



2006

## When Is Knowing Less Better than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law

Mark V. Tushnet

*Georgetown University Law Center*, [tushnet@law.georgetown.edu](mailto:tushnet@law.georgetown.edu)

This paper can be downloaded free of charge from:  
<https://scholarship.law.georgetown.edu/facpub/236>

---

90 Minn. L. Rev. 1275-1302 (2006)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.  
Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>



Part of the [Comparative and Foreign Law Commons](#), and the [Constitutional Law Commons](#)

# GEORGETOWN LAW

## Faculty Publications



February 2010

### When Is Knowing Less Better than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law

90 Minn. L. Rev. 1275-1302 (2006)

Mark V. Tushnet

Professor of Law

Georgetown University Law Center

[tushnet@law.georgetown.edu](mailto:tushnet@law.georgetown.edu)

This paper can be downloaded without charge from:  
Scholarly Commons: <http://scholarship.law.georgetown.edu/facpub/236/>

Posted with permission of the author

## Essay

# When is Knowing Less Better Than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law

Mark Tushnet<sup>†</sup>

Senator Jon Kyl asked John Roberts at his confirmation hearings, “[W]hat, if anything, is the proper role of foreign law in U.S. Supreme Court decisions?”<sup>1</sup> Judge Roberts replied:

[A]s a general matter, . . . [there are] a couple of things that cause concern on my part about the use of foreign law as precedent . . . .

The first has to do with democratic theory. Judicial decisions in this country—judges of course are not accountable to the people, but we are appointed through a process that allows for participation of the electorate, the President who nominates judges is obviously accountable to the people. The senators who confirm judges are accountable to the people. In that way the role of the judge is consistent with the democratic theory. If we’re relying on a decision from a German judge about what our Constitution means, no President accountable to the people appointed that judge, and no Senate accountable to the people confirmed that judge; and yet he’s playing a role in shaping a law that binds the people in this country. I think that’s a concern that has to be addressed.

The other part of it that would concern me is that relying on foreign precedent doesn’t confine judges. It doesn’t limit their discretion

---

<sup>†</sup> Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center. I would like to thank participants at the *Minnesota Law Review* Symposium and at workshops at Cardozo Law School and Georgetown University Law Center; Jeffrey Lehman, Eric Posner, and L. Michael Seidman for helpful comments; and Brian Simmonds for important research assistance. This Essay is a companion to Mark Tushnet, *Referring to Foreign Law in Constitutional Interpretation: An Episode in the Culture Wars*, 35 *BALT. L. REV.* (forthcoming May 2006), where some of the ideas touched on here are developed in more detail.

1. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 200 (2005) (statement of Sen. Jon Kyl, Member, S. Comm. on the Judiciary) [hereinafter *Confirmation Hearing*].

the way relying on domestic precedent does. Domestic precedent can confine and shape the discretion of the judges.

In foreign law you can find anything you want. If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia or wherever. As somebody said in another context, looking at foreign law for support is like looking out over a crowd and picking out your friends. You can find them, they're there. And that actually expands the discretion of the judge. It allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent because they're finding precedent in foreign law, and use that to determine the meaning of the Constitution. I think that's a misuse of precedent, not a correct use of precedent.<sup>2</sup>

Judge Roberts's answers were perfectly suitable for the occasion. Unfortunately, they are reflected in more academic works as what I think of as "talking-points scholarship," that is, in articles that repeat a standard set of arguments that misrepresent the claims made by those who sometimes refer to, or defend the occasional reference to, non-U.S. law in constitutional interpretation.<sup>3</sup> So, for example, I know of no one who believes that it is appropriate to use non-U.S. law as a precedent, where "precedent" is defined, as it should be, as a judicial holding that carries weight on grounds other than the correctness of the reasons provided by the court for its holding.<sup>4</sup> Judge Rob-

---

2. *Id.* at 200–01 (statement of Judge John Roberts).

3. Judge Roberts used a quotation from Judge Harold Leventhal ("looking out over a crowd and picking out your friends"), *id.* at 201, that is commonly cited to Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983). That quotation is an example of "talking-points"—and, in this instance, "sound-bite"—scholarship, when deployed in scholarly work. I could demonstrate the existence of "talking-points scholarship" by providing string cites for every criticism I discuss here, where each criticism was supported by citations to the same articles. Doing so would, however, give the footnotes an undesirable *ad hominem* quality, and so I have refrained from providing more than one or two citations to support each criticism. The scare quotes I have used around the word "scholarship" signal my uneasiness about even engaging in this discussion. I suspect that academic criticisms of the use of non-U.S. law in constitutional interpretation would be more productively analyzed in terms of the sociology of scholarship than on the merits.

4. Judge Richard Posner understands the definitional point:

In [the] case . . . of controlling authority and that of authority that is not controlling . . . the earlier case is cited for the fact that the court has ruled one way or another, regardless of how persuasive the court's reasoning is. It is cited because it is a precedent. It is quite something else to cite a decision by a foreign or international court not as a precedent but merely because it contains persuasive reasoning (a source or informational citation), just as one might cite a treatise or a law review article because it was persuasive, not because it was considered to have any force as precedent or any authority.

erts's other concern, that reference to non-U.S. law expands judicial discretion, is not distinctive to such references as is suggested by his allusion to "another context"—the use of legislative history in statutory interpretation.<sup>5</sup>

My goal in this Essay is simply to lay out the criticisms of the use of non-U.S. law in constitutional interpretation, so as to identify what might be correct (not much, in the end) in those criticisms.<sup>6</sup> I discuss criticisms based on theories of interpretation, on the claim that reference to non-U.S. law is merely decoration playing no role in generating outcomes, on the role the Constitution has in expressing distinctively American values, and on the proposition that judges are unlikely to do a good job in understanding—and therefore in referring to—non-U.S. law.<sup>7</sup> This last "quality-control" criticism has some validity, as does one version of the "expressivist" criticism, but only when they are formulated much more carefully than they have been in prior discussions of the issue.

My general conclusions are these: the criticisms are either irrelevant, not distinctive to the use of non-U.S. law, or seriously overstated. The structure of the irrelevance claim is simple: the validity of the criticism is entirely parasitic on some other argument—which is merely asserted, not defended—in the course of criticizing the references to non-U.S. law. The irrelevant criticisms apply *other* criticisms—deployed in a wide range of contexts, not just this one—of various judicial practices. The criticisms of references to non-U.S. law, that is, stand or fall with the validity of those other criticisms, and have little

---

Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFF., July–Aug. 2004, at 40, 41 [hereinafter Posner, *No Thanks*]. *But see* Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 85 (2005) [hereinafter Posner, *Political Court*] (stating that foreign decisions were used as authorities in *Lawrence* and *Roper* because they were looked to "for evidence of universality"). For a modest qualification of the proposition that no one relies on non-U.S. decisions as precedent, see *infra* notes 36–37 and accompanying text.

5. See *Confirmation Hearing*, *supra* note 1, at 201 (statement of Judge John Roberts); Wald, *supra* note 3, at 214.

6. I should emphasize that my aim is *not* to defend the practice of referring to non-U.S. law in some ultimate normative sense. I personally would like to see the exercise of judicial review scaled back considerably, but for reasons that have nothing to do with the addition of non-U.S. law to the body of materials to which the Justices refer. My argument is that, given existing practices of judicial review, referring to non-U.S. law raises no particularly pressing concerns.

7. Clearly, some of these criticisms are related to others, and I have identified them as I have primarily for analytic convenience.

or no independent force. The structure of the nondistinctiveness argument is a bit more complex. These “nondistinctive” criticisms are applicable to a much wider range of practices than reference to non-U.S. law, but critics do not explain why they have taken as their target the practice of referring to non-U.S. law. One reason might be that the practice is at present relatively unimportant and can be stifled before it becomes an important one. That is, the target is not the actual practice of referring to non-U.S. law but to some imagined practice that might develop out of the present one. Yet critics have provided no reasons why that development—which would involve the transformation of a practice that is defensible on its own terms into an indefensible one—will occur.

I have tried to support what Professor Kenneth Anderson calls “Justice Breyer’s ‘no big deal’ view.”<sup>8</sup> The references to non-U.S. law are few and nonthreatening, and the reaction to those references has been far out of proportion to their importance. Yet, one implication of the “no big deal” thesis is that it is no big deal *one way or the other*. We would not lose much were U.S. judges to conclude that the game of referring to non-U.S. law was not worth the candle.<sup>9</sup>

## I. THEORY-BASED CRITICISMS

This Section discusses three classes of theory-based criticisms of references to non-U.S. law: those based on a commitment to originalist approaches to constitutional interpretation, those dealing with problems such references might pose within a pragmatic account of constitutional interpretation, and those dealing with what can roughly be called authority-based accounts of constitutional interpretation.

### A. ORIGINALISM

My sense is that by far the largest portion of the criticisms of reference to non-U.S. law rests on the view—held by constitutional theorists and asserted occasionally by some Supreme Court Justices—that originalism is the only proper method of

---

8. Kenneth Anderson, *Foreign Law and the U.S. Constitution*, 131 *POLY REV.* 33, 39 (2005).

9. Not much, but something. The time may soon come when non-U.S. courts will grapple with novel issues—such as the regulation of genetic engineering—before U.S. courts do. The non-U.S. courts may provide some insights that would be useful when the U.S. courts later consider constitutional issues arising out of the same social phenomena.

constitutional interpretation. Originalist criticisms of reference to non-U.S. law exemplify the pattern in which criticisms of the targeted practice are entirely parasitic on other arguments (here the arguments for originalism itself). But, of course, those who refer to non-U.S. law are not originalists. Finding originalism inadequate as an account of constitutional interpretation, they have some other account. For them, originalist criticisms of their reference to non-U.S. law are irrelevant—at least until they are persuaded by the arguments for originalism itself.

Even on originalist terms, reference to contemporary non-U.S. law might sometimes be proper. An originalist inquiry might demonstrate that some particular constitutional provision, as originally understood,<sup>10</sup> confers on judges in the future the power to take into account the positions taken in non-U.S. law at the time the interpretive issue arises.<sup>11</sup> That, indeed, is at least part of the position the Supreme Court has taken with respect to the Cruel and Unusual Punishments Clause of the Eighth Amendment. The Justices have said (whether they believe it or not is another question) that the terms “cruel and unusual” were understood to refer to “evolving standards of decency,”<sup>12</sup> and not to freeze into the law a ban on only those practices that were understood to be cruel and unusual in 1791.<sup>13</sup> Of course, other originalists might dispute the claim about the original understanding of the clause, and they might criticize Justices who accept that claim as bad originalists. This criticism seems to be about one practice, reference to non-U.S. law, but turns out to be a quite different criticism, that the targeted practice rests on a mistaken application of originalist interpretation. The critics might be right about the proper

---

10. I do not mean by using this term to take a position on the proper form of originalist theory. Originalists have offered a range of possibilities, and originalist theory, at least as seen from the outside, remains quite fluid, with new variants being introduced with some regularity.

11. See Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 908 (2005), for this sort of clause-specific originalist account. In addition, contemporary British cases interpreting documents like the 1689 Bill of Rights might be relevant to the interpretation of constitutional provisions whose terms were drawn from such documents. See *Lackey v. Texas*, 514 U.S. 1045, 1046–47 (1995) (mem. of Stevens, J., respecting the denial of certiorari) (noting an opinion by two English judges interpreting the cruel and unusual punishments provision in the 1689 Bill of Rights).

12. *Trop v. Dulles*, 356 U.S. 86, 99–101 (1958).

13. *See id.*

originalist interpretation of the Eighth Amendment, but regardless, they have no independent foundation for criticizing the references to non-U.S. law.<sup>14</sup>

## B. CRITICISMS FROM WITHIN PRAGMATIC THEORY

The only theory-based criticisms with bite come from within the interpretive theory held by Justice Stephen Breyer, the Justice who refers to non-U.S. law. Justice Breyer has articulated an approach that has correctly been called pragmatic.<sup>15</sup> The “quality-control” objections discussed below accept pragmatism’s premises. Two other criticisms from within pragmatic interpretive theory deserve mention. First, it is said that pragmatists are selective in their references to non-U.S. law. Second, pragmatists tend to be liberals, but fail to realize that a full-bore practice of referring to non-U.S. law might generate nonliberal results.<sup>16</sup> The first criticism does not identify anything distinctive about referring to non-U.S. law; the second is irrelevant.<sup>17</sup>

As have others, Judge Roberts suggested that reference to non-U.S. law is undesirable because judges who make such references “cherry-pick” their sources, citing non-U.S. law that supports their preferences and ignoring non-U.S. law to the contrary.<sup>18</sup> I have two observations about this criticism. First, it is not unique to reference to non-U.S. law, as indeed Judge

---

14. Put somewhat differently, the critics should not rest their criticisms on the ground that referring to non-U.S. law is inconsistent with an originalist approach to constitutional interpretation, except in the empty sense that any purportedly originalist interpretation that is erroneous is not truly originalist.

15. See Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 692 (2005) (describing pragmatism as “the leading candidate for a constitutional theory that can credibly justify recourse to comparative material”).

16. See, e.g., *id.* at 702 (“If pragmatic comparativism is employed, it may be to justify a diminishment rather than an enhancement of constitutional liberties.”); Anderson, *supra* note 8, at 44–45 (“There is nothing in pragmatism that promises a particular vision of political progress . . . . [T]here is still a vast terrain of specifically American jurisprudence constraining the power of the state that progressivism might come to regret losing . . . .”). I note that Alford’s formulation assumes that there is an already-agreed-upon baseline of constitutional liberties against which diminution or enhancement can be measured; yet in circumstances what is precisely at stake is the location of that baseline.

17. These criticisms are obviously related: the thought appears to be that the judges are selective *because* they desire to reach liberal results.

18. See *Confirmation Hearing*, *supra* note 1, at 201 (statement of Judge John Roberts).



Roberts's formulation suggests. The phrase about looking out over a crowd and picking out your friends comes from Judge Harold Leventhal, who used it to describe the use of legislative history in statutory interpretation.<sup>19</sup> Justice Scalia's campaign against legislative history appears to have failed in its largest ambitions because his colleagues disagree with him about underlying questions of interpretive theory. So too, perhaps, in this context: the selectivity concern, like the originalist one, may be parasitic on a contested interpretive theory.

Judge Roberts suggested that expanding the sources on which constitutional interpretation might be based inevitably expands judicial discretion.<sup>20</sup> It is not clear to me why this is so. At least as an abstract proposition, looking at more material might produce *greater* rather than weaker constraints. But, even if Judge Roberts's suggestion is correct, the real question is whether reference to non-U.S. law produces more than a marginal increase in judicial discretion in a world where—under the interpretive theories the Justices appear to hold—the judges already have a great deal of discretion. One might think that worrying about the increase in judicial discretion arising from occasional references to non-U.S. law—while accepting the discretion inherent in referring to the traditions of the American people, or indeed the discretion inherent in the actual practice of originalist interpretation—is to strain at a gnat while swallowing a camel.<sup>21</sup>

Second, perhaps the selectivity criticism is simply a version of the “quality-control” criticism. The practice of referring to

---

19. See Wald, *supra* note 3, at 214.

20. See *Confirmation Hearing*, *supra* note 1, at 201 (statement of Judge John Roberts).

21. Adrian Vermeule suggested in oral comments on an earlier version of this Essay that critics might appropriately target *this* source of discretion because it is easier to stop a new practice expanding discretion on a new margin than it is to cut back on an existing practice. Perhaps so, but it seems equally possible that the effort devoted to strangling the new practice, if expended against a larger target, might have larger effects. Nor is it clear that the practice is in fact new. See Calabresi & Zimdahl, *supra* note 11 (describing the history of references to non-U.S. law in constitutional adjudication); see also Mark Tushnet, *Referring to Foreign Law in Constitutional Interpretation: An Episode in the Culture Wars*, 35 *BALT. L. REV.* (forthcoming May 2006) (considering whether criticisms of non-U.S. law references are predicated on the view that early references might place us on a slippery slope).

Issues of academic strategy might come into play as well. Perhaps there is an allocation of academic energy, with some critics targeting the new practice and others continuing to go after older ones. Or, having won (or lost) battles against older practices, maybe critics have turned to a new field of combat.

non-U.S. law seems relatively new to the judges who engage in it. Because they may not have developed the rhetorical techniques for “distinguishing” adverse non-U.S. material, they ignore it. As the practice matures, though, I think we can expect more complete references to non-U.S. law, along with the development of appropriate techniques for distinguishing adverse material.<sup>22</sup>

This latter version of the selectivity criticism blends into the “political tendency” criticism. Critics of pragmatic uses of non-U.S. material think it is a criticism to observe that a more comprehensive practice of referring to non-U.S. law might produce nonliberal results in some, perhaps many, instances.<sup>23</sup> I find it hard to understand why this is a criticism. I would think that the appropriate response is, “So what? I [that is, the person making the references to non-U.S. law] have no *a priori* commitment to liberal outcomes, and if it turns out that references to non-U.S. law produce conservative results, so be it.”

---

22. It seems that some criteria for identifying nations whose law might appropriately be referred to are emerging. For example, references to the law of nations that can fairly be described as reasonably well-functioning democracies are more appropriate than references to the law of other nations. See Rex D. Glensy, *Which Countries Count?: Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT'L L. 357, 361 (2005). Also, references to the law of nations where the law-on-the-books fits reasonably well with the law-in-action are more appropriate than references to the law of nations where the gap between the former and the latter is substantially larger. See *id.* And, related to the prior point, references to the law of nations where judges and other decision makers reasonably believe that their decisions might actually affect government operation and citizens' lives are more appropriate than references to the law of nations where judges and some other decision makers operate without much impact on daily life. See *id.* Glensy offers three parameters to guide courts in locating foreign authority. See *id.* First, “the democratic quotient of the institutional body which American courts are proposing to cite,” second, “the societal affinities that the nation which originated the proposed persuasive authority shares with the United States,” and third, a “purely practical” criterion. *Id.* I take it that some combination of these criteria account for Justice Breyer's acknowledgement that his reference to a decision by a Zimbabwean court might have been inappropriate. See Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer (Jan. 13, 2005), <http://domino.american.edu/AU/media/mediarel.nsf> (follow “AU News Releases–Category” hyperlink; then follow “Speeches on Campus” hyperlink; then follow “2005” hyperlink; then follow “January” hyperlink; then follow “Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer – AU Washington College of Law, Jan. 13” hyperlink) [hereinafter Transcript]. Clearly, though, more work needs to be done on this topic. In Part IV, I further address the concern that other nations are not “enough” like the United States to support comparisons.

23. See *supra* note 16 and accompanying text.

The best I can devise is this: the criticism might be a sort of truncated argument from hypocrisy or, in Justice Scalia's term, "sophistry,"<sup>24</sup> charging those who refer to non-U.S. law with doing so only when the references support liberal positions. So, for example, Justice Scalia noted that the Supreme Court applies the exclusionary rule in Fourth Amendment cases even though no other major jurisdiction does so; that the Supreme Court has adopted an account of nonestablishment and its evils that is inconsistent with practices elsewhere; and that the Supreme Court's abortion decisions have made the United States "one of only six countries that allow abortion on demand until the point of viability."<sup>25</sup>

Three observations are appropriate here. First, the references to non-U.S. law are rare enough that one cannot fairly accuse the judges who engage in the practice of being hypocritical<sup>26</sup>—or, at least of being any more hypocritical in referring to non-U.S. law than they and their colleagues are throughout their work.<sup>27</sup> Second, the underdeveloped practice of distinguishing adverse material might account for the purported inconsistencies. That is, the judges who refer to non-U.S. law may have an as-yet unarticulated account of why the death penalty and gay rights are different from abortion and nonestablishment in a way relevant to the practice of referring to non-U.S. law. Finally, conservative critics have engaged in a sort of unilateral disarmament. Because they oppose references to non-U.S. law in principle, they do not provide their allies on the Court with non-U.S. material that bears on the issues in specific cases before the Court or that would force their adversaries on the Court to confront adverse non-U.S. material.<sup>28</sup> Under

---

24. *Roper v. Simmons*, 543 U.S. 551, 627 (2005) (Scalia, J., dissenting) ("To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.").

25. *Id.* at 625. Much of the force of Justice Scalia's observation comes from his characterization of U.S. law, which is not, in my view, accurate.

26. Alford, *supra* note 15, at 702, refers to "the paucity of pragmatic jurisprudence that relies on comparative experiences."

27. This seems to me the general thesis of Posner, *Political Court*, *supra* note 4, and so it would be wrong to take Judge Posner's comments on the practice of referring to non-U.S. law as doing anything other than giving an example of a pervasive hypocrisy in constitutional adjudication.

28. Compare this view with the view Posner expresses in Posner, *Political Court*, *supra* note 4, at 86:

Justice Scalia could turn from denouncing the citation of foreign decisions by his colleagues to casting his own net wide enough to haul in precedents supporting his views on homosexuality, abortion, capital

these circumstances, it is at least premature to charge those who refer to non-U.S. law with hypocrisy.<sup>29</sup>

### C. AUTHORITY-BASED CONCERNS

Finally, one might call criticism of using non-U.S. law as precedent a theory-based criticism but for the fact, noted earlier, that no one who thinks it appropriate to refer to non-U.S. law treats it as precedent. A precedent, strictly speaking, is a decision that carries normative weight because of the authority of the court that issues it and not because of the reasons that support it.<sup>30</sup> Precedents matter only when one might disagree with the reasons for the decision but nonetheless accede to the authority of the issuing court.

Consider an obviously appropriate reference to a non-U.S. source. U.S. constitutional doctrine on the liability of the news media for false statements about public figures has attracted widespread criticism around the world and in the United States.<sup>31</sup> Suppose a Justice is faced with a new case testing the limits of existing libel doctrine, and believes that the First Amendment should not extend protection to the media under the circumstances presented, for reasons going to the balance between speech and privacy inherent in constitutionalized libel law. And suppose the Justice writes an opinion saying, "Justice Anthony Mason of the Australian High Court cogently expressed my concerns in terms on which I cannot improve," and then quotes Mason's opinion. Here, the Justice *refers* to a non-U.S. source of law—a source that does indeed have precedential weight within Australia—but does not *use* the source as a

---

punishment, and the role of religion in public life—for such precedents are abundant in the world's courts.

Conservatives' choice to not present non-U.S. law that supports their positions may explain the result that references to non-U.S. law typically support liberal conclusions. But not always. *See Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (referring to non-U.S. law as illustrating that the "international understanding of the office of affirmative action" is that such programs should be time-limited).

29. Justice Breyer has said that the correct response to improper selectivity of non-U.S. references is to expand the set of references. *See Transcript, supra* note 22. In general, that is right, unless the effort to expand the set would induce more or a different kind of error. For a discussion of this possibility, see *infra* Part IV.

30. *See* BLACK'S LAW DICTIONARY 1214–15 (8th ed. 2004); Posner, *No Thanks, supra* note 4, at 41.

31. *See* NORMAN DORSEN ET AL., *COMPARATIVE CONSTITUTIONALISM* 848–49 (2003) (citing non-U.S. and U.S. criticisms of U.S. constitutional libel law).

precedent. The Justice relies on Mason's opinion because of the reasons it contains, not because of its authority as precedent.

Similarly, the cases that have generated the most severe criticism do not use non-U.S. law as precedents in the appropriate sense. In *Atkins v. Virginia*<sup>32</sup> and *Roper v. Simmons*<sup>33</sup> the Court engaged in what Ernest Young calls "nose-counting," toting up the number of nations that rejected, at least in principle, the aspects of capital punishment at issue in those cases.<sup>34</sup> There are problems with nose-counting when used for some purposes, such as the potential gap between articulated principle and actual practice, and the failure to weight nations by population or degree of democratic governance. 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.<sup>35</sup> And, of course, nose-counting is precisely *not* using non-U.S. law as precedent.

Professor Vicki Jackson has suggested the only ground on which any advocate of referring to non-U.S. law might treat non-U.S. decisions as something like precedents. In canvassing the sources of normative guidance for interpretation, a judge might acknowledge that someone with responsibility for making decisions that have real-world effects (like a judge) might provide a better path to normative judgment than someone who does not have that kind of immediate responsibility (a philoso-

---

32. 536 U.S. 304 (2002).

33. 543 U.S. 551 (2005).

34. Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 150–51 (2005); see *Roper*, 543 U.S. at 575–78; *Atkins*, 536 U.S. at 316–17 n.21; see also Mark Tushnet, *How (and How Not) to Use Comparative Constitutional Law in Basic Constitutional Law Courses*, 49 ST. LOUIS U. L.J. 671, 673 (2005) (referring to "nose-counting on bottom-line results").

35. This formulation rests on the proposition that the Court in *Roper* meant what it said when it asserted that its independent judgment was "confirm[ed]" by the "opinion of the world community." 543 U.S. at 578. I see no reason to doubt the Court's word. Compare this view to the one expressed by Posner:

If I were writing an opinion invalidating the life sentence in my hypothetical marijuana case I would look at the punishments for this conduct . . . in the foreign countries . . . that we consider in some sense our peers. If a law could be said to be contrary to world public opinion I would consider this a reason, not compelling but not negligible either, for regarding a state law as unconstitutional even if the Constitution's text had to be stretched a bit to cover it.

Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 13 (1996).

pher, perhaps).<sup>36</sup> In such circumstances, the very fact that a decision is made by a judge does carry some weight by providing something akin to a warranty that the decision maker was fully serious in arriving at his or her normative conclusion.<sup>37</sup> Though this is related to treating a decision as a precedent, it is not actually doing so. In any event, Professor Jackson's argument remains at present purely theoretical, because no Supreme Court decision or even opinion uses non-U.S. authority to bolster constitutional interpretation in this way.

Finally, Judge Roberts's reference to "precedents" created by German judges who are not appointed by the President and confirmed by the Senate<sup>38</sup> hints at a final concern, that reference to non-U.S. law somehow undermines U.S. sovereignty. As I have argued elsewhere (and without refutation of which I am aware) U.S. sovereignty is not undermined when judges appointed by the President and confirmed by the Senate—that is, the Justices of the Supreme Court—make a decision for themselves to refer to non-U.S. sources of law.<sup>39</sup> Consider Kenneth Anderson's formulation. For him, reference to non-U.S. law is

a violation of the compact between government and governed, free people who choose to give up a measure of their liberties in return for the benefits of government—a particular pact with a particular community, in which the materials used in the countermajoritarian act of judging them nonetheless have, in some fashion, even indirectly, democratic provenance and consent.<sup>40</sup>

The decision by the Justices to refer to non-U.S. law gives that law "indirect" democratic provenance—or, at least, makes that reference indistinguishable from the indirect provenance of whatever sources the Justices refer to when they interpret

---

36. See Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 118 (2005).

37. Professor Jackson's argument might help identify some of the contours of the universe of nations to whose law references might be made. Some constitutional courts might be ineffective, which means that their judges do not have true responsibility for making decisions that affect people's lives. And, to the extent that constitutional courts exercise abstract review, particularly pre-enactment abstract review (as with the French *Conseil Constitutionnel* and with some aspects of the reference jurisdiction of the Supreme Court of Canada), their sense of responsibility and connection to real-world problems may be diminished.

38. See *Confirmation Hearing*, *supra* note 1, at 200–01 (statement of Judge John Roberts).

39. Mark Tushnet, *Transnational/Domestic Constitutional Law*, 37 LOY. L.A. L. REV. 239, 262–63 (2003).

40. Anderson, *supra* note 8, at 49.

the Constitution using an approach other than originalism.<sup>41</sup> Roger Alford suggests that “[c]omparativism is inconsistent with political democracy” because “there is no democratic check that the United States can impose upon the rulemaking power of foreign courts.”<sup>42</sup> Again, though, the check lies in the ability of U.S. judges to decide for themselves when and to what extent they will refer to non-U.S. law. Or, finally, consider Ernest Young’s formulation: “importing foreign law into the domestic legal system through constitutional interpretation circumvents the institutional mechanisms by which the political branches ordinarily control the interaction between the domestic and the foreign.”<sup>43</sup> Again, the relevant institutional mechanisms are those of the appointment process, unless one places unwarranted weight on the term “ordinary” in Professor Young’s formulation.<sup>44</sup>

## II. “IRRELEVANCE” CRITICISMS

If the theory-based criticisms are concerned that Justices are taking non-U.S. law too seriously, another criticism—oddly, sometimes deployed by the same critics—seems to be that the Justices do not take non-U.S. law seriously enough. According to this criticism, the references to non-U.S. law are “decorations” or “ornamentation.”<sup>45</sup> They do no analytic work. Of

---

41. *See id.*

42. Alford, *supra* note 15, at 709–10.

43. Young, *supra* note 34, at 163.

44. I note that there are two areas in which there might properly be concern over the reduction of domestic sovereignty: decisions by arbitral tribunals under the North American Free Trade Agreement, and, somewhat less so, decisions by the Appellate Body of the World Trade Organization. Even with respect to those institutions, I think the “sovereignty” criticisms are overstated. *See* Tushnet, *supra* note 39, at 251–57. But, in any event, no Supreme Court cases involve those institutions, and so I do not discuss them here except to note that critics of the Supreme Court’s reference to non-U.S. law sometimes confusingly throw in discussions of those tribunals. *See, e.g.,* Anderson, *supra* note 8, at 47–49; Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 2010–12 (2004).

45. Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 TEX. INT’L L.J. 353, 363 (2004) (“The citation is mere ornamentation . . .”); Posner, *No Thanks*, *supra* note 4, at 42 (describing reference to non-U.S. law as “fig-leaving”); *see* Posner, *Political Court*, *supra* note 4, at 88 (“Our Justices cite foreign decisions . . . [because] they are timid about speaking in their own voices lest the mask slip and legal justice be revealed as personal or political justice.”); Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 137–38 (2005) (“Perhaps judges are embarrassed to make moral pronouncements in their own voice, even un-

course, if that is so, one wonders why anyone would bother to criticize the references.<sup>46</sup> Judge Posner suggests one reason: the citations are not really mere decorations, but reflect a sort of intellectual laziness, a refusal to accept responsibility for making one's own decision.<sup>47</sup>

Judge Posner has also provided the response to this concern. Considered merely as decorations, references to non-U.S. law are indistinguishable from citations of law review articles,<sup>48</sup> or, indeed, citations of any material that the judge acknowledges is not binding. So, for example, Justice Scalia's reference to popular music<sup>49</sup> and Chief Justice Rehnquist's reference to poetry<sup>50</sup> are subject to the same criticism.<sup>51</sup> Whether a reference to non-U.S. law is more effective than a reference to popular music is a question of rhetoric, not of legal theory.<sup>52</sup>

The "mere decoration" criticism, then, is about a whole range of opinion-writing practices, not distinctively about references to non-U.S. law.<sup>53</sup> I personally do not find compelling

---

der the cover of the objectivity of natural law. . . . Reference to official judgments, whether local or foreign, helps rescue judges from a feeling of intellectual nakedness.").

46. For intellectual reasons, that is; people might bother because of xenophobia.

47. See Posner, *No Thanks*, *supra* note 4, at 42 ("Judges . . . are timid about speaking in their own voices lest they make legal justice seem too personal and discontinuous.").

48. Cf. Justice Ruth Bader Ginsburg, Comments at the University of Hawaii Law Review Symposium: To What Extent Should the Interpretation and Application of Provisions of the U.S. Constitution Be Informed by Rulings of Foreign and International Tribunals, in 26 U. HAW. L. REV. 335, 335 (2004) ("In one sense, we use foreign decisions . . . as an ornament . . . the way a law professor's commentary is.").

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

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

51. Calling something a decoration suggests that the critic is relying on some account of good literary style. And, perhaps, there is some such account in which references to non-U.S. law are bad decorations while references to popular music and poetry are good decorations. Once again, though, the criticism of the references to non-U.S. law are parasitic upon some other—here, unexpressed—theory.

52. Answering the question requires attentiveness to the fact that opinions have various audiences, and that one audience may admire a reference that another audience derides.

53. Another concern might be that references to non-U.S. law either are irrelevant, in which case they should be treated as mere decoration, or make some marginal contribution to the result, in which case the references carry



Judge Posner's suggestion that decorative citations are efforts to deny responsibility for exercising lawmaking authority. Even if he is correct, making references to non-U.S. law the focal point for this much broader concern seems strikingly misplaced. A campaign to reform citation practices ought to start elsewhere, because the campaign is unlikely to move beyond citations to non-U.S. law if such citations are its first target.<sup>54</sup>

### III. EXPRESSIVIST CRITICISMS

A tradition going back to Montesquieu treats the domestic law of each nation as uniquely the product of, and suitable to, the history and conditions of that nation.<sup>55</sup> A nation's law, that is, expresses something distinctive about that nation alone. As Sanford Levinson puts it, determining what a nation's law is might involve "trying to figure out what constitutes a particular society's way of expressing values in the world."<sup>56</sup> On this view, there could be something odd about incorporating the law of another nation into one's own law. Expressivist views of domestic law form the basis for another criticism of references to non-U.S. law in constitutional interpretation.

#### A. AMERICAN EXCEPTIONALISM VERSUS ENGAGEMENT WITH THE WORLD

One—but only one—understanding of the United States emphasizes American exceptionalism. In Levinson's terms, the United States has "a distinctly different political tradition" even from that of Europe.<sup>57</sup> He uses the example of controversies over the wearing of head scarves in school. French law em-

---

some weight, although not as precedent. Judges who refer to non-U.S. law fail to indicate into which category particular references fall, and thereby obscure the real sources of their decisions. In response, I suggest that identifying the category is not at all difficult in those few cases that make controversial references to non-U.S. law.

54. This observation is inapposite to Judge Posner, who is about as austere in his citation practices as any prominent modern judge has ever been.

55. See 1 *BARON DE MONTESQUIEU, THE SPIRIT OF LAWS* 6 (Thomas Nugent trans., rev. ed., New York, The Colonial Press 1899) (1751) ("[T]he government most conformable to nature is that which best agrees with the humor and disposition of the people in whose favor it is established.").

56. Levinson, *supra* note 45, at 363; see also Waldron, *supra* note 45, at 139 ("Some have speculated that law is essentially relative to local conditions . . . . Others have suggested that law is essentially relative to the peculiarities of local customs.").

57. Levinson, *supra* note 45, at 362.

bodies a nonestablishment principle that its political leaders have taken to require the elimination of symbols, including head scarves that conspicuously manifest a religious affiliation.<sup>58</sup> Levinson suggests that we in the United States should be skeptical of the claim that the French version of nonestablishment is at all relevant to the U.S. nonestablishment principle, because of our different traditions.<sup>59</sup> Similarly, Jed Rubenfeld writes, "In American constitutionalism, the U.S. Constitution is supposed to reflect our own fundamental legal and political commitments . . . . It is the self-giveness of the Constitution . . . that gives it authority as law."<sup>60</sup>

All this may be true enough, but the real question is, "what *are* the fundamental commitments we have given to ourselves in the Constitution?" That is a historical and empirical question, not a conceptual one. Those who believe that references to non-U.S. law are appropriate in constitutional interpretation could respond to these expressivist criticisms by contending, and not unreasonably, that such references are consistent with the vision the United States has of itself.

There is indeed one vision of the United States according to which our constitutive commitments are unique in the world. But that is only *one* vision of the United States. Another, at least equally important in U.S. history and to our self-understanding, is captured in several phrases. John Winthrop<sup>61</sup>

---

58. Law No. 2004-228 of Mar. 15, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 17, 2004, p. 5190, *available at* <http://www.legifrance.gouv.fr/WAspad/RechercheSimpleTexte.jsp> (search "Numero du texte" for "2004-228"; then follow "LOI n° 2004-228 du 15 mars 2004 Texte d'origine" hyperlink).

59. Levinson, *supra* note 45, at 362.

60. Rubenfeld, *supra* note 44, at 2006. Given the prominence this article has in the critical literature, I must note that Rubenfeld's article contains numerous errors or gross oversimplifications, some of which go to the arguments relevant in the present context. Among other things, he asserts that the "European view" of human rights takes them to be "uniform throughout the world." *Id.* at 2004. This overlooks the "margin of appreciation" doctrine, which allows for variation in human rights even within Europe. *See, e.g.,* Handyside v. United Kingdom, 1 Eur. Ct. H.R. 737, 753-54 (1976). Rubenfeld also writes that "European constitutionalism . . . [has broken] radically from its Kelsenian roots . . . [but] has not yet fully confronted the significance of this departure," Rubenfeld, *supra* note 44, at 1996, without citation to relevant European sources.

61. John Winthrop, A Modell of Christian Charity, in MASS. HISTORICAL SOC'Y, 2 WINTHROP PAPERS (BOSTON, 1929-47), *reprinted in* DARRETT B. RUTMAN, JOHN WINTHROP'S DECISION FOR AMERICA: 1629, at 94, 100 (Harold M. Hyman ed., 1975) ("wee shall be as a Citty upon a Hill, the eies of all people

and, several hundred years later, Ronald Reagan,<sup>62</sup> described us as a “city upon a hill.” Abraham Lincoln called the United States the “last best, hope of earth.”<sup>63</sup> And, in what is coming to be the most common quotation used in support of the practice of referring to non-U.S. law, the signers of the Declaration of Independence asserted that “a decent respect to the opinions of mankind require[d]” them to explain their reasons for rebellion.<sup>64</sup>

Each of these quotations captures something about the U.S. self-understanding that the American exceptionalist vision does not. Of course, each takes the form of asserting that our behavior will be a model for others, and not—directly—that what others do matters to us.<sup>65</sup> And yet, the quotations express a view of the United States as *engaged* with the world. Merely broadcasting our own positions might not count as the kind of engagement that would allow the United States to serve as a “beacon,” in President Reagan’s formulation, for others.<sup>66</sup>

---

are upon us”).

62. Farewell Address to the Nation, 2 PUB. PAPERS 1718, 1722 (Jan. 11, 1989) (“The past few days when I’ve been at that window upstairs, I’ve thought a bit of the ‘shining city upon a hill’ . . . And how stands the city on this winter night? . . . [S]he’s still a beacon, still a magnet for all who must have freedom, for all the pilgrims from all the lost places who are hurtling through the darkness, toward home.”).

63. Abraham Lincoln, Annual Message to Congress (Dec. 1, 1862), in 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN 518, 537 (Roy P. Basler ed., 1953).

64. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

65. For a discussion of this point in connection with the Declaration of Independence, see Eugene Kontorovich, *Disrespecting the “Opinions of Mankind”*: *International Law in Constitutional Interpretation*, 8 GREEN BAG 2D 261 (2005). See also Anderson, *supra* note 8, at 38 (pointing out that the “decent respect” phrase refers to the need to explain rebellion “in terms that the rest of mankind might understand”). Kontorovich offers a number of entirely plausible prudential reasons for the signers’ interest in explaining themselves to other nations, but I believe he fails to provide an adequate account of why they thought they were “required” to do so.

66. A stronger version of the argument about the kind of engagement entailed by the “decent respect” phrase could be based on the philosophical psychology of the Scottish Enlightenment, which modern scholars have argued was the conceptual underpinning of the Declaration as a whole. See, e.g., GARRY WILLS, *INVENTING AMERICA* 236–38, 316–18 (1978). So, for example, coming up with “terms that the rest of mankind might understand,” Anderson, *supra* note 8, at 38, might require a reciprocal engagement that references to non-U.S. law in constitutional interpretation might exemplify. I understand that this argument is seriously underdeveloped, and hope to expand upon it in another essay.

Add some prudential considerations to the general vision of the United States as engaged with the world, and references to non-U.S. law in constitutional interpretation become an even more evident technique of identifying what our self-given constitution (and Constitution) is. Perhaps merely explaining ourselves might have been enough in 1776 or 1862. But today, others will not listen unless we display some reciprocity.<sup>67</sup> To influence others, as this vision of our national self-constitution would have us do, we now must listen to them. Or, at least, so might some think. The expressivist criticism of references to non-U.S. law overlooks this dimension of our national self-understanding.

## B. OTHER EXPRESSIVIST CONCERNS

Some versions of expressivist criticisms are narrower, others broader, than the central expressivist criticism I have discussed. A narrower criticism is that references to non-U.S. law in cases applying human rights norms to state governments fail to take account of the distinctively American version of federalism. But, as with originalist criticisms, this one is badly framed as a criticism of references to non-U.S. law in such cases. The federalism problem, if it exists, arises from the incorporation of the Bill of Rights into the Fourteenth Amendment. That is, incorporation is itself insensitive to federalism.<sup>68</sup>

Consider in this context differences between two types of challenge to capital punishment. First, the broad-scale attack: at least as of today, the Supreme Court holds that the Eighth Amendment—and therefore the Fourteenth Amendment—does not prohibit governments from imposing capital punishment in appropriate cases.<sup>69</sup> One reason for that holding is that, today, normative disagreement among the people of the United States, expressed in differences in state laws authorizing or failing to authorize capital punishment, requires that some locations be allowed to have capital punishment. The interpreta-

---

67. Perhaps the anxiety generated by this implicit comment on the changed position of the United States as a moral force in the world accounts for some of the intense opposition to non-U.S. law references in U.S. decisions.

68. Incorporation is insensitive to federalism except to the extent that one interprets specific provisions in the Bill of Rights so as to take local variation into account.

69. I put aside the technical point that the Fourteenth Amendment might contain specific prohibitions on the administration of capital punishment that are independent of those contained in the Eighth Amendment.

tion of the Eighth Amendment, that is, *derives from* aspects of American federalism. Reference to non-U.S. law in broad-scale attacks on the death penalty would be inappropriate as long as federalism is thought relevant to interpreting the Eighth and Fourteenth Amendments. Second, attacks on particular aspects of death penalty administration: by giving weight to antideath penalty trends within the United States, decisions like *Atkins* and *Roper* explicitly assert that normative variation within the United States is *not* relevant to the constitutional questions presented in those cases.<sup>70</sup> And precisely for that reason, the expressivist concern about federalism is irrelevant in those cases.

Jot-for-jot incorporation—that is, the rule that normative variation among the states is not relevant to interpreting the provisions of the Bill of Rights—might be a bad idea,<sup>71</sup> but it expresses a vision of the United States as a single entity for certain human rights purposes. Given that vision, the observation that references to non-U.S. law are insensitive to federalism is inapposite.

The broadest expressivist criticism of reference to non-U.S. law in constitutional interpretation takes the strongly relativist position that justice itself is context-specific.<sup>72</sup> As Levinson points out, this is a surprising stance for conservatives to take.<sup>73</sup> Whatever one thinks their views are,<sup>74</sup> the critics have provided no reason to believe that those who refer to non-U.S. law are relativists—indeed, one would think that the inference to be drawn from their practice is precisely the opposite. And, obviously, once again we have a criticism whose validity depends entirely on the validity of another and plainly contestable position, here relativism. If relativism is correct, the rela-

---

70. See *Roper v. Simmons*, 543 U.S. 551, 565–66, (2005); *Atkins v. Virginia*, 536 U.S. 304, 315–17 (2002).

71. See *Duncan v. Louisiana*, 391 U.S. 145, 181 (1968) (Harlan, J., dissenting) (criticizing “jot-for-jot” incorporation).

72. See Levinson, *supra* note 45, at 361. Levinson asserts that “what distinguishes Albanians from Zimbabweans . . . include[s] quite different conceptions of justice . . . [I]t is indeed impossible to engage in the truly impersonal assessment of one or another aspect of the culture,” including its conception of justice. *Id.*

73. See *id.* at 361–62.

74. Recall my discussion of the “politically selective” criticism. See *supra* notes 23–29 and accompanying text. Observing an apparent tension between a criticism and a belief imputed to the critics does not in itself demonstrate the invalidity of the criticism, but raises a suspicion of sophistry or hypocrisy.

tivism-based criticism of references to non-U.S. law is correct as well—but if not, it fails.

#### IV. QUALITY-CONTROL CRITICISMS

The most cogent criticism of references to non-U.S. law in constitutional interpretation is surely that such references are likely to be wrong. We have to begin with what is basically a pragmatic defense of such references. Those who refer to non-U.S. law think that looking elsewhere provides information that might be helpful in addressing domestic interpretive questions. This is because judges in other nations are confronting the same, or at least quite similar, questions although the constitutional language they are interpreting and the history from which that language emerged are different from the language and history of the U.S. Constitution. We can learn something, proponents of such references believe, from seeing how other responsible people have addressed problems that are the same as, or at least quite similar to, the ones we face. And, after all, how can it be a bad thing to know more about how others have dealt with similar problems? As Professor Anderson puts it, as a preface to his criticism of the point, “Who wants to say that ignorance is the best policy . . . ?”<sup>75</sup>

Critics have a simple answer to that question. References to non-U.S. law are likely to be misleading when U.S. judges mistakenly think that they are dealing with the same questions as are non-U.S. judges. It is not merely that constitutional language differs. More important, as Judge Posner puts it, “foreign decisions emerge from complex social, political, cultural, and historical backgrounds of which Supreme Court Justices, like other American judges and lawyers, are largely ignorant.”<sup>76</sup>

The scope of the problem is illustrated by one prominent reference to non-U.S. law, particularly because Justice Breyer

---

75. Anderson, *supra* note 8, at 39. He continues,

Surely one does not want to tell a judge to increase his or her ignorance of how things are done in other places. And if that position is rejected . . . , then it would be disingenuous for a judge not to acknowledge the source of his or her knowledge, even if it just happened to be an opinion in a case from the constitutional court of some other country.

*Id.*

76. Posner, *Political Court*, *supra* note 4, at 86; see also Anderson, *supra* note 8, at 46 (“The effect [of citing non-U.S. law] is to deracinate the judicial texts of other legal systems, to strip them out of the particular social settings that animate them . . .”).

is the culprit. In *Printz v. United States*, he supported his view that national statutes requiring state executive officials to enforce national law were not inconsistent with the basic values of federalism by pointing to Germany's federalism.<sup>77</sup> There, he correctly observed, national law is essentially *always* enforced by state executive officials. The German experience, Justice Breyer wrote, might "cast an empirical light on the consequences of different solutions to a common legal problem—in this case the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent governmental entity."<sup>78</sup> He acknowledged that "there may be relevant political and structural differences between their systems and our own," as indeed there are.<sup>79</sup> As Daniel Halberstam has shown, the German subnational units have a much more substantial role in enacting German national legislation than do the states in the United States.<sup>80</sup> This institutional difference certainly has some bearing on the "common legal problem" to which Justice Breyer referred—to the point where the "empirical light" cast on the problem is quite dim. Or, put another way, the institutional differences are so great that what Justice Breyer asserted was a "common legal problem" was not in fact a single problem faced by two systems, but two distinct problems.

Another example is provided by the regulation of hate speech. Advocates of the position that such regulation should not be held to violate the First Amendment point to experiences in Canada and Great Britain, where the regulation of hate speech has not led to comprehensive speech-suppression.<sup>81</sup> But, as I have argued elsewhere, this overlooks the important institutional differences between the United States and those nations.<sup>82</sup> Far more prosecutors would be authorized to institute

---

77. 521 U.S. 898, 976–78 (1997) (Breyer, J., dissenting).

78. *Id.* at 977.

79. *Id.*

80. Daniel Halberstam, *Comparative Federalism and the Issue of Com-mandeering*, in *THE FEDERAL VISION* 213, 235–38 (Kalypso Nicolaidis & Robert Howse eds., 2001).

81. See, e.g., Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2341–48 (1989) (describing the development of international human rights law in connection with hate speech).

82. Mark Tushnet, *Interpreting Constitutions Comparatively: Some Cautionary Notes, with Reference to Affirmative Action*, 36 CONN. L. REV. 649, 650–52 (2004).

hate-speech prosecutions in the United States than in Canada and Great Britain, which means that the risks to free expression would be greater in the United States than has been the case in those nations.

Mistakes, one might think, are obviously bad. Yet, one can imagine circumstances in which a mistake about non-U.S. law would be harmless. Suppose a judge, reading some non-U.S. materials, finds in them—or believes she finds in them—an interesting idea. The judge then develops a domestic rule of law provoked by her reflections on the idea she found elsewhere. So, for example, the judge might notice that various European courts and legal theorists have referred to the regulation of “quangos,” which, the judge thinks, are roughly similar to public agencies controlled by politically-appointed boards but responsive to an important degree to constituencies outside the government.<sup>83</sup> The judge thinks that the idea of the quango illuminates some important First Amendment problems presented by actions of public broadcasting systems or arts agencies, and refers to European sources when explaining why her First Amendment doctrine is a sensible one. Here the judge could be completely mistaken about European law regarding quangos, her references badly askew, and yet the law she develops might indeed be quite good.<sup>84</sup>

In this example, the judge is referring to non-U.S. law as a source for her thinking. That is not how Justice Breyer referred to German law, and the difference is important. Justice Breyer argued that experience under German law showed that certain ways of organizing federal governments worked well. Getting the law right matters when the judge refers to non-U.S. law to identify the consequences of alternative rules.

Of course, proponents of these references do not defend using them badly or ignorantly. Perhaps ignorance could be rectified by educating judges through formal programs<sup>85</sup> and through presentation of appropriate material in briefs.<sup>86</sup> Yet,

---

83. I draw the example from Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1257–64 (1999).

84. I am grateful to Suzanne Stone for pointing out this possibility.

85. Since 1996, the Yale Law School has hosted a Global Constitutionalism Seminar, which has brought together constitutional court judges from around the world for programs of mutual education. See *YLS Hosts Global Constitutionalism Seminar*, YALE L. REP., Winter 2004, at 4–6, available at [http://www.law.yale.edu/outside/pdf/Public\\_Affairs/NiB.pdf](http://www.law.yale.edu/outside/pdf/Public_Affairs/NiB.pdf).

86. Cf. Young, *supra* note 34, at 166 (“[N]either advocates nor judges have yet invested the resources necessary to bring comparative analysis up to the



the marginal improvement in decision making that comes from referring to non-U.S. law might not be great enough to justify the cost of these educational efforts. The fact that Justice Breyer, a sophisticated proponent of reference to non-U.S. law, made a rather large mistake suggests that the educational task is quite substantial. We might be better off discouraging judges from referring to non-U.S. law, thereby saving the cost of the educational efforts and losing only the possibility of small and occasional improvements in the quality of constitutional interpretation. Quality-control efforts are costly, and we ought to be sure that we are getting real improvements in overall output when we put another piece of decision-making machinery to work.<sup>87</sup>

Those who defend the practice of referring to non-U.S. law do have one reasonable response to *this* version of the quality-control objection: the quality-control problem associated with references to non-U.S. law is neither distinctive to such references, nor, relatively speaking, terribly large. Nobody who knows anything about pension law thinks that Supreme Court Justices do a good job interpreting the Employee Retirement Income Security Act,<sup>88</sup> but we let them do it anyway, and hope that they can be educated to the point where they do the job acceptably. The example is not quite apt, because the Justices *must* interpret that Act but need not refer to non-U.S. law. So, consider some other optional interpretive methods. First, the role of neoclassical economics in antitrust law: judges have

---

standards of rigor that we demand of arguments grounded in domestic law.” (emphasis added).

87. For a cautious judgment on what the cost-benefit analysis might yield, see *id.* at 166–67. The costs may take the form of opportunity costs. Consider an attorney who must submit a brief limited to fifty pages. Discussion of non-U.S. law will displace *something*, and it may be that the lost material would have contributed more to the judge’s deliberation than the material on non-U.S. law. Yet, even here the costs might be self-limiting: the attorney should be able to make the judgment about how to allocate space in the brief and conclude that, even though judges seem to like material on non-U.S. law, her client’s interests would be better served by saving the space for discussion of something else. Additionally, coordination with groups filing amicus curiae briefs might further reduce the opportunity costs.

88. The statute is found at 29 U.S.C. §§ 1001–1467 (2000). For a reference to critical commentary on the Court’s performance, see John H. Langbein, *What ERISA Means by “Equitable”*: *The Supreme Court’s Trail of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317 (2003). Professor Langbein observes that these three Supreme Court ERISA cases “have been greeted with despair in the scholarly and practitioner literature,” and provides references to that literature. *Id.* at 1320 & n.15.

gone to great lengths to learn enough to be even marginally literate in economics, but few scholars think it inappropriate for judges who have just learned a little neoclassical economics to use that knowledge in antitrust cases. Second, consider the proposition, common to “pragmatist” judges, that one important component of the choice between alternative legal rules is an assessment of the likely consequences of the alternatives. Serious social scientists know that determining a legal rule’s effects is extremely difficult, and comparing the effects of alternatives harder still.<sup>89</sup> These difficulties, though, have not kept judges from treating possible effects as relevant to their job. Finally, it is commonplace to observe that the Court’s originalist interpretations quite often make poor historical essays; yet, again, we think that originalist interpretation is well within bounds.<sup>90</sup> It does not seem to me that judges who refer to non-U.S. law are likely to make more systematic or significant errors than judges who use neoclassical economics or assess consequences.<sup>91</sup>

There is, of course, a learning curve with respect to any form of knowledge, from microeconomics to history to non-U.S. law. In my opinion the curve is not that steep, but even if it is, the scholarly infrastructure is developing to enable judges to learn about non-U.S. law and its uses, just as they have learned microeconomics.

Counseling judges to try to avoid making mistakes does not, in principle, challenge the practice of referring to non-U.S. law. A stronger version of the concern for error, closely related to the “relativism” criticism, does. In this version, the critics

---

89. For criticisms of Judge Posner’s pragmatism, in part on the ground that its pragmatic embrace of empiricism is not empirical enough, see Jeremy Waldron, *Ego-Bloated Hovel*, 94 NW. U. L. REV. 597 (2000) (reviewing RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999)); John Mikhail, Book Note, *Law, Science, and Morality: A Review of Richard Posner’s The Problematics of Moral and Legal Theory*, 54 STAN. L. REV. 1057 (2002).

90. Cf. Young, *supra* note 34, at 166 (“[T]hese competence concerns parallel arguments against the use of history in originalist constitutional interpretation.”).

91. Perhaps the concern is that we should do what we can to thwart the introduction of a new source of sloppiness even though we have come to live with mistakes and sloppiness in using neoclassical economics and the like. This is a strategic question about what can be done to improve the quality of judicial decision making, and in my judgment, targeting references to non-U.S. law is less likely to achieve those improvements than targeting other sources of sloppiness and error. Perhaps, though, this is no more than a question about the allocation of tasks among the Court’s critics. Some will go after references to non-U.S. law, others the use of neoclassical economics.

question whether there really are “common legal problems” at all. Here it is helpful to distinguish between two kinds of references. One, exemplified by Justice Breyer’s reference to German federalism, implicates institutional arrangements; the other, exemplified by the critics’ view of *Atkins* and *Roper*, implicates constitutional provisions attempting to implement basic human rights. Each type of reference presents different concerns about the commonality of legal problems between countries.

Professor Jackson suggests—as does Justice Breyer’s error—that references to non-U.S. law may be particularly difficult when the task is to interpret constitutional provisions dealing with institutional arrangements.<sup>92</sup> Such provisions “are often peculiarly the product of political compromise in historically situated moments, generally designed as a practical rather than a principled accommodation of competing interests.”<sup>93</sup> Institutional arrangements tend to be tightly interrelated, sometimes in nonobvious ways. Federalism issues will be different in nations with separation-of-powers systems and nations with parliamentary systems, for example; questions of executive authority will be different in systems with proportional representation and those where seats in the legislature go to winners in local districts.<sup>94</sup>

For many, the case seems to be different with respect to questions of human rights.<sup>95</sup> As they see it, such questions in-

---

92. Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 272–73 (2001).

93. *Id.* at 273.

94. *Id.* (“[N]ot only are federal systems agreed to as a compromise, but the compromise typically constitutes an interrelated ‘package’ of arrangements.”). Professor Jackson also mentions differences in constitutional language:

That the Supreme Court of Canada has construed the Canadian national government’s power over “trade or commerce” quite narrowly (for example, not to extend to labeling requirements for products in a single industry) may have little bearing on the proper scope of the United States Congress’s power to regulate “interstate and foreign commerce,” in part because interpretation of the Canadian “trade and commerce” power has been influenced by the enumerated powers of the Canadian provinces over property and civil rights, an enumeration absent from the United States Constitution.

*Id.* at 272–73 (citation omitted). I would not place much emphasis on this point, because constitutional language will almost always differ from one constitution to another.

95. *See, e.g., id.* at 272 (“[Q]uestions of freedom of speech, freedom from torture, or freedom of religion [are] questions involving individual rights that widely are viewed as having some degree of universal character.”).

deed raise issues “common” to all legal systems worthy of being called democratic. And, perhaps, courts in all such systems are striving to reach the ultimate goal of a single, universally correct definition of what freedom of speech and the like, means in particular circumstances—or, at least, a single, universally correct verbal formulation of the criteria for determining when freedom of speech has been violated.<sup>96</sup>

Here, I think the critics are right in principle, although wrong to think that Justices who have referred to non-U.S. law actually make such references on the premise that human rights are universal. Professor Alford notes the connection between the view that human rights are universal and the natural law tradition, which seems to be discredited as a theory of constitutional interpretation.<sup>97</sup> Or, in Professor Anderson’s terms,<sup>98</sup> it is unclear what we know about universal human rights when we learn that India treats affirmative action as no violation of human rights but actually an implementation of them;<sup>99</sup> or that international human rights documents treat hate speech, and not its regulation, as a violation of human rights.<sup>100</sup> One can believe that all courts are working toward universally applicable rules and remain baffled by the question, “Who is closer to the goal, they or we?”

And, finally, one can hold that belief and still think that *legal* problems operate on a different level, requiring the application of perhaps universal norms in particular situations by specific institutions. Identifying the universal norm may be less important than being sensitive to the particularities of the situation and the institutions, such that a judge would do better ignoring the findings of judges faced with different situations and institutions.

---

96. See, e.g., DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* 171–73 (2004) (arguing that all courts should, and many do, apply a test of proportionality to determine when legislation violates human rights).

97. Alford, *supra* note 15, at 659–73.

98. Anderson, *supra* note 8, at 41 (“[W]hat is the information that . . . is acquired in this process?”).

99. See Tushnet, *supra* note 82, at 655–56.

100. See International Covenant on Civil and Political Rights art. 20, ¶ 2, *opened for signature* Dec. 19, 1966, 6 I.L.M. 368 (“Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”); International Convention on the Elimination of All Forms of Racial Discrimination art. 4(a), *adopted* Dec. 21, 1965, 660 U.N.T.S. 212 (“States Parties . . . [s]hall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred . . .”).

Having said all this, it is important to emphasize that the actual practice that has generated discussion of references to non-U.S. law makes only the tiniest gestures toward the idea that non-U.S. judgments can help identify universal norms. *Atkins*<sup>101</sup> and *Roper*<sup>102</sup> refer to non-U.S. law to determine if the majority's judgment—that imposition of the death penalty in those cases is cruel and unusual—is inconsistent with views elsewhere. The primary reference to non-U.S. law in *Lawrence v. Texas*<sup>103</sup> was to refute the suggestion made by Chief Justice Burger that homosexual sodomy was universally condemned in the Western tradition, not to demonstrate that homosexual sodomy was (universally) regarded as falling outside the proper domain of government.

Critics do not seem to believe that judges making non-U.S. law references have a limited vision of the relevance of those references,<sup>104</sup> perhaps because they know that advocates outside the courts have more capacious projects in mind. Until we

101. *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

102. *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005).

103. Justice Kennedy wrote for the *Lawrence* majority:

Chief Justice Burger joined the opinion for the Court in *Bowers* and further explained his views as follows: “Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards.” . . .

....  
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. . . .

Of even more importance, almost five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to . . . today's case. . . . [T]he decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.

539 U.S. 558, 571–73 (2003) (citations omitted).

104. *Cf.* Anderson, *supra* note 8, at 41 (“It is hard to avoid the conclusion that the determination of other people—other places, other legal systems, other sovereign orders—that it is deeply and grotesquely wrong to impose a penalty of death speaks deeply to the urbane, cosmopolitan, civilized Justice Breyer.”). *But cf.* *Strickler v. Greene*, 527 U.S. 263, 265 (1999) (Breyer, J., joining the opinion of the Court affirming the denial of habeas corpus in a death penalty case); *Hopkins v. Reeves*, 524 U.S. 88, 90 (1998) (Breyer, J., joining the opinion of the Court reversing the grant of habeas corpus in a death penalty case); *Loving v. United States*, 517 U.S. 748, 750 (1996) (Breyer, J., joining the opinion of the Court affirming a conviction in a case challenging the constitutionality of the death penalty on separation-of-powers grounds).

have more evidence, though, I believe we should take the judges at their word. They have not—yet—said that the U.S. Constitution instantiates universal human rights, whose contents can be determined by examining the decisions of non-U.S. tribunals along with other sources.

### CONCLUSION

There are some problems with the way some Justices have referred to non-U.S. law, most of which could be dealt with through more careful attention. And, of course, there are ways of using non-U.S. law that would be quite problematic. But, in general, the criticisms of the Court's actual practice are greatly overstated. Political scientists, sociologists, and historians are more likely to shed light on the controversy over the practice than are legal scholars.