

2007

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Ronald A. Brand

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Recommended Citation

Ronald A. Brand, *Judicial Review and United States Supreme Court Citations to Foreign and International Law*, 45 Duq. L. Rev. 423 (2007).

Available at: <https://dsc.duq.edu/dlr/vol45/iss3/9>

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Judicial Review and United States Supreme Court Citations to Foreign and International Law*

*Ronald A. Brand***

INTRODUCTION

My topic is listed in the program as “Transnational Uses of Judicial Review.” As a United States lawyer, I logically begin with judicial review in the United States in addressing this topic. It is here that we find a very rich, current debate about whether it is appropriate for the United States Supreme Court to cite to foreign authorities in its interpretation of the United States Constitution for the purpose of determining whether state or federal statutes are constitutional. In other words, when, and for what purposes, should a national supreme court, in determining the constitutionality of a legislative act, look outside its own national boundaries to find support for its rationale in deciding a case?

Like our Supreme Court Justices, I sometimes find helpful authority in sources not normally on the shelves of our law libraries or in the leading legal databases. As with much of life, I believe that this area, too, can draw upon the wisdom of the comic pages. More specifically, there is a classic Peanuts cartoon strip, by Charles Schulz, in which Lucy is sitting behind her booth with a sign that says “Psychiatric help, 5 cents, the Doctor is in.” Charlie Brown is sitting in front of the booth, looking both down and down-hearted. The dialogue goes like this:

Charlie Brown: What can you do when you don't fit in? What can you do when life seems to be passing you by?

Lucy: Follow me, I want to show you something. See the horizon over there? See how big this world is? See how much room there is for everybody? Have you ever seen any other worlds?

* For presentation at Judicial Review in the Americas . . . and Beyond, Friday, November 10, 2006, Duquesne University School of Law.

** Professor of Law and Director, Center for International Legal Education, University of Pittsburgh School of Law.

- Charlie Brown:* No.
- Lucy:* As far as you know this is the only world there is . . . right?
- Charlie Brown:* Right.
- Lucy:* There are no other worlds for you to live in . . . right?
- Charlie Brown:* Right.
- Lucy:* WELL, LIVE IN IT, THEN! Five cents, please.

As a society and as a legal profession, we often tend to make major debates out of matters that probably would benefit more from the simplicity of Lucy's five-cent advice. The debate about the use of foreign authority by the United States Supreme Court in interpreting the United States Constitution may well fall into this category.

Recent decisions by the United States Supreme Court and extracurricular discussions between two of the Justices in particular, Justices Breyer and Scalia,¹ have fueled a debate regarding whether it is appropriate for the Court to make reference to foreign legislation and judicial decisions in cases involving the interpretation and application of the United States Constitution.² This debate has, to some extent, paralleled the argument over whether the Constitution is best interpreted by looking at the intent of the original drafters — an originalist approach — or by considering it to be a “living” document that must be interpreted to take account of contemporary realities.

1. See Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer (Constitutional Relevance of Foreign Court Decisions), AU Washington College of Law, Jan. 13, 2005, available at <http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument>.

2. For articles discussing this issue, see, e.g., Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639 (2005); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005) (discussing the 2004 term of the Supreme Court); Donald J. Kochan, *Sovereignty and the American Courts at the Cocktail Party of International Law: The Dangers of Domestic Judicial Invocations of Foreign and International Law*, 29 FORDHAM INT'L L.J. 507 (2006); Ernst A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 149 (2005).

THE CONTOURS OF THE DEBATE

A. *A Rather Limited Issue*

The debate over the use of foreign law citations is first of all much more limited than either the headlines or the number of law review articles would seem to indicate. It is important to understand that there seems to be no justice and no commentator taking the position that the United States Supreme Court should *never* cite to foreign cases. On the contrary, even Justice Scalia — the most prominent *opponent* of the use of foreign cases for constitutional interpretation purposes — has openly admitted that it is appropriate to use foreign cases in decisions involving: (1) the interpretation of treaties, (2) questions raised by U.S. statutes that require reference to foreign law, and (3) examples that rebut the argument that the sky will fall if we do it a certain way.³ Even in the interpretation of the United States Constitution, Justice Scalia admits to his own use of foreign law, saying, “I use foreign law all the time, but it is all very old English law.”⁴ Anyone who has read Justice Scalia’s excellent expositions on due process is familiar with this use.⁵ It is the use of “modern foreign legal materials” that Justice Scalia finds inappropriate when cited for purposes of interpreting the United States Constitution.⁶

Thus, the debate begins with a rather limited focus. No party to the debate suggests a totally isolationist approach, and all parties to the debate recognize the importance of both foreign decisions and international law as appropriate subjects of reference in the U.S. legal order.⁷

3. Antonin Scalia, Keynote Address at the American Enterprise Institute: Outsourcing of American Law (Feb. 21, 2006) (transcript available at <http://www.aei.org/events/filter.all,eventID.1256/transcript.asp>).

4. *Id.*

5. See, e.g., *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 28-40 (1991) (Scalia, J., concurring).

6. “It is my view that foreign legal materials can never be relevant to an interpretation of . . . the meaning of the United States Constitution.” Scalia, Keynote Address, *supra* note 3.

7. There is another related debate that implicates broader disagreement over the role of *international* law in the U.S. legal system. Compare William S. Dodge, *Bridging Erie: Customary International Law in the U.S. Legal System After Sosa v. Alvarez-Machen*, 12 TULSA J. COMP. & INT’L L. 87, 88 (2004) (noting that *Sosa* “reaffirmed that ‘the domestic law of the United States recognizes the law of nations and characterized customary international law as ‘federal common law’ for purposes of the Alien Tort Statute”) with 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) (arguing that “contrary to conventional wisdom, CIL should not have the status of federal common law”).

B. *A Rather Limited Portion of the Constitution*

The types of cases before the United States Supreme Court in which the debate has surfaced also provide a rather limited context. Most of the cases have dealt with a single constitutional provision, the Eighth Amendment prohibition of cruel and unusual punishment.⁸

The first case to involve reference to foreign law in interpreting the Eighth Amendment appears to have been the 1958 case of *Trop v. Dulles*,⁹ in which the Supreme Court struck down a law that stripped a person in the military of his citizenship upon desertion from the United States Army in wartime.¹⁰ Chief Justice Warren referenced the laws of other nations to support the Court's conclusion that "the Eighth Amendment forbids Congress to punish by taking away citizenship."¹¹

The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime. It is true that several countries prescribe expatriation in the event that their nationals engage in conduct in derogation of native allegiance. Even statutes of this sort are generally applicable primarily to naturalized citizens. But use of denationalization as punishment for crime is an entirely different matter. The United Nations' survey of the nationality laws of 84 nations of the world reveals that only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion.¹² In this country, the Eighth Amendment forbids this practice.¹³

In 1977, the Court once again addressed the constitutionality of a statute under the Eighth Amendment in *Coker v. Georgia*.¹⁴ Holding that imposition of a death sentence for the rape of an adult woman was grossly disproportionate and excessive punishment forbidden by the Eighth Amendment,¹⁵ the Court, in a footnote, referred to the fact that in *Trop* "the plurality took pains to note the climate of international opinion concerning the acceptability of a particular punishment."¹⁶ It then cited a United Na-

8. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

9. 356 U.S. 86 (1958).

10. *Trop*, 356 U.S. at 103.

11. *Id.*

12. *Id.*

13. *Id.* at 102-03 (citations omitted).

14. 433 U.S. 584 (1977).

15. *Coker*, 433 U.S. at 599.

16. *Id.* at 596 n.10.

tions report on capital punishment, stating that “[i]t is thus not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue.”¹⁷

The next Eighth Amendment case, decided in 1982, was *Enmund v. Florida*.¹⁸ In this case, the Court held that a law allowing the death penalty for a defendant who aided and abetted a felony that resulted in murder committed by others — when the defendant himself did not kill, attempt to kill, or intend that the killing take place — was unconstitutional.¹⁹ The majority opinion relied, in part, on a survey of practice in other states, and, in its own footnote, recalled footnote 10 of the *Trop* opinion, stating that “[i]t is . . . worth noting that the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe.”²⁰

In 1988, the Court decided *Thompson v. Oklahoma*,²¹ holding that the Eighth and Fourteenth Amendments prohibited a state’s application of the death penalty to a person convicted of first-degree murder for an offense committed when he was only 15 years old.²² Justice Stevens wrote the plurality opinion in which he supported the holding by stating:

The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community. . . . Although the death penalty has not been entirely abolished in the United Kingdom or New Zealand (it has been abolished in Australia, except in the State of New South Wales, where it is available for treason and piracy), in neither of those countries may a juvenile be executed. The death penalty has been abolished in West Germany, France, Portugal, The Netherlands, and all of the Scandinavian countries, and

17. *Id.* (citing United Nations, Department of Economic and Social Affairs, *Capital Punishment* 40, 86 (1968)).

18. 458 U.S. 782 (1982).

19. *Enmund*, 458 U.S. at 801.

20. *Id.* at 796 n.22.

21. 487 U.S. 815 (1988).

22. *Thompson*, 487 U.S. at 823 (plurality opinion).

is available only for exceptional crimes such as treason in Canada, Italy, Spain, and Switzerland. Juvenile executions are also prohibited in the Soviet Union.²³

This information on the laws of other nations was obtained from the amicus brief which had been filed by Amnesty International, demonstrating the impact that non-party, non-governmental organizations may have on the decisions of the Court.²⁴

The most recent debate was first set off by the 2002 decision in *Atkins v. Virginia*,²⁵ where the Court held that the execution of a mentally retarded person was cruel and unusual punishment prohibited by the Eighth Amendment.²⁶ In *Atkins*, the European Union filed an amicus brief, and the opinion of the Court, delivered by Justice Stevens, drew from that brief to conclude that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."²⁷ Based in part on this information, the Court found "a consensus unquestionably reflect[ing] widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty."²⁸

Recently contributing to this discussion of the Eighth Amendment is *Roper v. Simmons*,²⁹ decided on March 1, 2005. In a majority opinion authored by Justice Kennedy, the Court held that a state's execution of a person under 18 years of age at the time of commission of a capital crime is prohibited by the Eighth and Fourteenth Amendments,³⁰ thus abrogating the Court's 1989 decision in *Stanford v. Kentucky*.³¹ The *Roper* opinion both acknowledges foreign law and discusses the impact of such an acknowledgment:

Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile

23. *Id.* at 830.

24. *Id.* at 831 n.34.

25. 536 U.S. 304 (2002).

26. *Atkins*, 536 U.S. at 321.

27. *Id.* at 316 n.21.

28. *Id.* at 317.

29. 543 U.S. 551 (2005).

30. *Roper*, 543 U.S. at 560, 578.

31. 492 U.S. 361 (1989).

death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court's decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments."³²

While Justice Kennedy made a point of noting that foreign law which evidences global opinion on a matter of U.S. constitutional stature did not alone require the decision in *Roper*, he also gave special emphasis to his use of foreign law references by placing it immediately before the final statement of the outcome of the case:

Not the least of the reasons we honor the Constitution, then, is because we know it to be our own. It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the

32. *Roper*, 543 U.S. at 575. Kennedy's opinion goes on to provide reference to amici submissions and to elaborate further on the global position on capital punishment for minors:

As respondent and a number of amici emphasize, Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18. . . . No ratifying country has entered a reservation to the provision prohibiting the execution of juvenile offenders. Parallel prohibitions are contained in other significant international covenants. . . .

Respondent and his amici have submitted, and petitioner does not contest, that only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice. . . . In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.

Though the international covenants prohibiting the juvenile death penalty are of more recent date, it is instructive to note that the United Kingdom abolished the juvenile death penalty before these covenants came into being. . . .

It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.

Id. at 576-78 (citations omitted).

centrality of those same rights within our own heritage of freedom.

The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.³³

The dissenting opinions of Justices O'Connor and Scalia in *Roper* help define the contours of the debate over citation to foreign law in interpreting the United States Constitution. Both disagreed with the majority result that relied on the Eighth Amendment to strike down a state statute allowing execution of minors.³⁴ Justice O'Connor, however, made a point of acknowledging her agreement with the propriety of reference to foreign law to interpret the Eighth Amendment:

I turn, finally, to the Court's discussion of foreign and international law. Without question, there has been a global trend in recent years towards abolishing capital punishment for under-18 offenders. Very few, if any, countries other than the United States now permit this practice in law or in fact. While acknowledging that the actions and views of other countries do not dictate the outcome of our Eighth Amendment inquiry, the Court asserts that "the overwhelming weight of international opinion against the juvenile death penalty . . . does provide respected and significant confirmation for [its] own conclusions." Because I do not believe that a genuine national *consensus* against the juvenile death penalty has yet developed, and because I do not believe the Court's moral proportionality argument justifies a categorical, age-based constitutional rule, I can assign no such *confirmatory* role to the international consensus described by the Court. In short, the evidence of an international consensus does not alter my determination that the Eighth Amendment does not, at this time, forbid capital punishment of 17-year-old murderers in all cases.

Nevertheless, I disagree with Justice Scalia's contention . . . that foreign and international law have no place in our Eighth Amendment jurisprudence. Over the course of nearly half a century, the Court has consistently referred to foreign and in-

33. *Id.* at 578 (citations omitted).

34. *Id.* at 587, 607.

ternational law as relevant to its assessment of evolving standards of decency. This inquiry reflects the special character of the Eighth Amendment, which, as the Court has long held, draws its meaning directly from the maturing values of civilized society. Obviously, American law is distinctive in many respects, not least where the specific provisions of our Constitution and the history of its exposition so dictate. . . . But this Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement — expressed in international law or in the domestic laws of individual countries — that a particular form of punishment is inconsistent with fundamental human rights. At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus. The instant case presents no such domestic consensus, however, and the recent emergence of an otherwise global consensus does not alter that basic fact.³⁵

Two Supreme Court decisions outside the Eighth Amendment line of cases add dimension to the debate on use of foreign law for purposes of constitutional interpretation. In 1997, the Court, in *Printz v. United States*,³⁶ held that the portion of the Brady Act that placed an obligation on state authorities to conduct background checks on prospective handgun purchasers imposed an unconstitutional obligation on state officers to execute federal laws.³⁷ In a five-to-four decision, Justice Scalia, writing for the majority, specifically referred to Justice Breyer's dissent that included reference to foreign law.³⁸ In a footnote, Justice Scalia wrote:

Justice Breyer's dissent would have us consider the benefits that other countries, and the European Union, believe they have derived from federal systems that are different from ours. We think such comparative analysis inappropriate to

35. *Id.* at 604-05 (O'Connor, J., dissenting) (citations omitted).

36. 521 U.S. 898 (1997).

37. *Printz*, 521 U.S. at 935.

38. *Id.* at 921 n.11.

the task of interpreting a constitution, though it was of course quite relevant to the task of writing one. The Framers were familiar with many federal systems, from classical antiquity down to their own time Some were (for the purpose here under discussion) quite similar to the modern “federal” systems that Justice Breyer favors. Madison’s and Hamilton’s opinion of such systems could not be clearer. The Federalist No. 20, after an extended critique of the system of government established by the Union of Utrecht for the United Netherlands, concludes:

“I make no apology for having dwelt so long on the contemplation of these federal precedents. Experience is the oracle of truth; and where its responses are unequivocal, they ought to be conclusive and sacred. The important truth, which it unequivocally pronounces in the present case, is that a sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity”

Antifederalists, on the other hand, pointed specifically to Switzerland — and its then-400 years of success as a “confederate republic” — as proof that the proposed Constitution and its federal structure was unnecessary. The fact is that our federalism is not Europe’s. It is “the unique contribution of the Framers to political science and political theory.”³⁹

In 2003, in *Lawrence v. Texas*,⁴⁰ the Court applied the Fourteenth Amendment Due Process Clause to find unconstitutional a Texas statute that made it a crime for two persons of the same sex to engage in certain intimate sexual conduct.⁴¹ Justice Kennedy wrote the majority opinion over the dissents of Scalia, Rhenquist, and Thomas.⁴² That decision overruled the 1986 decision in *Bowers v. Hardwick*,⁴³ in which the Court had held that the Constitution does not “confer[] a fundamental right upon homosexuals to engage in sodomy and hence [does not] invalidate the laws of the

39. *Id.* (citations omitted).

40. 539 U.S. 558 (2003).

41. *Lawrence*, 539 U.S. at 578-79.

42. *Id.* at 561. Justice O’Connor filed a concurring opinion. *Id.*

43. 478 U.S. 186 (1986).

many States that still make such conduct illegal and have done so for a very long time.”⁴⁴ Justice Kennedy’s opinion noted that the majority opinion by Justice Powell in *Bowers* had relied on reference to the practices of “Western civilization,” and then refuted the *Bowers* holding with reference to a decision of the European Court of Human Rights:

In *Bowers* the Court referred to the fact that before 1961 all 50 States had outlawed sodomy, and that at the time of the Court's decision 24 States and the District of Columbia had sodomy laws. Justice Powell pointed out that these prohibitions often were being ignored, however. Georgia, for instance, had not sought to enforce its law for decades. . . .

The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction. A committee advising the British Parliament recommended in 1957 repeal of laws punishing homosexual conduct. Parliament enacted the substance of those recommendations 10 years later.

Of even more importance, almost five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today’s case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.⁴⁵

Justice Scalia, in dissent, challenged both the “emerging awareness” Kennedy found in the United States of rights of homosexuals and the reference to foreign practice:

44. *Bowers*, 478 U.S. at 190 (citations omitted).

45. *Lawrence*, 539 U.S. at 572-73 (citations omitted).

[A]n “emerging awareness” is by definition not “deeply rooted in this Nation’s history and tradition[s],” as we have said “fundamental right” status requires. Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because foreign nations decriminalize conduct. The *Bowers* majority opinion never relied on “values we share with a wider civilization,” but rather rejected the claimed right to sodomy on the ground that such a right was not “deeply rooted in this Nation’s history and tradition.” *Bowers*’ rational-basis holding is likewise devoid of any reliance on the views of a “wider civilization.” The Court’s discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since “this Court . . . should not impose foreign moods, fads, or fashions on Americans.”⁴⁶

These cases demonstrate that a majority on the United States Supreme Court has embraced the practice of reference to foreign law in cases interpreting the United States Constitution. This practice has occurred in cases dealing with the Eighth and Fourteenth Amendments, and with the constitutional relationship between federal and state law. In no case, however, has the reference to foreign law provided the sole authority or rationale for the holding. This leads to the question of just what is the authority of these references to foreign law, and what level of authority might such references properly attain in the future.

THE AUTHORITY OF REFERENCE TO FOREIGN DECISIONS: A RATHER LIMITED PURPOSE

Supreme Court Justices can cite to anything in support of their opinions, but not everything they cite constitutes legal authority, either binding or persuasive. Chief Justice Rehnquist used references to poetry,⁴⁷ and Justice Scalia has referred to popular mu-

46. *Id.* at 598 (Scalia, J., dissenting) (quoting *Bowers*, 478 U.S. at 193-94, 196; *Foster v. Florida*, 537 U.S. 990, 990 n.123 (2002) (Thomas, J., concurring)).

47. See *Texas v. Johnson*, 491 U.S. 397, 424 n.25 (1989) (Rehnquist, C.J., dissenting) (quoting *Barbara Frietchie* by John Greenleaf Whittier).

sic.⁴⁸ No one would argue, however, that Whittier's verse or Cole Porter's lyrics provided a legal basis for the outcome of the case suggested in such opinions.

As noted above, on questions of judicial review, no Supreme Court Justice that has included a reference to foreign law in his or her opinion has indicated that the foreign authority cited was controlling in terms of the outcome of the case. This raises the question of what authority such a reference possesses in any given case.⁴⁹

There are times when a citation to foreign law is appropriate to the outcome of a case, and when that law (statute or case law) can and should influence the outcome. Examples include those types of cases Justice Scalia has said are appropriate for use of foreign law.⁵⁰ Certainly, if a United States court is presented with a case requiring the interpretation of the United Nations Convention on Contracts for the International Sale of Goods,⁵¹ Article 7 of that Convention (which is the Supreme Law of the Land under Article VI of the United States Constitution) compels both reference to and respect for foreign judicial decisions already expressing a position on the interpretation of the provision in question.⁵² Even in such a case, however, no one would argue that the Convention requires blind obedience to a foreign court's interpretation as binding authority. Such authority is persuasive at best, and to be followed only if the rationale behind it is also persuasive.⁵³

Such a case does not, however, rise to the level of constitutional status, and no court or commentator has to my knowledge suggested that foreign law should ever provide either binding or persuasive precedential authority on a question of interpretation of

48. See *County of Sacramento v. Lewis*, 523 U.S. 833, 861 (1998) (Scalia, J., concurring) (referring to *You're the Top* by Cole Porter).

49. This is not a novel question, and has been the subject of much discussion. See, e.g., Mark Tushnet, *When is Knowing Less Better Than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275 (2006).

50. See *supra* note 3 and accompanying text.

51. United Nations Convention on Contracts for the International Sale of Goods, art. 31, U.N. Doc. A/CONF.97/18, Annex I, *English version reprinted in* 52 C.F.R. § 6264 (1987) and 19 I.L.M. 668 (1980).

52. *Id.* Art. 7(1) provides:

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

Id.

53. See, e.g., Harry Flechtner, *Recovering Attorneys' Fees as Damages Under the U.N. Sales Convention (CISG): The Role of Case Law in the New International Commercial Practice, with Comments on Zapata Hermanos v. Hearthside Baking*, 22 NW. J. INT'L L. & BUS. 121 (2002).

the United States Constitution. None of the references to foreign law in opinions of the Supreme Court in cases of constitutional interpretation has ever suggested that the reference denotes precedential authority of any sort for the foreign law cited. As Mark Tushnet has stated:

When nose-counting is used as the Court has used it — to check that a judgment independently arrived at is not wildly inconsistent with judgments elsewhere — the practice hardly seems worthy of the ire it has attracted. And, of course, nose-counting is precisely not using non-U.S. law as precedent.⁵⁴

THE CONUNDRUM: BEING BETTER WITHOUT COMPARISON

Justice Scalia has summed up his position on the use of reference to foreign law for purposes of constitutional interpretation as follows:

If there was any thought absolutely foreign to the founders of our country, surely it was the notion that we Americans should be governed the way Europeans are and nothing has changed. I dare say that few of us here would want our life or liberty subject to the disposition of French or Italian criminal justice. Not because those systems are unjust, but because we think ours is better.⁵⁵

This statement raises two questions. The first is: does the practice of referring to foreign law in U.S. constitutional decisions lead to being “governed the way Europeans are?” I suggest it does not, certainly not when those references do no more than explain that the outcome in a constitutional decision is (or is not) consistent with practice elsewhere in the world. Law always has context, and part of the context for any national constitution is the global environment in which that constitution must be applied.

The second question raised by Justice Scalia’s comment is both more fundamental and more problematic. That is: if we “think our system is better” than others, on what basis can, and should, we ever make such an assumption? Justice Scalia’s statement, and the question it raises, necessarily require comparative analysis; and comparative analysis necessarily requires discussion of — that is, reference to — foreign law. Thus, Justice Scalia’s state-

54. Tushnet, *supra* note 49, at 1285.

55. Scalia, Keynote Address, *supra* note 3.

ment itself contains an internal contradiction that belies his fundamental premise. You cannot at once say that our legal system is better than other legal systems without at the same time knowing something about other legal systems. Neither can you know something about other legal systems (particularly something that makes our system better) without making reference to aspects of those legal systems. Thus, Justice Scalia's statement *against* reference to foreign law necessarily *requires* reference to foreign law. We *should* seek to have the better legal system. But we should not do so without an understanding of what it is we are trying to be better than.

CONCLUSION

It may well be that I already have provided too much discussion of an issue that I suggested at the outset deserves a very simple answer. Going back to my original analysis — which is not an originalist analysis — one might imagine the following dialogue between Supreme Court Justices that borrows from Charlie Brown and Lucy in order to sum up the current debate:

Justice Scalia: What can you do when you don't fit in? What can you do when life seems to be passing you by?

Justice Breyer: Follow me, I want to show you something. See the horizon over there? See how big this world is? See how much room there is for everybody? Have you ever seen any other worlds?

Justice Scalia: No.

Justice Breyer: As far as you know this is the only world there is . . . right?

Justice Scalia: Right.

Justice Breyer: There are no other worlds for you to live in . . . right?

Justice Scalia: Right.

Justice Breyer: WELL, LIVE IN IT, THEN! Five cents, please.

