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By Kenneth Anderson

Justice Anthony Kennedy's majority opinion in *Roper v. Simmons*,[1] which endorsed the use of foreign and international law in U.S. constitutional adjudication, has at least the virtue of putting everyone's cards on the table. Until that decision was handed down (on March 1, 2005), it remained possible to view the appearance of foreign law in constitutional decisions as nothing more than a minor hobbyhorse for Justice Stephen Breyer or Justice Kennedy — a merely rhetorical nod in the direction of the mostly Western European judges with whom they have become friends at international judicial conferences and other such venues over the years.

As for Justice Antonin Scalia's attacks on the use of foreign legal materials, well, they were withering and witty, as always, but surely a bit over the top? Judges, after all — even Justice Scalia — have been adorning their opinions with bits of poetry, Shakespeare, and the Bible for a very long time, so

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why not the occasional reference to opinions of the Supreme Court of Zimbabwe or the Privy Council or the European Court of Human Rights? What could possibly be the harm in it?

Justice Kennedy's *Roper* majority opinion puts paid to the conceit that this is all just a bit of fluff exaggerated into something sinister and conspiratorial by Federalist Society right-wing ideologues. *Roper* asserts far more, it turns out, than the prior use of foreign law in contemporary constitutional cases would have suggested.[2] It blesses in the contemporary era a new doctrine of constitutional adjudication, what has been called "constitutional comparativism," that is very far indeed from mere flirtation. It invites the deployment of a sweeping body of legal materials from outside U.S. domestic law into the process of interpreting the U.S. Constitution — and, moreover, invites it into American society's most difficult and contentious "values" questions.

The *Roper* opinion reassuringly holds that the "task of interpreting the Eighth Amendment [cruel and unusual punishment] remains our responsibility." It adds, however, that it does not "lessen our fidelity to the Constitution . . . to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our heritage of freedom." *Roper* then proceeds to deploy a startling range of international authorities that hitherto would have been thought not only irrelevant but affirmatively barred from U.S. constitutional adjudication. That the opinion overlays the groundwork for a globalizing Court with a series of pat phrases transparently aimed at soothing parochial American sensibilities — reassuring the populace that the Constitution remains "theirs" — does not lessen in the least the enormity of what the Court has done.

"International" or "universal"

Roper cites, for example, the United Nations Convention on the Rights of the Child. Indeed, the Court even notes in passing what might have been thought a fatal flaw, viz., that the United States has not ratified it. The Court prefers to treat this unratified convention as evidence of global — in the sense of *universal* — views on juvenile

[1] *Roper v. Simmons*, 125 S.Ct. 1183 (March 1, 2005).

[2] It is important to be clear that the controversy about foreign case law is specifically about the interpretation of the U.S. Constitution. All hands, including Justice Scalia, would readily acknowledge that the interpretation of statutes, conventions, international agreements, and so on frequently requires recourse to foreign and international law. U.S. statutes, for example, are often drafted with foreign and international law in mind. Moreover, the international law at issue is not that to which the United States has assented by ratifying a treaty, or customary international law acknowledged as such by the United States, but instead *unratified* international conventions and assertions of customary international law which the United States does *not* accept as custom. When this article refers to foreign law and international legal materials, this specific meaning is intended.

capital punishment to which the United States should, and the Court will ensure that it *does*, pay heed.

Such citation is problematic on a number of fronts. It is, moreover, emblematic of the several conceptual difficulties with the use of either foreign law or international law to which the United States has not assented and given an understanding of the nature and scope of its formal legal undertaking.[3] The Court's unstated assumption, for example, that the Children's Rights Convention's near-universal ratification means that it is actually accepted on its own terms by the world is simply false. Even at the formal legal level, the Court ignores how widely the Convention features sweeping reservations by individual countries: Saudi Arabia, for example, as with so many Muslim countries, has ratified, but with a formal reservation (surely not irrelevant to the Court's inquiry) that none of it has any application to the extent that it conflicts with shari'ah law.

As for compliance in fact — widespread adherence of the sort that would meaningfully reflect a consensus of opinion around the world — at generous best, we may say the Convention is essentially hortatory and honored in the breach by the nations of the world.[4] The Court is interested, of course, in one tiny part of the Convention, but the evidence proffered by the Court for its supposed universality obtains only in virtue of the Convention as a whole text, viz., the extent of the whole text's ratification. Widespread lack of compliance with large parts of the treaty undermines, therefore, the claim that it — or the specific rule concerning juvenile execution contained in it — is universal in the way that the Court asserts. The devil is in the details, in other words, and it is such empirical and formal legal details that elude the Court — or, more precisely, details which the Court elides in its scrubbing up of foreign and international law sources for the purposes for which it has preordained them.

A certain sleight-of-hand is involved in much discussion of the "universal" values the Court has grown fond of citing in the abstract. An unstated, unargued-for assumption in much of this rhetoric is that "global" and "international" are the same as "universal." It presumes, in other words, that if one's position can be described as "global" or "international" or

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[3]Starting with the issue of whether the international agreement in question even permits private claims by individuals to be heard with respect to it in federal court.

[4]The only two states that have not ratified are the United States and Somalia. The Convention is a pastiche of reasonably sensible provisions governing matters of obvious transborder significance, such as trafficking in children, on the one hand, and many more which aspire to regulate, as a matter of international law, the most intimate relations between parents and children by inserting the state between them, on the other. The treaty as a whole reflects a profoundly anti-parent, pro-state view of child-raising and has been widely criticized and, indeed, ridiculed for its many bizarre provisions. These include (among many examples) that the state shall use the "protection of the law" (as against parents) to ensure that "no child shall be subjected to arbitrary . . . interference with his or her privacy . . . or correspondence." International law prohibiting arbitrary parental interference in a child's letter-writing? This is the international agreement from which the Court draws, which such sententiousness, evidence of universal opinion regarding the juvenile death penalty? At the least, a Court honest about its deployment of sources would have found it necessary to square the Convention's supposedly universal views on juvenile capital punishment with its views on juvenile letter-writing.

"transnational" because it transcends mere geography and mere borders, it is "universal" in the moral sense of applicable to all, free of particular interests, free of prejudice and attachments, impartial and disinterested and hence suitable to judge as between others' particular interests.

But why assume that the views of those who live globally, internationally, or transnationally are indeed morally universal? Why assume that they have no particular interests and no partiality? Do they not have the particular, parochial, partial interests of elites who spiritually reside in the interstices among New York and London and Paris — and those, we might add, who judge in Washington but fete in Strasbourg? Is it not a category mistake at best and deliberate intellectual manipulation to the ends of power at worst? Why are universal values not equally well discovered by democratic majorities in particular societies, with all their openly acknowledged interests and partialities, as by transgeographic elites who refuse to acknowledge the fact that they, too, have interests and partiality, and indeed their own topology, by appealing to the authority of moral universalism? It is not hard to guess what Kant, who never went anywhere to speak of, would have thought of the conflation of "global" and "universal."

The *Roper* opinion further cites article 6(5) of the International Convention on Civil and Political Rights (ICCPR), which prohibits juvenile capital punishment. Merely in passing, however, does the Court trouble itself to note that the United States ratified the ICCPR with an express reservation concerning article 6(5). But perhaps most remarkable in this most remarkable opinion is that the Court nowhere cites a treaty or convention which the United States actually *has* ratified, assented to, and drawn into its domestic law without relevant reservation. Rather, it has chosen to cite treaties that the United States has quite deliberately refused to join or has joined only with reservations on the very point at issue. So much for the paradigmatic constitutional doctrine that binding the United States by treaty in the community of nations is a function belonging to the political branches of government. Indeed, the Court seems functionally to have treated all these unratified treaties and other materials as though its task were to pronounce on the content of customary international law (international law unwritten in treaties and yet considered binding on all states) and then require its application in the United States. The Court nowhere calls it customary law — because, one hopes the Court understands, it is *not* — but the process of reasoning toward a supposed consensus on the law's content feels (at least to this international lawyer) very much like it — provided one accepts, that is, a very contemporary, very expansive, and frankly dubious view of how customary law is discerned.

The *Roper* doctrine is thus the more startling because it is *not* principally about drawing foreign or international law as such into U.S. constitutional adjudication. It is not even about law as *law*. Instead, it is about drawing from such legal materials evidence as to foreign or international public opinion — more precisely, evidence about elite opinion in other parts of the

world, especially Western European elites whose views are more than likely to coincide with the *Roper* majority's own. *Roper* gathers up this body of foreign elite opinion, acknowledges it *as* opinion about values (rather than law as such), and blesses it as a source of decision-making by the Court. It is not (yet) binding precedent, to be sure, because it is not law as such, but it is not irrelevant either; nothing that a court need follow, because it is not law as such, but something a court, on no determinate basis, may choose to take into account. As Justice Scalia observes in dissent, the heart of the *Roper* doctrine is that "though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage."

"A decent respect"

Justice kennedy is not Justice Scalia's intellectual peer, and it is hard to extract much of a guiding theory — in the sense of knowing when such legal materials may be used and when they may not — from Justice Kennedy's unedifying admixture of piety, vacuity, earnestness, idealism, and platitude. Yet this is no mere trope of Justice Kennedy's. Fully six justices signed onto the *Roper* doctrine, including Justice Sandra Day O'Connor, who dissented from the dissenters specifically in order to approve the majority's use of foreign and international legal materials. However vaguely delimited in *Roper*, it is a doctrine with solid support on today's Court. What, then, of its justification (or not) as a constitutional doctrine?

Justification is, of course, a matter of legal and political theory: the question of how the use of these foreign and international legal materials can be squared, if at all, with broadly accepted theories of law and politics that purport to legitimize and justify the legal and political order. The "justification" inquiry has at least three relevant levels: philosophies of judging and the rhetoric of judging, constitutional interpretation, and the political theory of sovereignty. Of the three, most of the attention thus far has gone to the first, the question of squaring the practice with philosophies of judging, although attention is gradually shifting to the other two.

Prior to *Roper*, the principal decisional materials from which to form an idea of the current Court's view of foreign law in constitutional adjudication were a relatively small handful of cases, in which various foreign cases were cited.[5] Several were capital punishment cases (although the most famous instance of foreign case citation was found in Justice Kennedy's majority opinion in *Lawrence v. Texas*, which invalidated state laws against homosexual conduct).[6] Occasionally, justices — including O'Connor, Breyer, Ruth

[5]For example, *Printz v. United States*, 521 U.S. 898 (1997); *Atkins v. Virginia*, 536 U.S. 304 (2002); and *Foster v. Florida*, 537 U.S. 990 (2002).

[6]*Lawrence v. Texas*, 539 U.S. 558 (2003).

Bader Ginsburg, and Kennedy — have made favorable reference to the practice in public appearances, but often these were speeches before such bodies as the American Society of International Law, where a certain bowing to organizational and advocacy agendas would be expected but regarded as largely hortatory and not seriously jurisprudential.

None of these venues — cases or speeches — provides very much illumination on the practice itself, its legal justification, history, permissible extent, or limitations. Justice Breyer seemed to think it sufficient merely to remark, in his review of foreign court cases in *Knight v. Florida* (a capital punishment case), that the "willingness to consider foreign judicial views in comparable cases is not surprising in a Nation that from its birth has given a 'decent respect to the opinions of mankind'."[7]

We might ask whether this is so obvious. The reference to the Declaration of Independence's famous phrase is itself curious. Although the phrase has morphed into a cliché, offered in any and all circumstances in support of expansive views of the place of international law in U.S. law, its actual provenance is more limited. Jefferson was referring, after all, not to justification of the practices of a settled constitutional order of several centuries, but instead to a society that was about to undertake revolution, rebellion, sedition, treason, confiscation, secession, and war against its lawful sovereign. The moment indeed warranted an explanation for why all that was justified, in terms that the rest of mankind might understand. Nine generations later, Justice Breyer might more accurately have said that consideration of the opinions of mankind was appropriate *at*, not *from*, the moment of the nation's birth.

More than mere "information"

Justice Breyer's and his court colleagues' other opinions embracing the practice are similarly opaque as to justification. However, in January 2005 — not long before *Roper* was issued — Justices Breyer and Scalia held a "public conversation" at the Washington College of Law, American University, on exactly the question of the use of foreign law in U.S. constitutional adjudication.[8] One noteworthy aspect of the exchange was that both justices treated the essential question as being,

[7] *Knight v. Florida*, 528 U.S. 990 (1999) (mem.), at 997 (Breyer, J., dissenting from denial of certiorari).

[8] The event on January 13, 2005, moderated by Professor Norman Dorsen of New York University School of Law, was cosponsored by the U.S. Association of Constitutional Law, a scholarly comparative law society of which I am a board member. A full written transcript of the event can be found at the Washington College of Law website, www.wcl.american.edu. The discussion was informal and unscripted, and as such must not be unfairly overinterpreted by putting excessive weight upon extemporaneous, spoken turns of phrase. For that reason, I have here avoided quoting the justices directly and have instead paraphrased. Nonetheless, the event gave a remarkable window into the thinking of the two justices on this question.

first and foremost, the philosophy of judging — how to define and delimit the rhetoric of judging, in terms of sources, language, plasticity and permeability, rigidity and impenetrability. Some of these rhetorical issues meld into questions of constitutional interpretation, but even so, the focus was on the rhetorical task of what judges actually do. Neither justice showed any significant interest in raising the debate to the level of political theory and sovereignty.

Accordingly, rather than attacking the practice as inconsistent with the democratic sovereignty of the people of the United States, Justice Scalia criticized the practice for opening up the rhetoric of judging to a new kind of language, a vast body of sources that could, in his view, only lend themselves to allowing a judge to go wherever he or she wanted to go. He was very careful to make this criticism not only from the standpoint of his judicial philosophy of originalism — which would, by its nature, rule out nearly all foreign law but the special, historical English law relevant to the Constitution's founding — but also from the standpoint of a non-originalist. Even if you were not an originalist, he argued, even if you believed in an "evolving" or "living" Constitution, you still should be concerned about the unconstrained nature of the materials brought into play and the possibilities for unconstrained results. Adherents of the evolving Constitution, after all, generally want to see it as going *somewhere* — toward a substantive vision of progress, not simply wherever jurists will take it. And the effect of these materials is to de-constrain judges in their rhetoric and, eventually, in their judging. Judicial rhetoric matters.

Justice Breyer's response was, really, surprise that anyone should make a big deal out of this. Foreign case law is information like any other; judges take it in, and it informs them in the same way that reading books or attending academic lectures or anything else might. Judges, after all, read law review articles in order to be expert in their field, and yet, as Justice Breyer observed, no one elected the professors who wrote them. It would be downright perverse to say, no, judges should not be aware of any of the stuff that their counterparts do on similar issues in other countries. Who wants to say that ignorance is the best policy, for fear of — well, what? Contamination? 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 as absurd, 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. What in any of this is remotely objectionable?

Commentators have reinforced Justice Breyer's "no big deal" view with observations on how frequently the Supreme Court in the past has made reference to foreign law and international legal materials in constitutional adjudication — including some of the leading "values" cases; these include perhaps the lowest ebb of Court jurisprudence, the infamous *Dred Scott* slavery case, as well as *Reynolds* (upholding the outlawing of polygamy among

nineteenth-century Mormons). It might even be said, surveying the history of the Court's holdings, that controversial values cases seem affirmatively to attract citation of non-U.S. authorities because the Court sought rhetorical justification in what seemed at the time to be incontrovertible human truths present in all the world, or at least what the Court recognized as the civilized world.

It is not so clear what these historical arguments contribute to Justice Breyer's position. British law occupies a very special place with respect to the transition from the Colonies to the United States; there is no historically comparable body of law from any other source over which one could conceivably have the same argument. Put another way, in both citing early English law and objecting to the citation of other foreign law, Justice Scalia is not at all inconsistent. Moreover, the terms "international law" and "law of nations," and the range of subjects they cover, have shifted in sense so enormously over two centuries that it does not seem to mean much to say that the Court has long cited international law. One would have to show that the Court historically cited international law of a kind, say, purporting to cover such contemporary human rights concepts as a child's supposed right to keep his letter-writing private from his parents, and not merely international law as respecting prize courts.

More compelling is what we might call Justice Breyer's "anti-ignorance," "information" argument. If one takes his remarks at American University together with comments made in several speeches by other justices, one detects a certain bemusement, perhaps even concern and a touch of alarm, at the idea that a judge (especially in response to popular agitation) should be confined in his or her learning, reading, thinking, and acquisition of knowledge for fear of applying something that ought not to figure in a case. Hence Justice Breyer refers to "common" legal problems in which one jurisdiction might learn from another.

Yet this is too anodyne. Certain legal problems are "common" because they raise cross-border issues, such as settlement of water disputes or pollution between countries. One might also talk of "common" legal problems where the judiciary of one country might learn from the experience of another country's courts and their special techniques. France, for example, recently introduced a class action device, and it obviously and intelligently looked to comparative models.

Yet the most visible of the "common" legal problems Justice Breyer has in mind are very different. He seems to have in mind, at least to judge by the cases in which he has raised them, grand "values" questions. Capital punishment is evidently a concern, but there is no reason why the same concern should not apply to abortion, affirmative action, homosexual conduct, hate speech, religious accommodation, and so on. To be sure, other societies and other countries face at least some of these issues and work their way toward resolution. And of course one can acquire information about how they have dealt with those issues. But what, exactly,

has one acquired information about?

It is all very well to say that information is good, more information is better, and judges should be informed and should acknowledge the sources of their information. But what is the information that Justice Breyer says is acquired in this process? The fact that other countries have values issues in their legal and political systems and that sometimes they resolve them one way and sometimes another?

This is "information," yes. It is a fact, a datum, a bit of knowledge. But, frankly, so what? Knowing that other legal systems also express values, sometimes similar to and sometimes different from ours, does not seem to contribute very much to adjudication. Indeed, it has the suspicious sense of inviting us to confuse — really, to cover — an "ought" with an "is" — the "is" of informing us as to how, apparently as a merely factual matter, another legal system does things. But this can mean something as a matter of *judging* only if you say one of two additional things: either that we are compelled, as a matter of precedent, to replace our "ought" with their "ought" or, alternatively, that we *ought* to replace our "ought" with their "ought." The first of these alternatives is ruled out, thus far, by the *Roper* opinion, and the second requires some additional value of our own, which cannot be acquired merely by knowing what is done in some legal system somewhere else.

There is a third, much more radical possibility, of course. This is to look directly at the values underlying the reasons another legal system does things a different way (abolishing the death penalty, for example — or prohibiting abortion on the grounds that it is murder, to take an equally good example), not in order to understand it as "information" — facts and data — but instead simply to *see,* apperceiving, that their value is right and ours is wrong. 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. And it supplies the missing "values" predicate without which his "information" from other legal systems means nothing. Yet proceeding *judicially* on the basis of what amounts not to sense but to sensibility — not yet revealed, however, to the people through their legislatures — raises profoundly difficult issues of democracy and sovereignty.

Four theories

Constitutional comparativism, conceived merely as a means of rationally acquiring information in the way Justice Breyer has defended it — but really as something more passionately normative — would seem to carry severe difficulties for delineating the proper rhetorical function of a judge. At a minimum, it is insufficient to pass it off merely

as what judges do in their quotidian work or to say surely one cannot mean for judges to be affirmatively ignorant of the world around them. The process Justice Breyer defends would be better described as training judges' private sensibilities than as informing them of facts; but private sensibility in a functioning democracy is not fundamentally in the hands of judges to enforce (and despite the fact that a certain kind of private sensibility, as a matter of temperament, is also important in a judge). Put another way, seeing Justice Breyer's project of acquiring information as the education of sensibility sets up Justice Scalia's charge that the deployment of foreign and international legal materials in constitutional adjudication swings wide the door for the exercise of judges' purely private sensibilities asserted as public justice. It is, on this view, unconstrained and unconstrainable. And to that, the least convincing response put forth by Justice Breyer at the American University colloquium was to say merely that judges, if properly doing their jobs, would have the good sense to know when and to what extent it is appropriate to utilize such material, and in what matters. The merely ad hoc is not sufficient to effect a rescue.

Justice Scalia's critique is partly a matter of the philosophy and rhetoric of judging, but it also shades into the second issue in the justification of this practice: theories of legal and specifically constitutional interpretation. The appropriate level of constraint upon the private predilections of judges is, after all, a key element in any theory of legal interpretation, constitutional interpretation perhaps most of all. How does the use of foreign or international legal materials — constitutional comparativism — comport with leading contemporary theories of constitutional adjudication?[9]

The four leading theories today are originalism, natural law, majoritarianism, and pragmatism. None of these, points out Roger Alford, really gets those currently most enthusiastic about the practice — progressivist liberals of an internationalist and elitist bent — where they want to go with respect to substantive constitutional outcomes.

Originalism is plainly incompatible with the broad use of foreign and international legal materials because, as a theory historically grounded in a particular document as written by particular people at a particular time, it looks not at all at how other peoples in other countries today do things. Still less relevant to it is any sense of world public opinion, the opinion of the "international community," and so on.

Natural law, Alford observes, is "perhaps the most coherent rationale for recognizing the validity of comparative analysis in constitutional adjudication." Its appeals to "universalism and fundamentality" — language which figures, for example, in Justice O'Connor's dissent in *Roper* — are "often grounded in this theory. To contend that a right is inalienable or naturally endowed invites reference to comparative experiences to buttress or betray

[9]I draw here extensively on an important recent article, Roger P. Alford, "In Search of a Theory for Constitutional Comparativism," *UCLA Law Review* 52 (February 2005).

the universal appeal of the asserted right." Yet natural law is haunted by two "great ghosts" — indeterminacy and judicial hegemony — and has been largely discredited in contemporary jurisprudence as a theory of constitutional interpretation, as distinguished from a moral theory (although Alford traces its survival through modern cases, including *Lawrence)*.

Majoritarianism has two strands: a conservative version that seeks to limit the counter-majoritarian role of the Constitution and an activist version that seeks to "embody in the text of the Constitution current contemporary standards." Either version, however, is reflective of national democratic sovereignty, as the touchstone is when the majority should prevail and when it should not. Both versions firmly locate the discussion within the political community of the United States. In neither case is there much to be gained from comparativism.

The process Justice Breyer defends could be described as training judges' private sensibilities.

Of the live theories of constitutional interpretation, pragmatism offers the best fit with comparative constitutionalism. Essentially a rough and ready version of consequentialism, vaguely rooted in William James and Oliver Wendell Holmes ("the life of the law has not been logic: it has been experience"), and with an emphasis on empiricism and experience, it has been defined by a leading adherent as a "disposition to ground policy judgments on facts and consequences rather than on conceptualisms and generalities."[10] One of those empirical facts is globalization, and the most pronounced pragmatist justice on the Court, Justice Breyer, has thoroughly embraced the proposition that constitutional doctrine must, as Alford describes it, take account of "not just . . . our national experience, but also . . . global realities. Breyer's pragmatism has boldly invigorated transnational empiricism as a constitutional method."

I have already suggested that Breyer's apparent empiricism may conceal a host of ideological and moral premises that pragmatism, as an interpretive philosophy, may be inclined to deny. This is consistent with the fact that some leading pragmatists — Judge Richard Posner, for example — believe that it has gone beyond the conceptual limitations of conventional moral philosophy and is likewise beyond ideology — just the facts, ma'am.[11] The moral philosophers, unsurprisingly, do not agree. Nor do I; pragmatism seems to me riddled with values masquerading as facts. Nonetheless, as ideology, judicial pragmatism, coupled with a strong, highly particularized interpretation of the facts of globalization — viz., the view that globalization is destined to overcome borders, sovereignty, and the nation-state — naturally leads one to comparative constitutionalism. Thus, it is no surprise that

[10]Richard A. Posner, *Law, Pragmatism, and Democracy* (Harvard University Press, 2003), 76, 85.

[11]See, for example, Richard A. Posner, *Overcoming Law* (Harvard University Press, 1995).

in Justice Breyer's opinion writing, outside the constitutional arena as well as within, foreign law figures prominently.

Three cautions

THE MARRIAGE OF pragmatism and comparative constitutionalism may be a happy one for the couple, but enthusiasts of foreign law in constitutional cases might consider three cautions.

The first is that the marriage depends less on pragmatism than on a view about globalization. Judge Posner, for example (today's Ur-pragmatist), has expressed great caution about the enterprise and categorically rejects the central notion of Justice Breyer's comparativism, that the world is or is growing to be a unitary legal community. To cite "foreign law as authority," Posner says, "is to . . . suppose fantastically that the world's judges constitute a single, elite community of wisdom and conscience."[12] Justice Breyer, on the contrary, seems to believe that this and a great many other things about globalization are genuinely facts about the world. They appear to me, as to other skeptics, rather as articles of faith in a new world order, and one which the good judge is diligently (and, in fairness, in good faith) seeking to bring about — an elite participant in an enterprise as deeply ideological as any in politics or law. It is very easy to imagine a future historian of the Court writing of Justice Breyer not as the calmly dispassionate empiricist of globalization, but instead as the calmly dispassionate ideologue of a highly particular view of globalization and as purveyor of the agenda of a globalized Court to the Court itself.

The second caution goes directly to the agenda of those hoping to use comparative constitutionalism as a way of advancing a politically progressive agenda otherwise blocked by democratic majoritarianism. Much of the U.S. civil liberties tradition is an unabashed outlier with respect to the rest of the world — the Miranda warning and the exclusionary rule, Roe, and many other protections far less obvious. There is nothing in pragmatism that promises a particular vision of political progress, and, indeed, there is little if anything in pragmatism that argues for liberty or equality as such. Alford correctly says that pragmatism is

> hardly capable of sustaining the full freight of the comparativist agenda. Pragmatic decisions that enhance civil liberties are rare, and they frequently offer a rationale for curtailing rather than advancing constitutional rights. . . . Devoid of a *summum bonum*, pragmatism is not prescriptive to the degree that most comparativists would like it to be.

As liberals in recent years have grown tired of certain civil liberties — free

[12]See Richard A. Posner, "No Thanks, We Already Have Our Own Laws," *Legal Affairs* (July–August 2004).

speech, in particular, as it has proved to be useful in the hands of conservatives — the fact that pragmatism has little or no inclination to plow new grounds of principle may mean little to them. Likewise, they may not care that foreign law is frequently much less libertarian than American law if their fundamental substantive agenda is not liberty — save for abortion — but instead equality, interpreted as social democracy. One can spend much time drawing out of foreign and international legal materials a substantive economic agenda of social democracy.

Yet there is still a vast terrain of specifically American jurisprudence constraining the power of the state that progressivism might come to regret losing — battles over national identity cards, for example, or many elements of the Patriot Act(s) in which governmental power can be only too easily defended on the basis of Western European comparisons. Yet this is emphatically not merely a matter of "conservative" versus "liberal." Alford carefully examines the use of comparative constitutionalism not only in the great "values" issues, but in narrower constitutional matters such as law enforcement interrogation, working hours restrictions, and voting practices. He concludes that when

> comparative pragmatism is used in constitutional jurisprudence, it often is for the benefit of the government seeking to limit a right rather than the individual asserting the right. Pragmatic decisionmaking, with its focus on real-world consequences, may be used by the state to justify curtailments of a purported constitutional right. . . . Although the Court has suggested that comparative experiences may enhance individual rights, transnational empiricism has actually been invoked to curtail individual liberties and uphold the propriety of government action.

Third, as a judicial philosophy, pragmatism recognizes no principle that constrains what it undertakes and where it goes; it has, in Alford's phrase, no "unshakeable priors." Law simply *is* policy, a consequentialist calculus, and constraints are not deontological principles, but ultimately rules of thumb (even if very strong ones in the hands of a pragmatist like Judge Posner). This lack in principle of judicial constraint might not now bother political progressives, hoping as ever that the judiciary will give them the victories denied them by voters, but they may come to regret it. Foreign law, unless checked in some way, will be in the hands of conservative as well as liberal judges, and the ability to pick and choose from all the jurisdictions of the world, frequently much more statist in their jurisprudence than the U.S. — and this is true of "civilized" and "progressive" Western Europe — operates as a rhetorical "force multiplier" for a judge looking to buttress some position, any position, conservative or liberal. There is simply so much of it, and it is notably free of informal rules about "weight" or "predominant view" that obtain *within* any particular judicial system.

More abstractly, this foreign legal material is absorbed into the judging process as pure *text*, free of the "embeddedness" within our judicial system

that has created, in an organic, informal way, means and mechanisms to order and sort the myriad authorities available for citation by judges. And, just as important, it comes to our judicial system free of the *parallel* "embeddedness" of the foreign judicial system from which it came. The effect is to deracinate the judicial texts of other legal systems, to strip them out of the particular social settings that animate them for our own parochial purposes even as we grandly declare them to be "global" and "universal" purposes.

In so doing, however, we dishonor them — because we do not think their *particularity,* their "embeddedness," matters, while we certainly think ours does. We act like the dilettante religious seeker, borrowing a little bit from this religion and a little from that, a piece of pantheism here, nature worship there, Jesus hither, the Buddha thence, and then call the shallow mish-mash "global" and "universal" religion.

We all know the difference between citing a Supreme Court case and a quotation from Bartlett's.

We all know, in other words, within our informal ordering of authority, the difference between citing a Supreme Court case and a quotation from Bartlett's — but as between, for example, the German constitutional court and the high court of India? To go by the justices' citations, one wonders whether it is anything more than just whom they happened to meet over the years at international judicial conferences or, perhaps, the foreign languages they happen to read and speak. It is not irrelevant that Justice Breyer once cited the high court of Zimbabwe, apparently in order to give it more prestige, through association with the U.S. Supreme Court, in its own beleaguered political circumstances. Yet in the American University colloquium, he allowed that this was a mistake — presumably on the basis of finding out more about the facts of the regime and perhaps reflecting that, after all, a high court is still the high court *of a state*, in this case the vicious Mugabe dictatorship, even if that court seeks, within its practical bounds, to act well.

The point is that a judge can use *any* of this material how he or she will. Which is why Judge Posner, who even within a consequentialist ethic understands the need for constraint, has expressed grave concern at the invitation to judges to "troll deeply . . . in the world's *corpus juris*" to reach a politically preferred outcome.

Finally, it bears noting that the comparativism of *Roper*, like *Lawrence* — both authored by Justice Kennedy — is *not* founded on pragmatism. To the extent that the comparativism of either opinion has a coherent foundation, that foundation is natural law, not pragmatism. It is a confirmation of Justice Scalia's view that the leading opinions featuring comparative constitutionalism — those of Justice Breyer and Justice Kennedy — are animated by exactly the judicial philosophies which, with respect to the rhetoric of judging, are the least constrained. Either the citation of foreign and interna-

tional legal materials will come to nothing — it will mean nothing — or else, far more likely, it will open up whole new areas of rhetorical possibility. How can it be otherwise? There is nothing internal here, whether in principle or in practice, that acts to constrain. Progressivist, internationalist liberals should be very, very careful what they wish for in wishing open the door to foreign law in the hands of either natural law judges or judicial pragmatists.

Democratic sovereignty

In the American University debate, neither Justice Breyer nor Justice Scalia sought to engage the question of sovereignty, confining their analyses to philosophies of judging and constitutional interpretation. Nor, for that matter, have other justices commenting on comparative constitutionalism. This is unsurprising. Putting the matter as an issue of sovereignty raises the stakes enormously.

It may not be immediately obvious why, under *Roper*, sovereignty is an issue. If Lincoln famously defined sovereignty as a "political community, without a political superior," and if *Roper* agreed that foreign and international law is not binding precedent, then in what sense is sovereignty offended? How does this practice establish a political superior? The answer is that the introduction of these materials raises a serious question not about sovereignty as such, but about *democratic* sovereignty.

Justice Breyer and others on the Court may believe that American constitutionalism is simply part of a larger community of constitutionalism in the world and that the task of the globalized Court is to draw American constitutional norms into "ever closer union," as it were, with those of the rest of the world — "civilized" and "progressive" and "social democratic" Western Europe in particular. This is a demonstrably false — empirically false — understanding of the relationship between American democratic constitutionalism and that of much of the rest of the world, as Jed Rubenfeld has pointed out in several brilliant, blistering articles. The dominant international and, especially, European constitutional tradition contemplates "a constitutional order embodying universal principles that derive their authority from sources outside national democratic processes and that constrain national self-government."[13] Of course, as Rubenfeld points out, following the nationalist disasters of the interwar and Second World War period, much of Western Europe's constitutionalism was explicitly about reaching to any available source of constitutionalism *other* than national democratic self-government, which, equated with populism, was seen in no small part as a root evil of war and social strife. It is a tradition deeply fearful of democracy

[13]Jed Rubenfeld, "The Two World Orders," *Wilson Quarterly* (Autumn 2003); see also "Unilateralism and Constitutionalism," *New York University Law Review* 79:6 (December 2004)

and above all hostile to the concept of popular sovereignty. Indeed, in international constitutionalism, "interpretation by a body of international jurists is, in principle, not only satisfactory but *superior* to local interpretation, which invariably involves constitutional law in partisan and ideological political disputes."

The American constitutional tradition could not be more different. It regards, Rubenfeld says, a nation's constitution as made

> through that nation's democratic process, because the business of the constitution is to express the polity's most basic legal and political commitments. These commitments will include fundamental rights that majorities are not free to violate, but the countermajoritarian rights are not therefore counterdemocratic. Rather, they are democratic because they represent the nation's self-given law, enacted through a democratic constitutional politics. . . . American or democratic national constitutionalism . . . regards constitutional law as the embodiment of a particular nation's democratically self-given legal and political commitments. At any particular moment, these commitments operate as checks and constraints on national democratic will. But constitutional law is emphatically not antidemocratic. Rather, it aims at democracy over time.

It is, in other words, a vision of democratic constitutional self-government founded on democracy and popular sovereignty — everything that international constitutionalism and the European tradition most rejects. In the American tradition, the Constitution owes its legitimacy to the political community which enacted and sustains it, and not to anything exterior to it. Those who interpret its constitutional text owe their allegiance to that democratic, self-governing community. The inevitable result is that if there is a conflict between fidelity to the inside political community and the desires of outsiders — as there always will be — judges *cannot* satisfy the desires of outsiders, no matter how committed the judges also are to the undeniable virtues, in their place, of cosmopolitanism, urbanity, comity, globalism, universalism, and so on. Justice Kennedy sought, in *Roper*, to create a formulation in which that essential contradiction goes away by a little magic incantation, pretending that what fidelity to this political community requires of its constitutional interpreters and what outsiders desire of them will never be in irremediable conflict.[14]

The problem with comparative constitutionalism for democratic constitutional self-government, then, is the *provenance* of materials used in constitutional interpretation. Provenance matters in constitutional interpretation, at least if democracy and self-government are important, because though the content of the material may be, so to speak, intelligent or unintelligent, sen-

[14]See Eric D. Harpan, "The Sovereignty Implications of Two Recent Supreme Court Decisions," White Paper, Federalist Society, at www.fed-soc.org.

sible or stupid, prudent or imprudent, it is frankly secondary to the fact that it gives, even indirectly, the consent of the governed to its use and hence to the binding conclusions derived. Constitutional interpretation is not merely a matter of "best policy," considered in a vacuum, but "best policy" as it has arisen through democratic processes — which may or may not have been successful in reaching the best policy. Without fidelity to the principle of democratic, self-governing provenance over substantive content in the utilization of constitutional adjudicatory materials, a court becomes merely a purveyor of its own view of best policy. Yet this is not solely an issue of an unconstrained Court. It is, more importantly, 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. In this respect, citing a foreign court will *always* be different from citing Shakespeare, and it does not help to say, well, it is not binding precedent. It is the source that is the problem.

None of this is confined, of course, solely to Supreme Court cases. On the contrary, there are good reasons to believe that, given the open invitation of *Roper*, the practice will rapidly spread throughout the federal courts. Why shouldn't it? The use of these materials, *Roper* assures us, is after all a way of affirming fidelity to our constitutional traditions. The practice will now spread like an internet virus across the legal system, under pressure from both plaintiffs and defendants, liberals and conservatives, activists and those answering activists. Once one side has deployed them in litigation, the other side will have to respond to them and, crucially, find something to counterbalance them from the same *corpus juris* of foreign and international materials.

It will no longer do to say, in other words, *you* have cited a foreign case, but *I* have cited a U.S. domestic case, and that is self-evidently better authority. All that shows, should the judge be so inclined, is evidence of American parochialism. *Roper* tells U.S. judges, in effect, that they should strive not to be the Ugly Judicial American.

"Our" Court?

This essay has addressed the use of foreign and international legal materials in U.S. constitutional adjudication — comparative constitutionalism — almost entirely from the standpoint of the justification (or not) of the practice. It has addressed comparative constitutionalism as the question of whether or not it can be squared with existing theories of judging, legal interpretation, and political theory.

There is a second fundamental way to approach *Roper*, however. This is not as a matter of justification — not as a matter of judicial, legal, or politi-

cal theory — but instead as *sociology*, empirical sociology and social theory. What, in other words, is the causal account of how six members of the Supreme Court came to embrace the use of these materials, and what does that account say about the Court, its values, allegiances, and self-conception for the rest of society and, indeed, the rest of the world? Will it continue to think of itself as "our" Court? Or will it see itself instead as a court for the world?

This essay, like the rest of the commentary on comparative constitutionalism, has touched upon the sociology only in passing — only indirectly, in references to judges as part of a new global elite. Yet in the long run, sociology and social theory might turn out to be more significant than legal or political theory to an understanding of the *Roper* doctrine's origins in the Supreme Court, what the doctrine means for the Court's conception of *its* own place in the world — and what, in turn, the Court's new globalized sense of itself might mean for the democratic political community of the United States.