

“A DECENT RESPECT TO THE OPINIONS OF MANKIND”:
REFERRING TO FOREIGN LAW TO EXPRESS AMERICAN
NATIONHOOD

*Mark Tushnet**

What are we to make of references to non-U.S. law in Supreme Court opinions?¹ One place to begin is by distinguishing between uses and references. A court *uses* a source of law when that source provides some degree of authority to support a material proposition in its analysis. A source of law provides authority when the mere fact that it *is* a source supports the proposition; an authority has force independent of the reasons that support the court’s assertions.² A *reference*, in contrast, is a statement that something is a legal proposition, without any suggestion that the matter referred to has any authority beyond that fact.³

Importantly, the recent invocations of non-U.S. law in Supreme Court opinions are references, not uses.⁴ Nor, I emphasize, do references imply that the matters referred to have any degree of authority. For example, referring to a decision of the European Court of Human Rights to reject the proposition that some practice has been universally condemned in Western society does not imply anything about the correctness of the European Court’s decision, or that the substance of its decision has weight independent of whatever reasons can be mustered in its support.⁵ Another example: The statement “within the world community, the

* William Nelson Cromwell Professor of Law, Harvard Law School.

¹ See Mark Tushnet, *When is Knowing Less Better Than Knowing More?: Unpacking the Controversy Over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275 (2006) [hereinafter Tushnet, *When is Knowing Less Better*]; Mark Tushnet, *Referring to Foreign Law in Constitutional Interpretation: An Episode in the Culture Wars*, 35 U. BALT. L. REV. (forthcoming Spring 2006) [hereinafter Tushnet, *Referring to Foreign Law*].

² I should note that this is an entirely conventional way of thinking about sources of law and their authority.

³ John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U.L. REV. 303 (2006), recognizes the distinction, *id.* at 309–11, but then treats the Supreme Court’s practice as involving use rather than reference.

⁴ See generally Tushnet, *Referring to Foreign Law*, *supra* note 1.

⁵ See *Lawrence v. Texas*, 539 U.S. 558, 576–77 (2003).

imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved”⁶ does not accord that disapproval any authoritative weight, nor does it purport to “fabricate ‘national consensus,’” to quote Justice Antonin Scalia’s derisive phrase.⁷ It reports a fact about the world, and the report’s accuracy has not been challenged. Such references are indistinguishable in this regard from, for example, citations to law review articles as sources of factual information.⁸

Why might a court refer to non-U.S. law? Justice Stephen Breyer’s pragmatic defense of the practice is probably the most widely known, as are its defects.⁹ Here, I want to sketch a counterintuitive explanation for the practice. Referring to non-U.S. law in Supreme Court opinions might be a way in which Supreme Court Justices participate in the dissemination of a distinctively American self-understanding. By this I do not mean that Justices who refer to non-U.S. law necessarily endorse the (reasonable) interpretive theory that the U.S. Constitution instantiates universally true propositions of political morality.¹⁰ Rather, I mean that references to non-U.S. law might be a way of ensuring that the United States helps lead the world’s nations to a better way of governing themselves and their peoples.¹¹

That there is such a national self-understanding emerges from consideration of some brief texts that are classics precisely because they capture this self-understanding. The earliest, perhaps, is John Winthrop’s sermon on the *Arabella*, as the Pilgrims approached the

⁶ *Atkins v. Virginia*, 536 U.S. 304, 316–17 n.21 (2002) (holding that execution of mentally retarded persons violates the Eighth Amendment’s ban on cruel and unusual punishment).

⁷ *Id.* at 347 (Scalia, J., dissenting).

⁸ See McGinnis, *supra* note 3, at 310 (noting that law reviews “could have informational value” akin to that taken from non-U.S. law when such law is referred to rather than used). Occasionally law review articles *are* cited for their arguments, but in doing so the court does not give the articles weight independent of the reasons they offer. Rather, the court endorses those reasons, citing the article as a short-hand.

⁹ For a discussion, see Tushnet, *When is Knowing Less Better*, *supra* note 1.

¹⁰ To unpack the various judgments I am making in this sentence: There is a theory of constitutional interpretation that treats the Constitution as embodying universally true propositions of political theory. This theory holds that constitutional interpretation consists of identifying those true propositions. The theory is a reasonable one, and indeed some Supreme Court Justices have written opinions that are best understood as endorsing it. And, under this theory, an opinion by a foreign court might be as good as any domestic source in guiding the U.S. judge to the true proposition of political theory. A judge who refers to non-U.S. law might accept this universalistic theory, but he or she need not do so, for the reasons I delineate throughout the remainder of the text.

¹¹ The distinction between nations and their peoples is one of the things that U.S. self-understanding hopes to eliminate.

new world.¹² In this sermon, Winthrop said that the Pilgrims were about to create a “citty [sic] upon a hill” with the “eies [sic] of all people . . . uppon [sic] us.”¹³ How this new city unfolded in history would provide guidance to the rest of the world. Winthrop may have been the first to articulate this vision. Ronald Reagan may be among the most recent. In his farewell address to the American people, Reagan echoed Winthrop, referring to the United States as a “shining city upon a hill.”¹⁴ And between them there is Abraham Lincoln, describing the task of preserving a truly United States as one that would save—or lose—“the last best hope of earth.”¹⁵ But in discussions of the practice I am concerned with here, the canonical reference is to the phrase in the Declaration of Independence, “a decent respect to the opinions of mankind.”¹⁶

These statements say something about one version of the nation’s self-understanding, but on their face they do not seem to support referring to other nations’ law. They seem rather to be about other nations referring to—paying attention to and emulating—the United States.¹⁷ I suggest, though, that referring to non-U.S. law might be incorporated into that self-understanding for reasons that I call *prudential* and *philosophical*.

These reasons are best explored by attending to the full passage of the Declaration in which the “decent respect” phrase occurs:

W[hen] in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the

¹² JOHN WINTHROP, *A Modell of Christian Charity* (1630), available at http://en.wikisource.org/wiki/City_upon_a_Hill.

¹³ *Id.*

¹⁴ Farewell Address to the Nation, 2 PUB. PAPERS 1718, 1722 (Jan. 11, 1989). In this speech, Reagan attributed the phrase to Winthrop, although Winthrop had not used the word “shining.”

¹⁵ President Abraham Lincoln, Second Annual Message (Dec. 1, 1862), in 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1789–1897, at 126, 142 (James D. Richardson ed., 1897).

¹⁶ THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776), reprinted in 1 U.S.C. at xliii (2000); see also Eugene Kontorovich, *Disrespecting the “Opinions of Mankind”: International Law in Constitutional Interpretation*, 8 GREEN BAG 2d 261, 262–63 nn.4–13 (2005) (providing a collection of citations).

¹⁷ See McGinnis, *supra* note 3, at 321 (noting that the Declaration’s reference “requires us to explain our own views to the world, not accept the views of others”).

separation.¹⁸

As Eugene Kontorovich explains, one important reason for paying respect to the opinions of mankind was prudential.¹⁹ The rebellious Americans needed international support, or at least international neutrality, in their struggle for national liberation.²⁰ In particular, France, a monarchy, had to be assured that the American struggle was an attack, not on monarchy as such, but only on the British monarchy, for reasons arising out of its colonial misgovernment rather than out of an anti-monarchical principle.²¹ The long enumeration of grievances that made up the bulk of the Declaration localized the American challenge.²²

On this interpretation, the Declaration's reference to the opinions of mankind was almost precisely the opposite of a call for other nations to emulate the rebels. Yet, in the present context we can invoke its underlying idea that prudence sometimes dictates looking abroad. The national self-understanding we seek to promote is one in which the United States acts in the world in a way that inspires other nations to emulate us. Sometimes U.S. practices will be self-evidently better than those elsewhere. Then we need do nothing more than be ourselves for others to emulate us. Sometimes, though, the U.S. practices we wish others to emulate are in our view better, but in their view not obviously so.²³

How can we induce them to emulate us? This is a matter for prudential judgment. It is not unreasonable to think that in a post-imperialist world they will be more willing to emulate us when we demonstrate to them that we take them seriously.²⁴ References to their law might be one way of doing so.²⁵

¹⁸ THE DECLARATION OF INDEPENDENCE para. 1.

¹⁹ Kontorovich, *supra* note 16, at 266.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Perhaps the abstract propositions on which we act might be self-evident, but their specification in particular contexts less so.

²⁴ Kontorovich, therefore, has an unjustifiably narrow view in writing, "To apply [the Declaration's] worldview to current debates, European opinions on the juvenile death penalty should only be considered if, say, France or Spain would send a division to Iraq if we satisfied their 'European delicacy.'" Kontorovich, *supra* note 16, at 267. Apart from the peculiar narrowness of the test, why should the standard be "send[ing] a division to Iraq," *id.*, rather than "being more willing to support U.S. foreign policy initiatives"? The test overlooks the fact that prudential judgments vary with circumstances, that the circumstances that elicited a prudential concern for the opinions of mankind in 1776 were obviously different from contemporary circumstances, and that contemporary circumstances might elicit a prudential judgment to engage in the practice at issue here.

²⁵ In my view, this is what is really going on when Justices defend the practice of referring

Yet, there is more to the Declaration's statement than prudence. We can see this in several ways. Prudence is the statesman's virtue, and those who wrote the Declaration were indeed statesmen. But, as Pauline Maier has shown, Declaration of Independence drafts were circulating widely in the colonies before July 4, 1776.²⁶ Written by local elites, more ordinary than those in Philadelphia, these declarations sounded many of the same themes that the July 4 Declaration of Independence did.²⁷ This suggests that prudence was not the only thing at work, because the local drafters were less likely to be concerned about international affairs than Thomas Jefferson was. Indeed, some of the local declarations specifically deferred to the "prudence" of the Continental Congress on the question of *when* the united colonies should declare independence.²⁸

Second, as Maier writes, "Congress acted in a most curious way after it finally adopted the document" if its purpose was to enlist foreign support.²⁹ It dispatched the Declaration to Europe, but in a quite informal way. In contrast, it directed that the document be widely distributed within the colonies, without mentioning

to non-U.S. law as giving a boost to judges struggling to establish stable constitutional orders elsewhere. See, e.g., Sandra Day O'Connor, Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law (Mar. 16, 2002), in 96 AM SOC'Y INT'L L. PROC. 348, 350 (2002) (stating that "when life or liberty is at stake, the landmark judgments of the Supreme Court of the United States . . . are studied with as much attention in New Delhi or Strasbourg as they are in Washington, DC or the state of Washington or Springfield, Illinois"). Critics have, in my view correctly, suggested that giving that sort of assistance is not in the U.S. judge's job description. See, e.g., *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary House of Representatives*, 108th Cong. 30 (2004) (statement of Jeremy Rabkin, Professor of Government, Cornell University), available at http://commdocs.house.gov/committees/judiciary/hju92673.000/hju92673_0.HTM ("We implicitly appeal to our citizens to put up with court rulings they find objectionable in the interest of maintaining a common constitutional framework. It is a big leap beyond this understanding to ask Americans to put up with a ruling because it is what foreigners happen to approve."). It takes only a small tweak, though, to recharacterize those defenses into the form I describe in the text as vehicles for disseminating out national self-understanding. And *that*, I believe, is in the judge's job description.

²⁶ PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 48–49 (1997). In referring to these materials I do not mean to make an originalist argument but only to show how the considerations that underlay the Declaration might apply today to a different problem.

²⁷ As Maier writes, "For all practical purposes, the contents of the various state and local resolutions on Independence are virtually identical." *Id.* at 74. One reason is that most took the form of statements of the case for independence. Yet, it is worth noting that the colonists thought that making public such declarations was important. See generally *id.* at 49, 51.

²⁸ See, e.g., *id.* at 75 (quoting the statement from the people of Topsfield, Massachusetts, that the decision for independence should be left "to the well-known wisdom, prudence, justice, and integrity, of that honourable body the Continental Congress").

²⁹ *Id.* at 130.

distribution to France or Europe.³⁰

Finally, and perhaps most important, prudence may tell us that a decent respect to the opinions of mankind is desirable, but it does not tell us that paying such respect is, as the Declaration says, *required*.³¹ Paying such respect is required, I believe, because of a philosophy that in today's circumstances counsels reference to non-U.S. law if the nation is to be "a city upon a hill,"³² a hope for mankind, and a beacon to the world.³³

Garry Wills argued in 1978 that the Declaration was infused with Scottish "common sense" philosophy.³⁴ This Essay is not the place for a full exposition of that philosophy, but a summary will show the connection between it and the practice under consideration here. According to Wills, one of the philosophy's features was indeed a certain kind of universalism—the availability to all people of moral truths based upon a "simple perception, common to [everyone]."³⁵ But more important was what Wills calls the "*communal* sense" in "common sense," which was "a body of truths vouched for by the suffrage of mankind," that is, by the *community* of people (everywhere, because all people were equal with respect to their ability to discern moral truths).³⁶ And again, in Wills' terms, "well-disposed men" could grasp "self-evident truths . . . once the truths are set distinctly before them."³⁷ Therefore, setting out in the Declaration of Independence the causes for the rebellion would in itself garner the assent of the rest of the well-disposed world.

Jefferson's earlier "Declaration on the Causes of Taking Up Arms," written in July 1775, was perhaps more forceful in the present context. The phrase that was transformed into "decent respect" read:

[A]s it behoves [sic] those, who are called to this great decision [the assumption of arms], to be assured that their cause is approved before supreme reason, so it is of great

³⁰ *Id.*

³¹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776), *reprinted in* 1 U.S.C. at xliii (2000) (stating that "[p]rudence, indeed, will dictate that Governments long established should not be changed for light and transient causes").

³² WINTHROP, *supra* note 12.

³³ *See generally* Emma Lazarus, *The New Colossus* (1883), *in* 1 THE POEMS OF EMMA LAZARUS (1889).

³⁴ GARRY WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* 191–92 (Vintage Books 1979) (1978).

³⁵ *Id.* at 185.

³⁶ *Id.* at 188.

³⁷ *Id.* at 190.

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avail that it's justice be made known to the world, *whose affections will ever take part with those encountering oppression*.³⁸

For Jefferson, exposing one's reasons to the world would elicit agreement when those reasons were part of common sense in the philosophical sense.

The main thrust of the "common sense" philosophy is that of the straight-forward version of the "city on a hill" metaphor: By placing our constitutional reasoning before the world, we make it available to common sense and thereby elicit emulation. But the common-sense philosophy operates reciprocally, in a way that supports the practice of referring to non-U.S. law in constitutional decisions. To the extent that other nations' law is made in a candid or well-disposed way, it should set out common-sense truths that we *must* acknowledge if we ourselves are well-disposed.³⁹

In sum, references to non-U.S. law can be a way in which the United States accords a decent respect to the opinions of mankind—not their opinion of us, but their participation in a world-wide enterprise, the leadership of which is a central component of our national self-understanding.

³⁸ *Id.* at 334 (quoting Thomas Jefferson, Declaration of the Causes and Necessity for Taking Up Arms (1775), in 1 THE PAPERS OF THOMAS JEFFERSON 199 (Julian P. Boyd ed., 1950) (emphasis added).

³⁹ Notably, this analysis suggests one criterion for selecting nations to whose law U.S. judges can properly refer: they must be "well-disposed" in the relevant sense. Wills suggests that this disposition includes a "humble receptivity" to experience and evidence. *Id.* at 187, 191.