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ON LEARNING FROM OTHERS

Eric A. Posner
Cass R. Sunstein

RESPONSE

ON LEARNING FROM OTHERS

Eric A. Posner* and Cass R. Sunstein**

Some people think that the practices of many courts in many countries, or in many relevant countries, offer helpful guidance to courts in other countries, when those courts are approaching hard or novel questions.¹ In their view, the practices of many courts create a body of law in which other courts should be highly interested. The obvious question is: Why?

In *The Law of Other States*,² we attempt to make progress on this question. Our focus was not principally on the use of foreign precedents in the constitutional rulings of the U.S. Supreme Court. We meant to take that controversial and specialized problem as part of a much more general one, which involves courts in one jurisdiction using the decisions of courts in other jurisdictions. Within the United States, state courts frequently refer to the decisions of other state courts, even when construing state constitutions.³ The high courts of many nations refer to the decisions of high courts of other nations.⁴ The problem is that it is not self-evident that the practices of courts *A-Y* should be taken as valuable or informative for court *Z*. Exploration of that problem might also illuminate the question of whether and when a legislator or administrator in one state should attend to the decisions of legislators or administrators in other states.

Our principal submission was that the problem is helpfully approached through the lens of the Condorcet Jury Theorem (CJT). If many people have (independently) decided that *X* is true, or that *Y* is good, the CJT gives us reason, under identifiable conditions, to believe that *X* is true and that *Y* is

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1. See, e.g., Jeremy Waldron, *The Supreme Court, 2004 Term—Comment: Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129 (2005).

2. See Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131 (2006).

3. See *id.* at 133-35.

4. See *id.* at 135.

good. In our view, the CJT helps to formalize the intuition that if most courts have decided in favor of a certain result, other courts (and perhaps legislators and executive officials as well) should pay attention to their decisions. But if the CJT provides the strongest reason for the practice of consulting the law of other states, it also offers a series of important cautionary notes. If the courts of other states are systematically biased, or if most such courts are in a cascade, or if their judgments do not bear on any relevant proposition, then their conclusions do not deserve much attention. We hope that these points have general implications for the question of whether an institution, either public or private, might pay respectful attention to the decisions of many other institutions on the same topic.

In his generous and illuminating reply, Nicholas Rosenkranz understands us to have defended the U.S. Supreme Court's occasional practice of consulting the decisions of other high courts.⁵ But that was not our goal. Using the CJT, we meant to understand not only why a court might be interested in the decisions of other courts, but also on what assumptions that interest might be unjustified. We noted, for example, that originalists might not be especially concerned about the practices of other courts in other nations, because those practices would not bear on the Constitution's original meaning.⁶ It would certainly be possible to read our analysis to explain (a) why state courts should pay attention to the decisions of other state courts, (b) why high courts in India and South Africa should pay attention to the decisions of high courts in other nations, and (c) why the U.S. Supreme Court, on certain assumptions about constitutional method, does best to ignore the decisions of high courts in other nations.⁷ Rosenkranz's principal argument seems to be that originalists are not likely to be impressed with the CJT approach. We are tempted merely to applaud. But here as elsewhere, things are not quite so simple.

Suppose that the original understanding of the Constitution requires courts to answer some question of fact. Perhaps a restriction of "the freedom of speech" is permissible, on the original understanding, if the government has a very strong reason for imposing the restriction; perhaps the original understanding requires an assessment of the strength of the government's reason. If so, the CJT approach may be compatible with originalism.⁸ Imagine that all (relevant) courts, in other nations, believe that restrictions on false commercial advertising are acceptable. That unanimous view may well provide useful information on a pertinent question of fact—whether, for example, restrictions on false commercial advertising are likely to interfere with legitimate political debate or might end up limiting market competition by

5. See Nicholas Quinn Rosenkranz, *Condorcet and the Constitution: A Response to The Law of Other States*, 59 STAN. L. REV 1281 (2007).

6. See Posner & Sunstein, *supra* note 2, at 137-38, 150, 172.

7. Because we did not attempt to identify the proper constitutional method, we did not come to a final conclusion on this question.

8. See Posner & Sunstein, *supra* note 2, at 137-38.

reducing the ability of new entrants to bring their products to the attention of the public. One might reasonably think that if other democratic states can tolerate such restrictions, or if other market economies can flourish despite such restrictions, then restricting commercial advertising provides significant benefits and imposes few costs.

Or suppose that the word “unreasonable” in the Fourth Amendment requires courts to make judgments of both fact and value in order to decide whether a certain search is reasonable. If all other (relevant) courts believe that it is “reasonable” to undertake administrative searches under provisions that require an assessment of the reasonableness of searches and seizures, the CJT approach deserves attention. The experiences of other states may provide courts with information about whether such searches are likely to be intrusive or not, whether less restrictive substitutes are available, and whether the searches provide valuable information. Whether originalism is compatible with the CJT approach depends on the nature of the original understanding, and we cannot know that without investigating that understanding.

Rosenkranz is right, however, to emphasize that in many domains, the original understanding will require courts to pay no attention to the law of other states. But he also offers a more provocative argument, to the effect that an approach based on the CJT would compromise democratic values, in a way that should trouble nonoriginalists no less than originalists:

The notion of unelected judges updating the Constitution to reflect their own evolving view of good government is troubling to some, in itself. But the notion that this evolution may be brought about by changes in foreign law raises even deeper issues of democratic self-governance. Again, to put the point most sharply, when the Supreme Court declares that the Constitution evolves, and declares further that foreign law effects its evolution, it is declaring nothing less than *the power of foreign governments to change the meaning of the U.S. Constitution.*⁹

We confess that we are not sure what Rosenkranz means to say here. Do judges who depart from the original understanding engage in the project of “updating” it? The answer would be clear only if departures from the original understanding count as “updating,” which nonoriginalists deny; the word “updating” begs the question on originalism’s behalf. Nonoriginalists believe that the Constitution is binding and should not be “updated”; they reject the view that the original understanding is part of the Constitution.¹⁰ Nor is it clear what “a devotee of democracy” should fear most. Suppose that judges invoked the original understanding to strike down a great deal of democratically enacted

9. Rosenkranz, *supra* note 5, at 1304 (footnote omitted).

10. Note also that many originalists accept stare decisis and are therefore willing to adhere to decisions that depart from the original understanding. *See, e.g.,* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861-64 (1989) (referring to stare decisis and “faint-hearted” originalism). The idea of stare decisis is not itself in the Constitution, and originalists have not generally contended that its use is compelled by the original understanding.

legislation. Should devotees of democracy be delighted? Or suppose that whatever the original understanding, judges interpreted the founding document with a presumption of constitutionality, so as to ensure the validation of almost all democratically enacted decisions of Congress and state legislatures.¹¹ Suppose that judges did so with explicit reference to the CJT itself, on the theory that democratically enacted decisions are highly likely to reflect the views of many people.¹² Should a devotee of democracy be troubled?¹³ The relationship between originalism and democracy is uneasy at best.

Let us put these questions to one side. Rosenkranz thinks that it is bad enough for unelected judges to update the Constitution on the basis of their policy preferences; it is worse (apparently) for unelected judges to update the Constitution by relying on the law of other states. But the whole point of relying on the law of other states is to constrain judicial policy preferences. When a state court in Arizona relies on the practices of the other forty-nine states, it is not giving its own policy preferences free reign. It is engaged in a form of self-discipline.¹⁴ Our own interest in the CJT stems from the thought that judges (or legislators or administrators) might consult the practices of others to limit their own judgments by obtaining relevant information. Those who follow the general practice of many others do so to constrain their discretion, not to increase it.

Rosenkranz's most fundamental concern appears to be that under the CJT approach, foreign governments will have the power to change the meaning of the U.S. Constitution. We happily agree that it would be most unfortunate if the CJT approach gave the French Parliament the power to declare that the U.S. Constitution prohibits the death penalty. But we are not terribly worried. In fact the CJT approach would likely forbid the result that Rosenkranz fears. France has just one "vote," and the vote must be sincere. At most, France's law would do no more than express the view of one of 193 or so nations. The view is information only; it is not a political act, and it lacks authority. To the extent that France has acted sincerely, it does have the ability to inform the United

11. See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006).

12. See Adrian Vermeule, *Common-Law Constitutionalism and the Limits of Reason* 4-28 (Harvard Pub. Law Working Paper No. 07-02), available at <http://ssrn.com/abstract=969527>.

13. A democrat might of course seek to invalidate legislation that is not produced in a genuinely democratic way. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

14. Perhaps Rosenkranz implicitly embraces the "fig leaf" theory that has been advanced by others. See, e.g., Richard A. Posner, *The Supreme Court 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 88-89 (2005) (arguing that judges incorporate their own policy preferences under the guise of applying foreign law). But if that is what is going on, there is no realistic fear that foreign states can influence American law (or, at least, their power to do so is hampered by their ability only to be a fig leaf for the policy preferences of current judges).

States, but that ability is analogous to what happens when France increases the red wine consumption of American citizens as a result of a study showing that French people who consume red wine have longer lives. Information and power are different phenomena. If the German legislature takes account of the practices of legislatures in the United States, France, Italy, and Spain, we should not fear that the latter nations have usurped the lawmaking function of the German legislature.

As an analogy, consider the development of the common law. It is possible that a British court's decision about the availability of specific performance for breach of contract could influence an Illinois common law court. (Stranger things have happened.) It would seem odd to say that, by virtue of this influence, Britain has exercised the power to change the meaning of Illinois law. The Illinois court attends to the British court not because it has special authority but because its decision is a useful source of information. To give a more pedestrian example, imagine that the Supreme Court of Arizona is interested in the law of other states. Should we be very troubled that by demonstrating that interest, the court has allowed New York and Tennessee to decide on the meaning of Arizona law?

There is a confusion, here and elsewhere, between learning and obeying—or, correlatively, informing and ordering. The United Kingdom can inform the United States of physical and (assuming they exist) moral facts—more precisely, the United Kingdom can provide to the United States information about those physical and moral facts. If the CJT were explicitly rather than intuitively incorporated into doctrine, then American courts would be constrained to take this information about facts into account. But American courts are already required to make their decisions on the basis of the facts; instructing them to take these “foreign” facts into account no more reduces their authority than instructing them to take account of valid scientific studies, perhaps from the United Kingdom, that they would otherwise be inclined to ignore. Requiring courts to follow scientific studies rather than relying on anecdotes or local knowledge reduces their discretion in the unimportant sense that it reduces their discretion to make errors. It improves their decisions. Requiring courts to use information derived from foreign sources, where and if appropriate under the governing interpretive method, should have the same effect.

Rosenkranz objects that we do not need to have unelected judges update the Constitution because Article V already provides that function. In making this argument, he shifts the debate from one about the CJT to one about originalism. Originalists believe that in defiance of Article V, nonoriginalists change the Constitution by departing from the original understanding. But the Article V argument gives originalists no help at all; the question is whether departing from the original understanding updates or changes the Constitution. Unless the key questions are begged, the CJT approach cannot be ruled off-limits by reference to Article V. State constitutions contain provisions for

amendments, and those provisions do not make it illegitimate for Arizona courts to consult the practices of other states to decide on the meaning of the Arizona Constitution.

But our principal message lies elsewhere. The question whether one state should consult the law of other states is large and interesting—much larger and more interesting than the question whether the U.S. Supreme Court, or its two originalist members, should construe the U.S. Constitution with reference to the constitutional rulings of other high courts. If the law of other states is relevant—for the Supreme Court of Arizona or the Constitutional Court of Germany or for legislators and administrators in India and Brazil—the CJT provides a useful place to start.

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