political power in long-established constitutional systems.

220. And it is a strong reason for advocates of U.S. adherence to international legal rules to engage with democratic processes in national, state and local legislative bodies for enactment of implementing legislation.

221. As I will argue below, giving consideration to foreign and international norms in the resolution of domestic questions should not be seen as an effort to bind through external norms but as an effort to expand the deliberative materials through which we, through constitutional organs of government, give meaning to our own law. *See also* Knop, *supra* note 23, at 531–32 (discussing Jennifer Nedelsky's work); *supra* note 199.

that it specifies the procedures by which democratic decision-making proceeds.[222]

But these rule-of-law values should not preclude resort to the decisions of non-U.S. tribunals as an effort at genuine interpretation of existing U.S. legal texts, including the Constitution.[223] Rule-of-law considerations may even favor interpretive rules that assume a national preference to be in conformity with international human rights law, as *The Schooner Charming Betsy* presumes with respect to statutes.[224] Consideration of foreign and international law is consistent with some of our oldest constitutional traditions.[225] In its founding decades, the United States Supreme Court resorted to the "law of nations" not only as a set of independent decisional rules in areas such as admiralty or cases affecting ambassadors,[226] but also as

222. *See* Sunstein, *supra* note 215, at 638–39.

223. *Cf.* Hannum, *supra* note 75, at 292, 298–311 (noting countries that treat their own constitution as supreme over customary international law but nonetheless refer to international human rights norms in resolving cases). I do not mean to suggest that international law would "trump" U.S. constitutional law but that it may be helpful in its interpretation.

224. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). Bradley and Goldsmith have stressed the more expansive and intrusive scope of international law today as compared to in the Founding period as a reason for resistance to treating it as binding in U.S. courts. *See* Bradley & Goldsmith, *supra* note 198, at 821. The difficulty of constitutional "translation" here, see Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1371–76 (1997), is considerable. In this context, should we assume that the more important value to be translated is preserving areas for state resolution or instead is compliance with international law? Rule of law arguments may exist on both sides of this question, though given the strong desire of the Constitution's framers to provide for a unitary voice in foreign affairs and the foreign affairs difficulties state noncompliance with international law may entail, there would plainly be grounds for concern about treating clearly established customary international law as without any legal force with respect to the states. For illuminating disagreements, see sources cited *supra* note 198.

225. The U.S. Constitution does not include an explicit authorization to consider foreign or international law in interpreting the Constitution, as is the case in South Africa. *See* Tushnet, *supra* note 4, at 1270 n.215 (questioning authority of courts absent such authorization). Certainly the presence of such an explicit provision largely eliminates legitimacy based challenges to the practice of considering foreign law. But judicial practice can itself generate legitimacy for particular interpretive practices. *See also* Harding, *supra* note 5, at 460.

226. *See* William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L.

an interpretive guide to constitutional meaning. Sometimes the law of nations was explained as a background norm that the Constitution was intended to depart from.[227] In other cases the law of nations was treated as a form of persuasive authority for one constitutional interpretation over another.[228] Consideration of transnational legal

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REV. 1513, 1517 (1984); (describing eighteenth and nineteenth century understandings in U.S. of "general common law," a law "not attached to any particular sovereign," that "rather . . . existed by common practice and consent among a number of sovereigns").

227. For pre-Civil War opinions treating the law of nations as a "negative" precedent that particular constitutional clauses were intended to modify, see for example, Nelson v. Carland, 42 U.S. (1 How.) 265, 280 (1843) (reprinting opinion of Catron, J., sitting as Circuit Justice in In re Klein, 14. F. Cas. 716, 718 (D. Mo. 1843)) (contrasting bankruptcy decrees under the law of nations, which relied only on comity to secure respect of decree by other sovereigns, with Congress' bankruptcy power, intended to provide for discharge binding on all of the states); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 611 (1842) (referring to law of nations, which would have allowed one state to refuse to recognize slave property based on municipal laws in another state, as reason for fugitive slave clause in the Constitution).

228. For examples of persuasive uses of the law of nations in construing constitutional powers, see Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832) (relying on the law of nations to help determine Indian tribes' status within the United States and concluding that, under the Constitution, Indian tribes retained rights of self government with which state could not interfere); Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 569–72 (1840) (Taney, C.J., opinion for 4 justices) (interpreting the Constitution's provisions on treaties in light of the practice of nations as to the subjects appropriate for treaties and concluding that because treaties dealt with surrender of fugitives the federal treaty power should be read to preclude state governor from deciding to extradite a fugitive to Canada); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 227 (1824) (Johnson, J. concurring) (relying in part on law of nations to conclude that the federal power to regulate interstate commerce must be exclusive). For other uses of or references to the law of nations in early Supreme Court decisions touching on federal powers, federal relations or federal statutes, see, for example, Schooner Exch. v. M'Faddon, 11 U.S. (7 Cranch) 116, 137–38 (1812) (looking to practices of the "whole civilized world" in concluding that vessel of foreign sovereign has sovereign immunity from in rem jurisdiction in U.S. ports); United States v. The Schooner Amistad, 40 U.S. (15 Pet.) 518, 594, 596 (1841) (treating the law of nations as constraining U.S. in dealing with foreign subjects); *Charming Betsy*, 6 U.S. at 118 (indicating that federal statutes should generally be construed in ways consistent with international law); Davis v. Packard, 32 U.S. (7 Pet.) 276, 284–85 (1833) (referring to the law of nations and practice in England to hold that a foreign consul did not waive immunity by failing to object at the trial level); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 281 (1796)(Wilson, J.) ("When the United States declared their independence, they were bound to receive the law of nations, in its modern

materials as interpretive sources, then, consists with some of our oldest forms of constitutional interpretation.[229]

Apart from this general receptivity to considering transnational sources in the older cases, there are particular reasons within our interpretive traditions to consider those sources in gender equality cases.[230] First, the legal movements for women's suffrage and gender equality in the United States developed in conjunction with, were influenced by and exerted influence on, similar movements in other countries.[231] From its inception, the idea of women's suffrage,

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state of purity and refinement."); *see also* James H. Lengel, *The Role of International Law in the Development of Constitutional Jurisprudence in the Supreme Court: The Marshall Court and American Indians*, 43 AM. J. LEGAL HIST. 117 (1999); *cf.* Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 589–90 (1839) (applying rules of international comity to the question of whether a corporation chartered in one state could make a contract in another). Until late in the nineteenth century, U.S. courts treated international law as routinely applicable in a variety of cases, including admiralty, cases affecting ambassadors and public ministers, and disputes between American states. *See* Koh, *Transnational Public Law Litigation*, *supra* note 33, at 2353–54. And in ascertaining the scope of that domestically applicable law of nations, the Court commented that "[t]he decisions of the Courts of every country . . . will be received, not as authority, but with respect." Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 198 (1815).

229. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304, 335 (1816) (noting that the Constitution's grants of subject matter jurisdiction to Article III courts meant that the jurisdiction over cases under the Constitution, federal laws and treaties would "affect not only our internal policy, but our foreign relations [and it] would, therefore, be perilous to restrain it in any manner whatsoever, inasmuch as it might hazard the national safety"); *id.* (noting other categories of federal jurisdiction, including admiralty, "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.") That the Court may have manifested greater attention to the law of nations in its early years of decisions than it does today is perhaps not surprising. *Cf.* McCrudden, *supra* note 1, at 503, 514, 523 (noting reasons of economy, given absence of legal development in early years of constitutional regimes, that may lead courts to look to other courts' decisions as aids). What is less understandable is the strong resistance to the legitimacy of considering foreign or international sources as aids to interpretation that Justices Thomas and Scalia have at times expressed.

230. For additional reasons to consider such transnational sources, see *infra* text accompanying notes 259–62.

231. The transnational origins of the women's movement in the United States are both intellectual and political in character. Mary Wollstonecraft's Vindication of the Rights of Women, published in Britain in 1792 and soon translated into German and French, see LEILA J. RUPP, WORLDS OF WOMEN:

its implications and the principles for which it stood were the subject of a rich transnational discourse and some formal international organization.[232] Looking to comparative and international sources on

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THE MAKING OF AN INTERNATIONAL WOMEN'S MOVEMENT 14 (1997), is widely regarded as the intellectual inspiration for the early women's suffrage movement. And the political spur to the relationships among women abolitionists that then led to the Seneca Falls Convention of 1848, with its ringing declaration of women's rights, was the ejection of women representatives from a meeting in Britain of the Anti-Slavery Society in 1840. *See* Judith Resnik, *Women, Meeting (Again), in and Beyond the United States*, *in* THE DIFFERENCE "DIFFERENCE" MAKES 203–06 (Deborah Rhode ed., 2003); CHARLESWORTH & CHINKIN, *supra* note 219, at 14–20. On transnational aspects of the women's movement and the U.S., see Judith Resnik, *Sisterhood, Slavery and Sovereignty: Transnational Antislavery Work, Women's Rights Movements, and the Ambivalent Role of United States Lawmakers*, *in* SISTERHOOD AND SLAVERY (Katherine Sklar and James Stewart eds., Yale Univ. Press) (forthcoming 2004) (manuscript of Sept. 12, 2003 on file with author) (describing how "transatlantic crossings" in antislavery movement of nineteenth century established paradigms for subsequent women's activities on behalf of equality carried forward in various ways at the international level and noting U.S. leadership in international anti-trafficking initiatives). For individual examples, note that Carrie Chapman Catt, whose organizational skills are widely credited as important to securing passage and ratification of the Nineteenth Amendment, had served for several years as head of the International Council of Women. Rosika Schwimmer, whose application for U.S. citizenship was famously rejected by the Supreme Court (because she refused to swear to take up arms for the U.S. at a time when she would not have been allowed to do so, see United States v. Schwimmer, 279 U.S. 644 (1929)), and who was originally from Hungary, served as the International Press Secretary, headquartered in London, of the International Women's Suffrage Alliance before coming to the U.S. *See* Stephanie A. Levin, *Women and Violence: Reflections on Ending the Combat Exclusion*, 26 NEW ENG. L. REV. 805, 818 (1992). Mary Clark's study of the first 20 women admitted to the bar of the U.S. Supreme Court reveals that a number were also involved with international women lawyer associations, international conferences and organizations. *See* Mary Clark, *The First Women Members of the Supreme Court Bar, 1879–1900*, 36 SAN DIEGO L. REV. 87, 88, 120–26 (1999). *See also* Sylvia Law, *Crystal Eastman: Organizer for Women's Rights, Peace and Civil Liberties in the 1910s*, 28 VAL. U.L. REV. 1305 (1994) (noting Crystal Eastman's involvements in both international women's suffrage and U.S. suffrage activities)

232. *See supra* note 231; *see also* KECK & SIKKINK, *supra* note 12, at 51–60. Connections between the women's suffrage movement in the U.S. and international women's organizations have in recent years become the subject of significant scholarship. *See* Rupp, *supra* note 231 at 4 (explaining how her research on the U.S. National Women's Party led to her "discovery of U.S. women's involvement in the transnational struggle for equal rights"). According to Rupp, trans-border organizations of women began in the late

gender equality in law as part of the process by which we now interpret our constitutional commitments to equality is thus consistent with the broader history that gave rise to the constitutional change and may accordingly shed light on its meaning.[233]

Second, as I argue elsewhere, comparative constitutional law may be of particular assistance to the United States in addressing the enduring problem of how to integrate newer constitutional commitments with older ones.[234] Ours is a constitutional system in which governmental structures and liberty-protecting rights were

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nineteenth century: the first international women's conference was held in Paris in 1878; the second, called by the U.S. National Women Suffrage Association took place in Washington D.C. in 1888 and led to the creation of the International Council of Women. *Id.* at 13, 15. International women's organizations and national chapters grew in numbers and cross-affiliations. *See id.* at 16–18; Nitza Berkovitch, *The International Women's Movement*, *in* CONSTRUCTING WORLD CULTURE: INTERNATIONAL NGOS SINCE 1875 100, 104, 117 (John Boli & George M. Thomas eds., 1999). The International Alliance of Women for Suffrage and Legal Citizenship (now known as the International Alliance of Women) was founded in 1904 at a meeting in Berlin, through earlier work of representatives from the U.S., England, Australia, Canada, Norway, Sweden, Germany, Russia, Turkey and Chile; its founding declaration of principles asserted that "men and women are equally free and independent members of the human race and equally entitled to the free exercise of their individual rights and liberties." *Id.* at 105. By 1913, twenty-six countries had national sections. *See* Rupp, *supra* note 231, at 16. Members self-consciously identified bonds of commonality with women from other nations in pursuit of their goals. *See id.* at 82–83, 218–22; Jane Connors, *NGOs and the Human Rights of Women at the United Nations*, *in* THE CONSCIENCE OF THE WORLD: THE INFLUENCE OF NON-GOVERNMENTAL ORGANIZATIONS IN THE UN SYSTEM 147, 149–50 (Peter Willetts ed., 1996) (discussing involvement of at least twenty women's organizations in League of Nations related matters in Geneva after World War I including "British and US women's societies"); CHARLESWORTH & CHINKIN, *supra* note 219 at 14 (noting that over 1500 women met in an International Congress of Women in the Hague to discuss linkages between women's participation in politics and the prevention of war).

233. *Cf.* Sandra Day O'Connor, *The History of the Women's Suffrage Movement*, 49 VAND. L. REV. 657, 659, 665 (1994) (noting exclusion of women from the 1840 London meeting and also noting that in the early 1900s, the American suffrage movement received a "necessary jolt" from the political tactics of women suffragists in England).

234. Vicki C. Jackson, *Holistic Interpretation, Comparative Constitutionalism and Fissian Freedoms*, U. MIAMI L. REV. (forthcoming 2003–04) [hereinafter "Fissian Freedoms"]; Vicki C. Jackson, *Holistic Interpretation: Fitzpatrick v. Bitzer and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259, 1298–1301 (2001) [hereinafter *Holistic Interpretation*].

adopted well ahead of commitments to human equality, including women's equality, as bedrock principles.[235] We have had to "evolve" our understandings of equality in the Fourteenth Amendment from one focused on slavery and racial discrimination to embrace the equality of women,[236] arguably reading that equality-protecting amendment in the light of the Nineteenth Amendment's expansion of suffrage[237] in order to develop even the most basic anti-discrimination principles on gender. After a seventy-year struggle for gender equality in voting (from 1848 to 1920), it was another fifty years before the Court began to realize the impact of this commitment more pervasively on our understandings of earlier parts of the Constitution, including the general guarantee of equality rights in the Fourteenth Amendment. Newer constitutional systems from their inception have combined commitments to liberty with commitments to equality and have had to integrate those commitments together with structural aspects of their systems (e.g. federalism) in their constitutional jurisprudence.[238] Their courts have

235. I have argued elsewhere that human equality was a subordinate theme of the original constitution that only became central to constitutional self-understanding after the Civil War. *See* Jackson, *Fissian Freedoms*, *supra* note 234. For a different view, see ROBERT GOLDWIN, WHY BLACKS, WOMEN AND JEWS ARE NOT MENTIONED IN THE CONSTITUTION, AND OTHER UNORTHODOX VIEWS 9–15 (1990) (arguing that Constitution was from the beginning founded on principles of equality and that Constitution neither approved of slavery nor excluded women, but required amendment to overcome state practices inconsistent with basic constitutional vision of equality).

236. *See, e.g.*, Winkler, *supra* note 218, at 1457 (describing arguments of suffragists for interpretive method of "living constitutionalism"); *see also* Farnsworth, *supra* note 213, at 1291–95.

237. *See* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism and the Family*, 118 HARV. L. REV. 947, 960–77 (2002); Michael C. Dorf, *Equal Protecion Incorporation*, 88 VA. L. REV. 951, 979–80 (2002); Amar, *supra* note 211, at 51–52, 107–09; Jackson, *Holistic Interpretation*, *supra* note 234, at 1284–92.

238. *See, e.g.*, Jackson, *Holistic Interpretation*, *supra* note 234, at 1299–1301 (discussing Canadian decision in which Justice Frazer, of the Alberta Court of Appeals, read the federal power over criminal law expansively in light of Charter commitments to women's equality). Countries that have developed their basic constitutional framework with participation from women as well as men may cast valuable light on how a twenty-first century constitution now committed to gender equality and representative government ought to be understood. In this regard the Canadian Charter of 1982, the South African Constitution of 1996, the Colombian Constitution of 1993, and the Ugandan

elaborated on equality norms in their relationship with other important human rights values in polities less encumbered by a binding eighteenth century document (in whose framing women were excluded and which was committed only to a very particular understanding of who was entitled to be treated equally). Their jurisprudence might thus be of particular assistance to developing understandings of how to integrate our relatively newer found commitment to gender equality into the rest of U.S. constitutional law.[239]

B. Judicial Discretion, Expertise and Constraint

Discretion and Power: A distinct objection to the consideration of foreign precedents focuses on the question of judicial discretion and constraint in interpretation. Professor Charles Fried has recently argued that a judge, unlike a scholar, is constrained (by virtue of having the power of judgment) to engage only in interpretation of legal materials, and has suggested that "expand[ing] the authoritative canon" of sources for constitutional interpretation to include comparative materials would threaten that constraint.[240] But a

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Constitution of 1995 are among those notable for the organized involvement of women in their development.

239. For discussion of possible differences between decisions of domestic courts and general statements of international human rights, for purpose of influencing domestic legal interpretation, see *infra* text accompanying notes 250–55.

240. *See* Charles Fried, *Scholars and Judges: Reason and Power*, 23 HARV. J. L. & PUB. POL'Y 807, 818–29 (2000) (arguing that judges, unlike scholars, exercise power and in so doing are bound by a limited interpretive canon). In contrast to scholars, who may redefine what the interpretive canon is, Fried says, a court must be confined by law.

> What does it mean to be confined by the law? It means that however much freedom the interpretative task may seem to leave judges, still, they do interpret the *law*. They interpret the legal materials out of which they construct a legal theory that carries them forward to the new decision they must make, and there is a limit beyond which it is simply no longer plausible to claim that a decision is interpreting those materials rather than twisting or ignoring them.

Id. at 811. Fried describes Justice Breyer's dissent in *Printz*, invoking comparative constitutional law as "one of the few instances of a deliberate attempt by a Justice to expand the canon of authoritative materials from which constitutional common law reasoning might go forward." *Id.* at 819. Professor Fried thus appears implicitly to approve of Justice Scalia's effort to prevent

commitment to interpretation as a distinctive feature of judging does not of itself rule in or out particular sources. Early uses of the "law of nations" in constitutional interpretation suggest that our authoritative canon may have been more inclusive in the past and is capable of change over time.[241] Rather than increasing judicial discretion by expanding the sources available to be considered, a practice of considering other courts' approaches to analogous issues may, by eliciting reasoning about distinctions or similarities between U.S. constitutional commitments and conditions and others, increase the deliberative quality and accountability of judging.[242]

Professor McCrudden and others, however, have questioned whether resort to foreign decision is not more likely simply to reflect a judge's predisposition, and to allow judges to give vent to their preferences because it expands the range of views for which some precedent can be found.[243] I think this objection is best answered by Professor Glenn's observation that having to confront foreign decisions offers far greater opportunity for critical reflection on one's own first instincts than otherwise.[244] A judge's instincts are likely conditioned by the legal system in which she already functions; it seems most unlikely that a judge would be predisposed to a result that had no support already in her own tradition (or that judges

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this expansion of the canon because it would allow too much room for "twisting" interpretation beyond any sense of constraint. *See id.* at 811.

241. *See supra* notes 225–29; Fontana, *supra* note 4, at 544–52; Jackson, *Ambivalent Resistance*, *supra* note 72, at 584–91.

242. See Jackson, *Narratives*, *supra* note 126, at 259–61; *see also id.* at 263–71 (noting possibility of moderating effects on U.S. concerns from broader comparative knowledge of other constitutional systems); *cf.* Klug, *supra* note 44, at 616 ("The emergence of a world constitutionalism . . . provides an opportunity to United States judges and lawyers . . . to advance their own constitutional endeavors . . . . [B]y joining this emerging constitutional discussion, the United States Supreme Court would enrich its own discussion of constitutional alternatives . . . even if it distinguished or rejected foreign arguments . . .").

243. *See* McCrudden, *supra* note 1, at 507. There is no question that international legal sources stand for multiple values and will be subject to divergent interpretations in different courts of different countries. *See generally* Knop, *supra* note 23, at 526–31 (emphasizing role of culture in interpretation of international law). For conflicting approaches to gender equality and customary law in Africa, see, e.g., cases cited *supra* note 99.

244. *See* Glenn, *supra* note 63, at 264.

would act upon such a view on finding foreign support).[245] It seems more likely that consideration of foreign decisions and approaches would produce decision-making more aware of the possibility of interpretive choices, and thus more likely to respond by reasoning rather than by an instinctive assumption that one has the right answer.

Expertise. A more substantial objection to transnational judicial discourse goes to expertise or competence. Most U.S. judges today were not educated in law school or in practice about international and foreign law.[246] Contextualized understandings of other countries' legal systems are important for fair use of foreign cases; there is a significant risk that doctrines, rules or principles that make sense in one context will change meaning or lose value in another context. And there are risks of sheer confusion, about the scope and content of international law and of how to understand constitutional decisions of other courts.[247] Given the varying degrees to which foreign or international law is likely to be helpful in resolving domestic constitutional issues, judges may be understandably reluctant either to invest the time needed to feel comfortable relying on those sources or to risk error in relying on them without adequate knowledge and understanding of their meaning and status. Until law schools do more to train lawyers to understand these external materials and lawyers in turn alert domestic judges to the possible utility or applicability of foreign or international legal sources, judicial hesitation will likely continue.

Foreign judgments and international law. Whatever the outcome of current debates over the self-executing character of treaties or the status of customary international law,[248] or of what

245. Thus I do not deny that judges sometimes cite selectively to foreign or transnational sources because they conform to the judge's views of how the case should be resolved. Rather, I am skeptical of the capacity of foreign or international materials to influence a judge's choice beyond those choices already supported within the domestic interpretive tradition.

246. *See* Jackson, *Ambivalent Resistance*, *supra* note 72, at 592–95.

247. For example, Canadian Section 1 rights cases cannot be read without some understanding of the proportionality doctrine. For a brief explanation, see Jackson, *Transnational Legal Discourse*, *supra* note 108, at 385 n. 45.

248. *See supra* notes 196–98.

norms are embraced within the *jus cogens*,[249] it is clear that a decision of the Canadian Supreme Court on the meaning of the federalism and equality provisions of its own Charter, or of the Indian Supreme Court on the need for the government to protect women from sexual harassment (however helpful they may be to a fuller understanding of what it may mean to be constitutionally committed to equality[250]) are not "binding" in the United States. Yet those judgments are binding in their own polities. To the extent that other nations' reasoned judicial decisions reflect actual judgments affecting real litigants by judges with responsibilities in an ongoing government, they may be regarded by other judges as more persuasive accounts than those found in scholarly writings or in unenforceable or under-enforced standards of international law.

Among nonbinding "outside" sources, it may bear considering whether there are systematic differences between comparative constitutional law and international human rights law with respect to their helpfulness to or influence on domestic courts. Unlike international human rights law, the constitutional law of individual rights in other countries is embedded in an entire system of governance; judicial judgments on constitutional questions in domestic courts thus may not only reflect the special concentration of the mind to which Professor Fried refers but an awareness of how the judgment fits with an overall system of governance.[251] Thus, domestic court decisions upholding claims of right may in some respects be more persuasive than statements of human rights

249. *See* CHARLESWORTH & CHINKIN, *supra* note 219, at 16–17. (complaining that gender discrimination is not treated as *jus cogens*); *cf.* Ladan Askari, *Girls Rights Under International Law: An Argument for Establishing Gender Equality as Jus Cogens*, 8 S. CAL. REV. L. & WOMEN'S STUD. 23 (1998) (arguing that gender discrimination should be treated as *jus cogens*).

250. *See infra* text at notes 291–98.

251. *Cf.* Fried, *supra* note 240, at 823 ("one substantial advantage the judge enjoys over the scholar comes from the fact that just because the judge exercises power, because her decision directly effects lives, she will have thought differently and perhaps more deeply, more responsibly. . . . Responsibility — like the prospect of hanging — concentrates the mind."). Some of the objections raised to customary international law seem to resonate with Judge Fried's point about how the greater responsibility of judges (to give actual judgments) requires them to think differently ("more responsibly") than scholars. *Cf., e.g.*, Bradley & Goldsmith, *supra* note 198, at 839 (raising concern that today customary international law is less tied to actual state practices and based more on international pronouncements).

principles issued by bodies with no other governmental responsibilities. To the extent that part of the special responsibility of judging comes from the power of giving a coercive or effective judgment within a governmental system,[252] domestic courts may find more reason to pay attention to what their judicial counterparts in other countries have to say.[253] Yet to the extent international sources reflect an actual international consensus about human rights, such as the meaning of gender equality, they may be more readily assimilated into domestic legal interpretation through presumptions favoring interpretations of ambiguous law in ways consistent with international law.[254]

C. National Distinctiveness and Gender Equality in the U.S. Supreme Court: The Sounds of Transnational Silence

One important function of a constitution is to give expression to a distinctive national identity and historical experience.[255] I have noted elsewhere the possibility that the Court's ambivalence about referring to foreign authority might reflect concern about diminishing the acceptability of the Court's reasoning and results before its relevant domestic audiences, particularly when "exceptionalist" strands in U.S. political thought are ascendent.[256] But there is no

252. *See supra* note 251; Fried, *supra* note 240, at 823 ("The prospect of the real life effect of her decision gives off the vapors which the judge inhales to nourish her prophetic utterances."); *see generally id.* at 821–26 (distinguishing judicial decisions on constitutional questions from scholarly writings).

253. *See also* Kirby, *Road from Bangalore*, *supra* note 136 (noting skepticism about international tribunals and committees, and the generality of expression in many international human rights instruments); Kirby, *Role of the Judge*, *supra* note 129, at 523 (noting concerns for "hypocrisy and double standards" in the process of norm development in international law in which "authoritarian regimes indifferent to human rights" purport to lay down law for others in "vaguely worded instruments").

254. These presumptions might have particular appeal where an international instrument is binding on the country (because, for example, a treaty has been ratified), but is not independently judicially enforceable (because the treaty is non self-executing). A non-self executing treaty provision is one that is not judicially enforceable without implementing legislation. For critical discussion and debate over this doctrine, see sources cited *supra* note 197.

255. *See* Tushnet, *supra* note 4, at 1270–81, 1307; Choudhry, *supra* note 6, at 835, 838 (on dialogic uses of comparison and other countries' constitutional experience as negative precedent.)

256. *See* Jackson, *Narratives*, *supra* note 126, at 265–66.

reason why a constitutional democracy, including the United States, cannot see itself as having a national legal identity concerned with whether its own practices meet transnational and international norms, and at times in its history the United States has embraced such concerns.[257] It may now be particularly important for the stature of the United States in the international legal community for its courts at least to acknowledge widely held views on human rights norms, including gender equality, whatever position is ultimately taken as a matter of U.S. law.[258] Considering other sources of law and explaining why they are or not persuasive or relevant in the domestic setting permits a broader dialogue within the course of the adjudication and may increase participants' sense of fair process.[259] And if the Court increasingly incorporates consideration of international and transnational sources on human rights, legitimacy for this interpretive practice is likely to follow.

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257. *See supra* notes 225–29; *cf.* United States v. Burns, [2001] 1 S.C.R. 283 (Canadian Supreme Court clearly aligns Canada with leadership in international human rights on death penalty, as part of national identity). Despite recent scholarly interest in the Bricker Amendment (a proposed constitutional amendment in the 1950s, one version of which would have provided that treaties can be effective as internal law only through legislation valid in the absence of the treaty), it is important to remember that the Bricker Amendment (unlike the ERA) never passed out of Congress. *See* Golove, *supra* note 196, at 1273–78.

258. Some prominent jurists have suggested that national supreme courts that ignore transnational judicial discourse do so at the risk of declining influence. *See, e.g.*, L'Heureux-Dubé, *supra* note 1, at 29–30. Although influencing the courts of other nations may not be high on the list of what a national supreme court should care about, the Court's and the nation's interest may well be served by at least demonstrating knowledge of and respect for what goes on elsewhere. *Cf.* Hilton v. Guyot, 159 U.S. 113, 163–64 (1895) (defining comity of one nation to another as "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other").

259. Professor Glenn interestingly suggests that too internal a view of "binding" national law may be dangerous for the very concept of law itself:

> In seeking to bind it fails to persuade and resistance becomes easier to justify than adherence. Opponents to laws made by the State are excluded from the world of law and are driven to attack it. Multiplying the sources of law, however, means multiplying the sources of legal dialogue. Law is less precise but more communal and there are more possibilities of persuasion . . . .

Glenn, *supra* note 63, at 297.

Yet there remains the question why domestic courts in the United States should invest the effort required to understand transnational legal sources. U.S. legal practice has made real contributions to the idea of gender equality and its legal protection; we have a rich body of domestic law and research that bears on gender equality issues. Why, given the time and effort required to avoid misunderstandings, should lawyers and judges look beyond U.S. law?

Among the reason for comparative study generally,[260] the capacity of comparative study to provide perspective on one's own situation has particular resonance for legal approaches to gender inequalities. The deeply entrenched sense of the "naturalness" of gender distinctions, in the hearts and minds of many, provides a special opportunity for the benefits of reflective comparison with external sources and practices—its capacity to challenge assumptions that existing ways of proceeding are "necessary" or "natural."[261] Moreover, the mistreatment of women thrives on darkness and obscurity, often associated with the realm of the "private." Insistence on the autonomy of the "private" from "public" intervention has been a tool of the continued subordination of women, for example, as victims of domestic violence.[262] Shedding light, making information

260. Benefits to judges'deliberative process from comparative constitutional knowledge include illuminating shared constitutional concepts such as human dignity and equality; better understanding one's own tradition by comparing it with others; developing knowledge of the range of functional solutions to constitutional problems and of their consequences; and in so doing, strengthening the reason-giving capacities of courts. *See* Jackson, *Narratives*, *supra* note 126, at 254–63. Further, some degree of comparison with what one believes about constitutional experience in other countries is inevitable in the highly interconnected information age in which we live; given the inevitability of comparison, it should be well-informed. *See* Jackson, *Ambivalent Resistance*, *supra* note 72, at 600–01.

261. *Cf.* VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 169 (Foundation Press 1999) (noting potential for comparative constitutional study to dispel a sense of false necessity about existing arrangements).

262. *See, e.g.*, Berta Esperanza Hernandez-Truyol, *Sex, Culture and Rights: A Re-Conceptualization of Violence for the Twenty-First Century*, 60 ALB. L. REV. 607, 629–32 (1997) (discussing relationship between rape, domestic violence and the "public/private" divide in law); Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, *in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 85 (Rebecca J. Cook

available, about different practices, good and bad, in different contexts around the world, is, I believe, likely in the long run to improve the conditions of those who are oppressed—including, in many parts of the world and in many aspects of life, women. So apart from the benefits to the deliberative process that can accrue from informed awareness of international and foreign approaches, insisting on the legitimacy and sharedness of the enterprise of promoting gender equality as both a human right and a right secured by national law holds the promise of improved conditions for women around the world, as well as in the United States.

There are, of course, important differences in the scope of the rights recognized in international and regional legal regimes and in other constitutions that in particular settings may limit the utility of transnational materials except for the purpose of differentiation.[263] For example, to the extent that the U.S. Constitution is read to stand generally against principles of "positive rights," international legal norms requiring states to affirmatively take action may have little traction; consider *United States v. Morrison*,[264] where the Court struck down the civil rights remedy in the Violence Against Women Act in part because there was insufficient "state action."[265] To the extent CEDAW (which the U.S. has not ratified) requires governments to take positive action, it may be dismissed by some as inconsistent with basic normative commitments of the U.S. Constitution to protecting a broader realm of private liberty through the requirement of "state action."[266] Moreover, given the wide range

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ed., 1994); *see also* Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657, 1671–75 (1997)(summarizing feminist objections to "public-private" dichotomy).

263. The U.S. First Amendment law is a leading example. Another is the absence of social welfare rights in the U.S. Constitution.

264. 529 U.S. 598, 621–25 (2000).

265. *See id.* at 621–27. For an important challenge to the Court's current understanding of Fourteenth Amendment rights as "negative" only, see ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT (Duke University Press 1994) (arguing that the requirement of "equal protection of the laws" should be understood to impose affirmative duties of protection on government).

266. Comparative constitutional decisions on federalism might also have been thought relevant to the issue in *Morrison*, notwithstanding important differences among federal systems. In both Canada and Australia, courts have upheld expansive understandings of national government power to prevent gender-motivated harassment or violence. See Reference re Firearms Act, 219

of actual practices with respect to gender equality by nations that have ratified both the ICCPR and the CEDAW,[267] appeals to transnational practices under such instruments may have less persuasive force.

Moreover, the institutional settings of different constitutions and constitutional courts vary widely,[268] and may yield complex and highly particular doctrine not easily amenable to transnational comparisons. In *Nevada Department of Human Resources v. Hibbs*,[269] which concerned the enforceability of the Family and Medical Leave Act (FMLA), there was no discussion in the Court's

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A.R. 201 (Alta Ct. App. 1998) (Fraser, C.J.A.) (relying *inter alia* on national interest in preventing domestic violence to support national power to require gun licensing and registration), *aff'd*, [2000] 1 S.C.R. 783, 2000 Can. Sup. Ct. LEXIS 29, *discussed in* Jackson, *Holistic Interpretation*, *supra* note 234, at 1299–1301; Aldridge v. Booth, 80 A.L.R. 1 (Austl. 1988) (upholding federal sex harassment statute against challenge to its scope as beyond proper exercise of external affairs power to implement CEDAW). Although the United States, unlike Australia, has not ratified CEDAW, it did ratify the ICCPR, which bars gender discrimination in the rights it guarantees. *See* Brief Amici Curiae of International Law Scholars, *supra* note 189 (arguing that VAWA could be upheld as an implementation of the ICCPR obligations, or as an exercise of Congress' power to define offenses against nations in light of customary international law). On the difficulty of direct comparison of the meanings of power-allocating clauses in federal constitutions, see Jackson, *Constitutional Federalism*, *supra* note 163.

267. *Cf.* Kirby, *Road from Bangalore*, *supra* note 136; Kirby, *Role of the Judge*, *supra* note 129, at 523 (noting concerns about hypocrisy in ratification of international human rights standards and the vagueness of those standards in international documents). The failures of many parties to comply with the ICCPR or CEDAW may undermine the willingness of a U.S. court to give those documents significant weight in determining what customary international law requires. *See supra* text at notes 251–53.

268. *See generally* Neuman, *supra* note 125, at 1869–72. The United States, for example, has a decentralized system of constitutional review which may require more bright line approaches than in smaller countries with more unified judiciaries or with specialized constitutional courts.

269. 123 S. Ct. 1972, 1976–77, 1981–83 (2003) (upholding FMLA as exercise of Congress' power under Section 5 of the Fourteenth Amendment and thus upholding provisions permitting suits for violation of the Act against a state). The arcane complexity of the Court's current doctrine on the amenability of states to suits under federal law holds that states cannot be sued under valid and applicable federal statutes enacted under Congress' Article I powers, but may be sued under valid and applicable statutes enacted under the Fourteenth Amendment. *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996). It appears that no party or amicus brief in *Hibbs* (searchable on WESTLAW) referred to comparative materials.

opinions of the wide range of European and other approaches to how to achieve more gender equality in the distribution of employment and family responsibilities and benefits.[270] The question in *Hibbs* was whether the FMLA could be regarded as Fourteenth Amendment legislation in order to authorize suit for violation against the state;[271] under the Court's recent cases, this question turned on tests of the "proportionality" and "congruence" of the statutory means to a constitutional purpose, an analysis to be based in significant measure on the nature of the record before the Congress.[272] The complexity of U.S. jurisprudence on the constitutional questions presented, and its internal focus on what Congress considered,[273] may help account for the *Hibbs* Court's silence on transnational sources on the role of different forms of family leave in promoting gender equality.[274]

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270. For a helpful description of one European system, see Arnlaug Leira, *Caring as Social Right: Cash for Child Care and Daddy Leave*, 5 SOC. POLITICS 362, 370–73 (OUP, 1998) (describing Norway's adoption, in connection with a general expansion of family care benefits, of a "use it or lose it 'daddy leave'" designed to encourage fathers to take leave).

271. *Hibbs*, 123 S. Ct. at 1976.

272. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 89-91 (2000); Bd. of Tr. of Univ. of Ala. v. Garrett, 531 U.S. 356, 368-71 (2001); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank , 527 U.S. 627, 637-41 (1999); Boerne v. Flores, 521 U.S. 507, 530-32 (1997).

273. *See, e.g., Garrett*, 531 U.S. at 368–71; *Kimel*, 528 U.S. at 89–91. It appears that at least some in Congress considered the practice of other nations in arguing for adoption of the FMLA. *See, e.g.*, 139 Cong. Rec. H379, H384 (daily ed. Feb. 3, 1993) (statement of Rep. Schroeder) ("[L]et us get real about that and let us realize that we do have to be both care-givers and good employees. If every other country can get it, we can get it.").

274. To the extent there were questions whether the particular statute was sufficiently likely to avoid or prevent gender discrimination, the comparative approaches of other countries similarly committed to gender equality might have been helpful in providing a context for deciding the "appropriateness" of Congress' judgment. *Cf.* U.S. CONST. amend. XIV, § 5. But divergence in international and comparative legal authorities on whether, and to what degree, commitments to gender equality should permit or forbid "protective" or differentiated treatment of women and men in employment settings may have made resort to such materials less attractive. *See, e.g.*, Leira, *supra* note 270 (noting disagreement over whether social rights should be based on "sameness" or "difference," and citing Carole Pateman's work); Case 184/83, Hofmann v. Barmer Ersatzkasse, 1984 E.C.R. 3047 (1984) (European Court of Justice decision upholding paid maternity leave only for women); CEDAW convention art. 11.2, *available at* http://www.un.org/womenwatch/daw/cedaw/econvention.htm (last visited Sept. 22, 2003) (requiring maternity leave

A notable example of a decision whose reasoning and result might have been improved, within the Court's own doctrinal framework for decision, by some engagement with comparative constitutional decisions is *Nguyen v. INS*,[275] upholding a gender discrimination in the capacities of U.S. citizen mothers and fathers to pass on U.S. citizenship for children born out-of-wedlock abroad.[276] Under the relevant federal statute, children born abroad to an unmarried U.S. citizen father had to meet requirements for citizenship that went beyond those imposed on those born abroad to unmarried U.S. citizen mothers, including, for children claiming citizenship through unmarried fathers, a requirement that certain formal proofs of parentage were established before age eighteen. The Court in a five to four decision upheld the statute.[277] It concluded that the distinction was appropriately designed to assure opportunities for parent-child bonds to develop because mothers (in contrast to fathers) are inevitably present at birth,[278] so reasoning notwithstanding the fact that in *Nguyen* itself, the child had been

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but not referring to paternity leave and authorizing the provision of special protection at work to pregnant women, subject to scientific assessments). For discussion of tensions between the protective model for women workers and a more gender-neutral non-discrimination model in the ILO standards, see, for example, Aida Gonzalez-Martinez, *Human Rights of Women*, 5 WASH. U.J.L. & POL'Y 157 (2001); Sean Cooney, *Testing Times for the ILO: Institutional Reform for the New International Political Economy*, 20 COMP. LAB. L & POL'Y J. 365, 369 (1999); Jane Dwasi, *1999 Kenya: A Study in International Labor Standards and Their Effect on Working Women in Developing Countries: The Case for Integration of Enforcmeent Issues in the World Bank's Policies*, 17 WIS. INT'L L.J. 347, 397 (1999); Katarina Tomasevski, *European Approaches to Enhancing Reproductive Freedom*, 44 AM. U.L. REV. 1037, 1043–44 (1995).

275. 533 U.S. 53 (2001).

276. *Id.* at 57. Nguyen was born out of wedlock in Vietnam to a U.S. citizen father and a Vietnamese citizen mother. Although from an early age he lived in Texas with and was raised by his father, a state court order of parentage, based on DNA testing, was not obtained until well after he was 18. *Id.*

277. *Id.* at 73.

278. *Id.* at 64–66. The Court also found that the statute served a second important government interest, that of assuring a biological connection with a U.S. parent. *See id.* at 62–64. As I understand the facts, however, the major barrier to Nguyen's citizenship claim was that the proof of biological connection requirements were satisfied too late. And in its discussion of the age limit the Court placed weight on the argument described in text above. *See id.* at 68–69.

raised in the United States by his U.S. citizen father since the age of six.[279] The result was in considerable tension with what many believed to be the requirements of "intermediate scrutiny" of gender classifications, as the dissent vehemently argued.[280] It was also at least arguably inconsistent with the ICCPR, to which the United States is a party,[281] and with CEDAW.[282] Decisions of several other

279. 533 U.S. at 57.

280. Under intermediate scrutiny, use of a gender discriminatory classification is prohibited unless it is "substantially related" to the achievement of an important government interest. *See* 533 U.S. at 60. As Justice O'Connor argued in dissent, intermediate scrutiny is intended to prohibit reliance on stereotypes, even when they are true, if individualized determinations are possible. *See id.* at 74–79 (O'Connor, J., dissenting). To the extent that the government had an important interest in extending citizenship only to those children born abroad to unwed U.S. citizens who had opportunities to develop a parent-child bond, there were individualized, gender-neutral alternatives available to meet that interest (including proof, after age 18, that a parental bond had been established earlier). *See id* at 85 (O'Connor, J. dissenting). Likewise, to the extent that the government interest was in assuring a biological connection, requiring fathers, but not mothers, to establish that link before age 18 did not substantially advance that interest as required by intermediate scrutiny, especially in light of the availability of DNA testing. *See id* at 80–81 (O'Connor, J. dissenting).

281. *See e.g.*, Aumeeruddy-Cziffra v. Mauritius, U.N. GAOR, Human Rights Comm., 12th Sess., Comm'n No. 35/1928, U.N. Doc. CCPR/C/12/D/35/1978 (1981) (finding ICCPR violation in distinctions made between males and females for purposes of obtaining residency permits for foreign spouses). In contrast to *Morrison*, where the ICCPR would have provided an arguable basis to uphold a federal statute, in *Nguyen* the ICCPR might have supported invalidation of a federal statute. One might hypothesize that a Court would be more hesitant to consider a non-self-executing treaty in making an interpretive choice to invalidate, rather than to support, national legislation.

282. CEDAW, which the United States has signed but not ratified, provides in article 9, paragraph 2 that "States Parties shall grant women equal rights with men with respect to the nationality of their children." *See* CEDAW, *supra* note 18, at art. 9, para. 2. The CEDAW Committee has emphasized in General Recommendation 21 its view that the equality rights CEDAW secures with respect to parents are symmetrical: "States parties should ensure that by their laws both parents, regardless of their marital status and whether they live with their children or not, share equal rights and responsibilities for their children." U.N. G.A.O.R. 49th Sess. Supp. No. 38, at 1. *See also* Knop & Chinkin, *supra* note 156, at 584–85 (describing International Law Association's position favoring gender equality in nationality and citizenship rules, including nondiscrimination based on sex in identifying the "personal relationships that form the basis for preferential treatment under immigration and nationality rules").

tribunals have stricken gender qualifications related to citizenship or rights of residency in Canada,[283] Botswana,[284] Costa Rica,[285] Zimbabwe,[286] and in the European Union.[287] Gender based distinctions in citizenship laws have been upheld in Bangladesh[288] and Pakistan,[289] in the latter case on reasoning, aspects of which

283. *See* Benner v. Canada, [1997] 1 S.C.R. 358 (holding unconstitutional a gender distinction that discriminated against mothers in the capacity to pass on Canadian citizenship); *see also id.* at 399 (citing Elias v. U.S. Dep't of State, 721 F. Supp. 243 (N.D. Cal. 1989) in support of a finding of standing).

284. *See* Atty Gen. v. Unity Dow, (1992) 103 I.L.R. 128, *reprinted in* 13 Hum. Rts Q. 614 (1991).

285. Inter-American Court of Human Rights, *Amendments to the Naturalization Provisions of the Constitution of Costa Rica/Advisory Opinion*, 5 HUM. RTS. L.J. 161 (1984).

286. *See* Rattigan v. Chief Immigr. Officer, 103 I.L.R. 224 (Zimb. Sup. Ct. 1994).

287. *See* Abdulaziz v. United Kingdom, 1985 Eur. Ct. H.R. 9214/80, 7 Eur. H.R. Rep. 471 (1985) (striking down United Kingdom's gender distinction between foreign spouses entitled to remain in the UK based on other spouse's citizenship). According to the Women's Human Rights Resources database of the Bora Laskin Law Library at the University of Toronto, in Judgment No. 30 of 28 January 1983, Italian Constitutional Court, (1983) 62 Raccolata Ufficiale delle Sentenze e Ordinanze della Corte Constitutionale, "the Italian Constitutional Court declared a law unconstitutional that provided that the child of an Italian father was Italian by birth, without also providing that the child of an Italian mother was Italian by birth." *WHRR Web page*, *supra* note 84, *at* http://eir.library.utoronto.ca/whrr (last modified Nov 2, 2003) (Note that a direct URL is not available; to find this case description, go to "subject areas" of "WHRR database", select "Nationality and Citizenship," then select "Documents"). For a more detailed analysis of decisions around the world addressing issues of gender discrimination in nationality laws, see *Final Report on Women's Equality and Nationality in International Law*, International Law Assocation (London Conference, 2000) (prepared by Karen Knop, Rapporteur); Kif Augustine-Adams, *Gendered States: A Comparative Construction of Citizenship and Nation*, 41 VA. J. INT'L L. 93 (2000); *see also* KIM RUBENSTEIN, AUSTRALIAN CITIZENSHIP LAW IN CONTEXT, 55–58, 91, 95–99 (Lawbook Co. 2002).

288. *See WHRR Web Page*, *supra* note 84, (last visited Feb. 9, 2004) (providing description of unreported decision in Bangl. v. Malkani, Supr. Ct. Writ No. 3192 (1992)) (*Malkani* description last modified Feb. 9, 2004) (on file with Loyola of Los Angeles Law Review) (note that direct URL for this description is unavailable. To access the description, enter the word "Malkani" into the search function at the WHRR index page); *see also* KNOP & CHINKIN, *supra* note 156, at 534–35, 547–48 (describing *Malkani* case and continued inability of Bangladeshi mothers to pass on citizenship to their children).

289. *See* Sharifan v. Fed'n of Pakistan, P.L.D. 1998 Lahore 59, 50 All Pak. Legal Decisions 59 (1997) (Lahore). The challenged law provided access to

would in all likelihood not be accepted in the United States.[290] Consideration of foreign constitutional approaches, then, would have informed the U.S. Supreme Court that in at least some countries with arguably analogous legal regimes and roles of courts (including countries that are recipients of immigrants),[291] arguably similar gender discriminations in citizenship laws had been disavowed.

For example, the Canadian decision emphasized the lack of equality between men and women that was conveyed through the gender discrimination in the ability to pass on citizenship to a child born abroad. In invalidating a statute that provided for easier acquisition of Canadian citizenship for children born abroad to Canadian fathers than to Canadian mothers, the Court wrote, "[t]his legislation continues to suggest that, at least in some cases, men and women are not equally capable of passing on whatever it takes to be

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Pakistani citizenship for a foreign female spouse but not to a foreign male spouse of a Pakistani citizen. *See id.* at 61. One of the reasons given in the judgment was that granting citizenship to foreign husbands of Pakistani women would result in an uncontrollable influx of foreigners becoming citizens, a national concern trumping equality rights. *See id.* at 63. This concern has some resonance with *Nguyen*'s discussion of the larger number of male than female soldiers abroad, and the concomitant concern about potentially large numbers of claims for "citizenship by male parentage" resulting from the activity of American servicemen. See Nguyen v. INS, 533 U.S. 53, 65–66 (2001); *cf.* President of the Republic of South Africa v. Hugo, 1997 (6) BCLR 708 (CC), 1997 SACLR LEXIS 91, *91, *74, *63-65 (upholding pardons for incarcerated mothers of young children against a discrimination challenge brought by an incarcerated father and noting the large numbers of male, as opposed to female, prisoners, and the likelihood of fathers having less responsibility for childrearing than mothers).

290. *See infra* text accompanying note 303 (describing Pakistani court's reliance on a rule that a woman's domicile must follow her husband's); note 306.

291. One could imagine the Court distinguishing decisions from countries that do not face the prospect of many applicants for citizenship, but in Canada and the EU there is net immigration. Canada accepts more immigrants per capita than any other country in the world, *see* International Immigration Agency, *Immigration and Relocation to Canada*, *at* http://how2immigrate.net/canada/ (last visited Sept. 23, 2003), and Canada has had net in-migration since as early as 1900. *See* U.C. DAVIS MIGRATION NEWS, *at* http://migration.ucdavis.edu/mn/more.php?id=2949_0_2_0 (last visited Sept. 23, 2003). The EU, as well, has enjoyed net in-migration for many years. *See* THE EUROPEAN UNION ONLINE, *at* www.europa.eu.int/comm/eurostat/Public/datashop/print-product/EN?catalogue=Eurostat&product=3-po020in-EN&mode=download. (last visited Oct. 27, 2003).

a good Canadian citizen."[292] The U.S. Court, by contrast, ignored the expressive meaning of gender distinctions as to the capacity to pass on citizenship, albeit in a case in which the classification disadvantaged men, not women, in their capacity to pass on citizenship.[293]

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292. Benner v. Canada, [1997] 1 S.C.R. 358, 403. Although the discrimination at issue in *Benner* (one imposing greater burdens on a born-abroad child claiming citizenship through a Canadian mother than through a Canadian father) is similar, it is not identical to that in *Nguyen*. Nonetheless the Canadian Court's reasoning suggests that, were it faced with the identical discrimination, it would have scrutinized the statute more aggressively than did the majority in *Nguyen*.

293. The U.S. Court may have reached the conclusion it did because of a concern about permitting a wider range of persons to become U.S. citizens than Congress could have intended. *See Nguyen*, 533 U.S. at 66; *see also id.* at 73 (Scalia, J., concurring) (doubting whether Court had constitutional authority to permit citizenship to be granted where Congress had not so specified); *see generally* David A. Martin, *Behind the Scenes on a Different Set: What Congress Needs to Do in the Aftermath of St. Cyr and Nguyen*, 16 GEO. IMMIGR. L.J. 313, 333–35 (2002)(suggesting that it was fear of the large consequences for many would-be citizens that motivated the decision in *Nguyen*, given the Court's commitment to a rigid rule that its decisions must be given complete retroactive effect). Both U.S. and foreign constitutional law may have offered alternatives to the feared result, possibly by delaying the effective date of the decision to allow time for a constitutionally acceptable legislative response, though such efforts would have raised other constitutional questions. *See, e.g.*, N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 88 (1982) (the Court stayed its judgment for several months to allow Congress time to enact a replacement scheme); Re Manitoba Language Rights, [1985] 1 S.C.R. 721, 721–22 (holding that all statutes in Manitoba were invalid for not having been enacted simultaneously in French as well as English, but staying the effect of its decision by concluding that the unconstitutional laws were to have "temporary force and effect" in order to allow the legislature time to enact substitute legislation). For discussion of the Canadian case, see PETER HOGG, CONSTITUTIONAL LAW OF CANADA § 37(d), § 55.8 (3d ed. 1997). On proposed solutions to the *Nguyen* concern, see Martin, *supra* at 336–37 (arguing that Court could have given its holding prospective effect only and urging Congress to redress the statutory discrimination in Nguyen but with prospective effect only). *But cf., e.g.*, Teague v. Lane, 489 U.S. 288, 316 (1989) (implying that it would offend Article III judicial power to announce a new rule of constitutional law but not apply it to release the petitioner who brought the challenge); Harper v. Va. Dep't of Taxation, 509 U.S. 86, 95–97 (1993) (indicating that non-retroactive, prospective decisionmaking is for legislatures, not courts).

Nguyen was not a "new technology" case,[294] nor was it as intensely divisive a case as some discussed earlier. Yet *Nguyen* was a case in which reasonable jurists might well have considered available transnational sources, not least because the subject matter was one of international concern whose result could affect other nations.[295] Moreover, as noted earlier, gender equality cases may be particularly likely to raise divisive questions as deeply engrained attitudes and belief, derived from custom, tradition, family experience and/or religion, are challenged.[296] The Court's willingness in *Nguyen* to accept the mother's supposed opportunity based on physical childbirth to develop a relationship with the child as a basis for excluding fathers from the same ability to pass on citizenship may reflect at least a tolerance for such engrained attitudes. Where such deeply held beliefs are in confrontation with emancipatory equality commitments, a judge's greater knowledge of how other courts around the world have responded may help clarify reasoning about both human rights and judicial roles.[297]

Cases vindicating gender equality as against traditional norms may have persuasive value through the force of their reasoning combined with respect for the particular tribunal's willingness to issue and reach a judgment of condemnation.[298] Cases *rejecting*

294. *See supra* text accompanying notes 167–68. However, members of the majority in *Nguyen* may have been influenced by awareness that new technologies made it increasingly easy to establish paternity long after a child was conceived and born.

295. The Court's determination that a party lacks U.S. citizenship may quite directly affect another country by leaving it responsible for another national.

296. *Cf.* Karst, *supra* note 211, at 470–71 ("The chief mechanisms by which the personal becomes political lie in the deepest recesses of the psyche. Neither little boys nor adult male judges consciously *choose* to define the idea of woman around their own needs for masculine self-identification. Each of us — male or female. . . is born into a family and a culture.")

297. *See* Bayefsky, *supra* note 13, at 352–69; Knop, *supra* note 23, at 531–34. One cannot, of course, assume that gender equality decisions from other countries or international tribunals will always be progressive. *See* Jackson, *Transnational Legal Discourse*, *supra* note 108, at 391 n.76; *supra* text accompanying notes 288–90 (discussing *Hugo* and *Sharifan* cases).

298. As a general matter, moreover, the persuasive value of particular foreign decisions may also be reinforced if the passage of time and events demonstrates that the decision's consequences are positive (or not destructive). On consequentialism and comparison, see, for example, Printz v. United States, 521 U.S. 898, 976–77 (1997) (Breyer, J., dissenting).

gender equality challenges to discriminatory laws may also be helpful for courts to consider. Such cases may persuade positively—the majority's reasoning in *Hugo* bears a haunting resemblance to aspects of the majority decision in *Nguyen*.[299] But they may also engender more critical stances, by making explicit the premises behind gender distinctions and illuminating their subordinating or invidious effects. One should consider here not only the dissent in *Hugo*,[300] but also the *Sharifan*[301] case in Pakistan. The court there rejected a challenge to the constitutionality of allowing foreign wives of Pakistani husbands to claim Pakistani citizenship while access to Pakistan citizenship based on marriage is denied to the husbands of Pakistan wives.[302] A significant aspect of the court's reasoning was that a woman's domicile must follow that of her husband under "private international law," recognized in (older) Commonwealth case law;[303] the court suggests that its interpretation of the Pakistani Constitution and the statute itself were justified as in conformity with international law.[304] Invoking Pakistani decisions requiring a

299. *See supra* text accompanying notes 109–11; *supra* note 289 (discussing South Africa v. Hugo, 1997 (6) BCLR 708 (CC), 1997 SACLR LEXIS 91)

300. *See supra* text accompanying notes 110–11.

301. Sharifan v. Fed'n of Pakistan, 50 All Pak. Legal Decisions 59 (1997) (Lahore).

302. The challenge was based on article 25 of the Constitution, which provides that: "(1) All citizens are equal before law and are entitled to equal protection of law. (2) There shall be no discrimination on the basis of sex alone. (3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children." PAK. CONST., pt. II, ch. , art. 25. The Court first reasoned, formalistically, that because foreign spouses are not already "citizens," they were outside the reach of Article 25. *See Sharifan*, 50 All Pak. Legal Decisions, at 61 (further indicating that citizenship, according to the Constitution, was to be determined by statute and thus distinctions between men and women in access to citizenship could not be "discrimination"). Alternatively, the Court said, the easier access of foreign wives to citizenship could be regarded as a "special provision for the protection of women" under Article 25 (3) (that is for the foreign noncitizen spouses, not the Pakistani women with foreign husbands). *Id.*

303. *Id.* at 62 (emphasizing that a "woman by virtue of her marriage acquires the domicile of her husband").

304. As noted earlier, the Court also invoked national interest on behalf of the discrimination, assuming it did violate fundamental equality rights, but stated that "[i]t is impossible to allow every foreigner to acquire citizenship of Pakistan just by means of a marriage with a Pakistani lady," which could result in a "flood and influx of foreigners becoming citizens . . . in indiscriminate manner." *Id.* at 63. *See supra* note 289. The Court commented on the

woman's domicile to follow that of her husband, the court seemed to suggest the pervasiveness and naturalness of gender discriminations relating to marriage and its effects.[305] Here is a case invoking international law and the decisions of other nations to support gender discrimination in access to citizenship based on marriage, choosing sources that embrace a rule that women's domicile must follow their husbands but offering no reasoned basis other than highly gendered traditions. For those with "eyes to see," a court decision upholding a gender distinction in citizenship for such a reason may prompt reconsideration of how other gender distinctions should be regarded in societies that would reject rigid gender-based rules of domicile.[306]

CONCLUDING REMARKS

Constitutional law is an important location for expressing fundamental commitments to gender equality and for giving those commitments meaning and enforcement. But constitutions do not function solely as a charter of self-government, or an expression of unique national identity. They also function to establish and proclaim a country's status as a member of the community of nations, an independent state entitled to be treated as such by other

"wisdom" of the current policy restricting citizenship rights, citing, *inter alia*, the decision in United States v. Cruikshank, 92 U.S. 542 (1875), and suggesting that citizens are members of the body politic entitled to vote. *Sharifan*, 50 All Pak. Legal Decisions at 62. (A concern to limit "outsider" voting influence could, however, be advanced through gender-neutral numerical limits or other exclusions.)

305. *Id.* at 63. Notwithstanding its earlier approval of the "wisdom" of the statute, the Court goes on to invite legislative change. *Id.* (acknowledging that "women are no longer to be treated as a property of the male members of the society" and that the "equal participation of the women . . . in all walks of life is essential" to national progress).

306. Although in the nineteenth century some U.S. Supreme Court justices were willing to deny a wife, legally separated from her husband, the capacity as a citizen of a diverse state to bring an action against her spouse in federal court, see Barber v. Barber, 62 U.S. (21 How.) 582, 603 (1859) (Daniel, J. dissenting), it is difficult to imagine that today a state law requiring that wives be treated as having the domicile of their husbands would pass constitutional muster. *See, e.g.* Reed v. Reed, 404 U.S. 71 (1971) (invalidating a statute giving a preference to men over women for purposes of appointing the executors of estates of intestate decedents).

national states and to engage with other nations on that basis.[307] Constitutions are thus adopted, and interpreted, not only with an eye to the internal demands of the polity but also with an eye on the stature and position of the nation state in the international arena[308]—even arguably "dualist" constitutions like that of the United States.[309] And courts, in cases legitimately before them, are organs of communication about the content of international law, though within different procedural paradigms than the political branches.[310] As the

307. *See* Unity Dow v. Atty Gen., 103 I.L.R. 128, 159–60 (Bots. Ct. App.1992)(1996) ("Botswana was, at the time the Constitution was promulgated, about to enter the comity of nations . . . .").

308. *See, e.g.*, H.W.O. Okoth-Ogendo, *Constitutions Without Constitutionalism: Reflections on an African Political Paradox, in* CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 65–80 (Douglas Greenberg et al. eds., 1993) (noting constitution's function in demonstrating the sovereign existence of the polity).

309. The Federalist Papers, for example, reveal a pervasive concern about how the United States would be viewed by other countries. *See, e.g.*, THE FEDERALIST NO. 3 (John Jay)(discussing fear of war and interest in commerce with foreign countries and noting importance of having federal courts to provide uniform interpretations to treaties); THE FEDERALIST NO. 79 (Alexander Hamilton) (explaining that federal courts have jurisdiction over all cases involving citizens of other countries in order to prevent creating a cause for war from an unjust judicial decision). These comments are also noteworthy:

> An attention to the judgment of other nations is important to every government for two reasons: the one is, that, independently of the merits of any particular plan or measure, it is desirable . . . that it should appear to other nations as the offspring of a wise and honorable policy; the second is, that in doubtful cases, particularly where the national councils may be warped by some strong passion or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can be followed.

THE FEDERALIST NO. 63 (Alexander Hamilton or James Madison) (discussing role of Senate).

310. *Cf.* Stephan, *supra* note 198 at 644–46, 648–49, 654–55 (noting "expressive" decisions in U.S. courts which have a pedagogical purpose with respect to the content of foreign law and raising cautions based on the comparative institutional advantage courts have in deciding on concrete facts). Professor Stephan's analysis may undervalue the degree to which courts also may have relative institutional advantages in habits of principled reason-giving. "Expressive" decisionmaking by courts is likely, then, to differ from that of the political branches, for whom decidedly different norms of reason giving and consistency apply. *But cf.* Keith E. Whittington, *Extrajudicial Constitutional Interpretations: Three Objections and Responses*, 80 N.C. L.

international legal order itself has evolved,[311] rigid insistence on the autonomy of its own constitutional law from developing world understandings of rights apparently shared among domestic constitutions and the international human rights order may be seen in the community of nations as inconsistent with the obligations of a national state. The local and global functions of a domestic constitution can be mediated by appropriate consideration of international and foreign legal developments insofar as they are helpful, even if not binding.

There is particular reason to look outside, as well as within, in resolving constitutional claims that relate to gender equality. Most of the world community of nations profess adherence to the norm of gender equality,[312] although there is significant divergence in both practice and in the legal justifications offered for deviations from stated norms. Given the widespread subordination of women and their exclusion from domestic or international power until the mid-twentieth century, many polities have had to grapple in roughly the same time period with how to realize newfound constitutional commitments to gender equality.[313] A number of constitutional

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REV. 773, 813–25 (2002) (challenging idea that courts are unusually well suited to reasoned deliberation).

311. The nineteenth and first part of the 20th century view was based on a strong idea of sovereignty and independence, under which each state's "[c]onsent to the regime of international law . . . becomes the vehicle by which the sovereign independence of states is reconciled with the practical imperatives of co-existence with other states." O. Schacter, *Sovereignty, Then and Now*, *in* ESSAYS IN HONOUR OF WANG TIEYA, 671, 675 (R. Macdonald ed., 1993). The expansion of human rights law, as widely noted, pierces a state's sovereignty to insist on norms of conduct between the state and its citizens.

312. *See supra* text accompanying notes 8–10.

313. It should come as no surprise that women's groups—in Canada, Uganda, Colombia—have been among the leaders in calls for broader participation in constitution making, or that the CEDAW review process has focused so much attention on female participation. *See* Lorraine E. Weinrib, *Canada's Charter of Rights: Paradigm Lost?*, 6 REV. OF CONST. STUD. 119, 139 n.51 (2002); Penelope E. Andrews, *From Gender Apartheid to Non-Sexism: The Pursuit of Women's Rights in South Africa*, 26 N.C.J. INT'L L. & COM. REG. 693, 717–18 (2001); Hart, *supra* note 155; CHARLESWORTH & CHINKIN, *supra* note 156, at 189–216; *cf.* Judith Resnik, *Reconstructing Equality: Of Justice, Justicia, and the Gender of Jurisdiction*, 14 YALE J.L. & FEMINISM 393, 399 (2002) (critiquing "the maintenance of jurisdictional

courts, as well as international tribunals, have deliberated and pronounced judgment on questions of gender equality,[314] sometimes in directions that I think are consistent with stated commitments to equality and sometimes not. In the face of highly gendered distributions of benefits and responsibilities in most societies, the struggle to re-understand our constitutional world through the lens of gender equality, is ongoing. It is an effort that can benefit from all the thinking and rethinking, in local, national and transnational locations, informed by the experience of others, that can be mustered.[315]

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distinctions that constrain national powers to reduce the inequality of women and men").

314. Although many would argue that gender equality norms (including those in CEDAW) represent customary international law, see e.g., UNIFEM, BRINGING EQUALITY HOME, *supra* note 102, at 9; Chantalle Forgues, Note, *A Global Hurdle: The Implementation of an International Nondiscrimination Norm Protecting Women from Gender Discrimination in International Sports*, 18 B.U. INT'L L.J. 247, 262 (2000); *Cf.* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 702, comment l (noting possibility that freedom from state policy of gender discrimination "may already be a principle of customary international law"), others disagree. *See, e.g.*, Weisburd, *supra* note 147, at 117–20 (doubting that CEDAW and the ICCPR are now part of customary international law); An-Na'im, *supra* note 125, at 168 (stating that it would be "difficult to establish a principle of customary international law prohibiting all forms of discrimination on grounds of gender"); *cf. supra* notes 219, 249 (noting feminist objections to exclusion of gender discrimination from *jus cogens*).

315. *See* Glenn, *supra* note 63, at 263. Glenn argues that legal development preceding modern national states rested on a view of law necessarily open to persuasive authority and that widespread reliance on nonbinding persuasive authority represented an "ongoing commitment to better ideas." *Id.* at 268. As law became an instrument of securing national states in Europe, concepts of binding national law began to displace reliance on persuasive authority from other sources, according to Glenn, while outside the West the idea of law as national response was less persuasive and the idea of law as enquiry, as a search for better ideas, persisted. *See id.* at 278–88. Although Glenn's historic description associates nationalism with the idea of binding law and pluralism with the idea of law as enquiry, *see id.* at 278–88, he concludes that both concepts can co-exist because it "is in the nature of persuasive authority. . .to tolerate assertions of local particularity." *Id.* at 289.