The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court

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THE IMPORTANCE OF DIALOGUE:
GLOBALIZATION AND THE INTERNATIONAL IMPACT OF THE REHNQUIST COURT

The Honourable Claire L’Heureux-Dubé

I. INTRODUCTION

Just over ten years ago, shortly after William Rehnquist became Chief Justice of the United States Supreme Court, leading British barrister Anthony Lester, Q.C. (now Lord Lester of Herne Hill) wrote about the growing “overseas trade” in the U.S. Bill of Rights. He noted that:

[T]he Bill of Rights is more than an historical inspiration for the creation of charters and institutions dedicated to the protection of liberty. Currently, there is a vigorous overseas trade in the Bill of Rights, in international and constitutional litigation involving norms derived from American constitutional law. When life or liberty is at stake, the landmark judgments of the Supreme Court of the United States, giving fresh meaning to the principles of the Bill of Rights, are studied with as much attention in New Delhi or Strasbourg as they are in Washington, D.C., or the State of Washington, or Springfield, Illinois.¹

Lord Lester observed that there were many positive aspects of this American influence—but he also remarked that the U.S. Supreme Court was not considering the judgments of the courts that were referring to it, and suggested that this failure was a loss for American jurisprudence, and for the development of human rights around the world.²

I have been asked to speak about the international impact of the Rehnquist Court. This presumes a process where the American court is the one that puts forward ideas and interpretations, which are then picked up by others around the world. Considering only the international impact of the Rehnquist Court, however,

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² See id. at 561.
fails to take into account the possibility, as suggested by Lord Lester, that Americans could be influenced by others, and that impact or influence could work both ways.

Since William Rehnquist was sworn in as Chief Justice, and since Lord Lester wrote about the isolation of the U.S. Supreme Court, tremendous changes have taken place in the world at large, and in the judicial world, and issues have arisen which have affected both the process of judging, and the nature of the relationship between courts in different jurisdictions. Therefore, the question of where the Rehnquist Court is situated internationally cannot be discussed adequately by examining only its impact on the rest of the world. We must also consider its place in the increasingly internationalized legal world, particularly in the field of human rights. To do so requires an understanding of the changed nature of interactions between judges in different jurisdictions, the changing ways courts consider each others’ judgments, and the role of the Rehnquist Court within the new global judicial community.

II. GLOBALIZATION OF THE JUDICIAL WORLD

In recent years, tremendous changes have begun to make their presence felt in various areas of human life. In our homes and personal lives, rapid advances in technology have been gradually changing our daily activities—from the way we carry out household tasks to the options we have for entertainment. In the field of education, the explosion of information has revolutionized the way we learn, research, and communicate our findings. The lowering of trade barriers and the creation of global “markets,” in particular, have caused tremendous changes in economies throughout the world, and in the process have affected everything from the availability of jobs and the types of work available, to working conditions and standards, to the way products are marketed and corporations are organized. The explosion of technology, and the development of medicine and science have brought new issues onto the legal and political table such as the regulation of cyberspace, mapping of the human genome, and DNA testing. At the same time, social issues such as assisted suicide and abortion have created new debates around the world. In short, developments in recent years have brought new global links and connections in diverse areas of societal life.

What is often given less attention in the legal community is how globalization is also occurring in the process of judging and lawyering, and how growing international links and influences are affecting and changing judicial decisions, particularly at the level of top appellate courts throughout the world. More and more courts, particularly within the common law world, are looking to the judgments of other jurisdictions, particularly when making decisions on human rights issues. Deciding on applicable legal principles and solutions increasingly involves a consideration of the approaches that have been adopted with regard to similar legal problems elsewhere.

This development is a tremendous change from the way judicial influence between jurisdictions occurred in the past, when colonial powers such as Britain and France were the most influential, and to many, the only acceptable sources of foreign
authority on most matters. In the fields of human rights and constitutional principles, the United States often had a similar influence. However, as courts look all over the world for sources of authority, the process of international influence has changed from reception to dialogue. Judges no longer simply receive the cases of other jurisdictions and then apply them or modify them for their own jurisdiction. Rather, cross-pollination and dialogue between jurisdictions is increasingly occurring. As judgments in different countries increasingly build on each other, mutual respect and dialogue are fostered among appellate courts. Judges around the world look to each other for persuasive authority, rather than some judges being “givers” of law while others are “receivers.” Reception is turning to dialogue.

A. Reception

Reception of other courts’ decisions in a broad sense, has been the experience in Canada, as in many other former colonies, throughout our history.3 The Canadian Supreme Court was bound by the decisions of the Judicial Committee of the Privy Council in London until the abolition of appeals to that body in 1949. For the common law provinces, as for other British colonies, the principle of uniformity of the common law ensured that the solutions adopted in Britain would be those applied elsewhere. The common law was as declared by the House of Lords and the Privy Council, in Britain, and their cases were applied by colonial courts throughout the world.4 Even as the formal bonds of colonialism were loosened, and adherence to these decisions was no longer necessary, the influence of British jurisprudence on Canadian courts remained strong. American decisions were sometimes considered, as well, although they were not binding authority. To be sure, Canadian courts examined American decisions much more frequently than American courts considered Canadian decisions. The use of American precedents increased as our country developed.5

In the province of Québec, which has a civil law system, a similar one-way process occurred. Though there was no colonial link with France, French authors and decisions were examined far more frequently in Québec than Québec authors or decisions were examined in France.6 In addition, the common law was examined, discussed, and sometimes followed far more often in civil law cases than Québec

decisions were considered elsewhere.\textsuperscript{7} In general, until recently, influence always went one way—the reasoning of some jurisdictions was applied by others.

As the bonds of colonialism loosened, the prominence of American jurisprudence grew throughout the world. This is particularly true in the field of constitutionalism and human rights. The very concept of judicial review of legislation in accordance with guaranteed rights originated in the U.S. Supreme Court, in the classic case of \textit{Marbury v. Madison}.\textsuperscript{8} As one of the pioneer rights documents, and the first to be interpreted and given meaning by the judiciary, the U.S. Bill of Rights had a long history that made it natural for other countries to look to its text and interpretation when drafting and interpreting their own constitutions and human rights protections.\textsuperscript{9} For example, the language of the Indian Constitution of 1950 borrowed heavily from the American document, to the point where, according to Professor Tripathi, "almost every important fundamental right which was included in these drafts and which finally became a part of the Constitution of India has its counterpart in the United States."\textsuperscript{10} This process took into account not only the textual wording of American provisions, but also interpretations of them by the American courts. In some cases, where the drafters of the Indian provisions believed modified wording would better reflect the interpretation of the Constitution by the U.S. Supreme Court, they changed the language to reflect the approach of the Supreme Court.\textsuperscript{11} American influence on constitutions all over the world was considerable.\textsuperscript{12}

In Canada we have also experienced heavy American influence on the development of human rights protections. Although the wording of the \textit{Canadian Charter of Rights and Freedoms}\textsuperscript{13} is arguably less influenced by the U.S. Bill of Rights than by international human rights instruments, the American influence can be seen in certain sections of the \textit{Charter}.\textsuperscript{14} Even before the courts developed extensive \textit{Charter} jurisprudence, Canadians looked southward for inspiration on its meaning and interpretation. Immediately after the passage of the \textit{Charter} in 1982, scholars compared and contrasted its language with that of the American Bill of

\begin{itemize}
  \item \textsuperscript{7} See generally John E.C. Brierley, \textit{Bijuralism in Canada}, in \textit{CONTEMPORARY LAW/DROIT CONTEMPORAIN} 22, at 39-43 (Canadian Comp. Law Ass’n & Québec Soc’y of Comp. Law eds., 1990); Jobin, \textit{supra} note 6. See also Glenn, \textit{supra} note 3 (discussing the increasing use of civil law decisions in common law courts).
  \item \textsuperscript{8} 5 U.S. (1 Cranch) 137 (1803).
  \item \textsuperscript{10} P.K. Tripathi, \textit{Perspectives on the American Constitutional Influence on the Constitution of India, in CONSTITUTIONALISM IN ASIA, \textit{supra} note 9, at 59, 80.}
  \item \textsuperscript{11} See id.
  \item \textsuperscript{12} See Alejandro M. Garro et al., \textit{The Influence Abroad of the United States Constitution on Judicial Review and a Bill of Rights}, 2 TEMP. INT’L AND COMP. L.J. 59 (1987-88).
  \item \textsuperscript{13} CARL CONST. (Constitution Act, 1982) pt. 1 (Canadian Charter of Rights and Freedoms).
  \item \textsuperscript{14} \textit{Id.} §§ 7, 10-14; see Peter W. Hogg, \textit{Canada’s New Charter of Rights}, 32 AM. J. COMP. L. 283 (1984).
\end{itemize}
Rights for indications of how the Charter should be interpreted, focusing on both the similarities and the differences in the two documents.  

The courts, particularly the Supreme Court of Canada, have followed this lead. In elaborating the rights and freedoms in the Charter, our Court frequently has turned to American jurisprudence on the Bill of Rights. Though other international sources are also used, especially judgments of the European Court and Commission of Human Rights, American jurisprudence was most prominently used, particularly in the early years.

Our court has used this jurisprudence in a number of ways. First, in setting forth principles of interpretation for the Charter, the Canadian Supreme Court has been heavily influenced by those of the U.S. Court. General statements of principle and approach taken from U.S. cases have been an important influence on our Court’s approach to all the rights enumerated in the Charter. Second, judicial interpretations of specific rights in the U.S. Bill of Rights have been considered in determining the equivalent interpretations of Canadian rights. American jurisprudence on rights like freedom of religion, due process guarantees, and free speech have been considered by our court in giving meaning to these guarantees and in developing legal tests to determine whether they have been violated. 

Examining how American courts have viewed the purposes of the rights guaranteed in the Bill of Rights, as well as considering the successes and failures of various approaches to those rights, have provided important background with which to approach our definitions of the rights in the Charter. Third, we have considered American solutions to particular problems before ruling on the same issues. This has given us the advantage of wisdom in areas including the constitutionality of restrictions on abortion, hate speech, and publication of court proceedings, to name just a few.

Fourth, the rights guaranteed under Canada’s Charter may be infringed by the government if the law is “demonstrably justified in a free and democratic society.”

Our courts have held that one factor in making this determination is examination of experience and practice in other free and democratic societies. As a neighbouring country, with values similar in some ways to our own, America’s statutes and jurisprudence have played a prominent role in this comparison of foreign approaches.

In all these ways, Canada, like many other countries, has looked to the United States for indications of how the Charter should be interpreted, focusing on both the similarities and the differences in the two documents.


States as a pioneer when formulating its own human rights jurisprudence. We have not always or even usually followed the U.S. approach. Two examples among many lie in the areas of hate speech and mandatory contributions to unions for political purposes, where our Court has explicitly rejected in each case the American approach.23 However, examining and considering American jurisprudence has allowed us to benefit from expertise acquired during two hundred years of Constitutional interpretation. When we have rejected American approaches, we have usually articulated the societal or legal differences that led to this rejection.

The worldwide influence of the U.S. Supreme Court comes not just from its age or experience; the oldest American cases are not the most often cited or most useful to us. On the contrary, what has been most influential upon our Court’s interpretation of the Charter, in my opinion, are cases from the 1950s, 1960s, 1970s, and early 1980s—from the Warren and Burger courts. During these years, particularly those of the Warren Court, the U.S. Supreme Court engaged in a redefinition, expansion and modernization of Bill of Rights interpretation. Cases like Miranda v. Arizona24 and Brown v. Board of Education25 have had a large impact on the spirit and development of human rights protections worldwide.26 The strength of these judgments comes not only from the fact that the Court was interpreting a Constitution that had been in place for over a century. They also attempted to make the principles of their constitution relevant for modern times.27

There were other reasons, of course, for the strong influence of countries like the United States and Britain. Until recently, only certain countries’ law reports were widely available in many places. Legal literature also focused on the largest and most important jurisdictions. Judges and litigants, naturally, looked to places with the most easily accessible materials.

Another especially influential factor is the importance of education. Judges, lawyers, and academics who go abroad for parts of their education usually attend universities in places like Britain, France, and the United States. When time comes to look for solutions to similar problems, they naturally turn for inspiration and comparison to those jurisdictions whose ideas are familiar to them. For example, Israeli Supreme Court Justice Shimon Agranat, who was educated in the United States, made extensive use of American principles in several of his judgments.28 In Canada, too, educational backgrounds have clearly contributed to the influence of certain jurisdictions on our law. Supreme Court Justices who were educated in the

23. See id.; see also Keegstra, 3 S.C.R. 697 (Can.).
26. However, it is important to note that one area where the Warren Court was not forward-looking or expansive was that of women’s rights. See Hoyt v. Florida, 368 U.S. 57 (1961).
27. See S.J. Sorabjee, Equality in the United States and India, in CONSTITUTIONALISM AND RIGHTS, supra note 9, at 94, 114-15 (discussing the importance of the Warren and Burger Courts in India.).
United States have referred to the United States with more frequency than others.\textsuperscript{29} A shift in the places where students went for their education also caused a shift in the focus of judicial thought. As McWhinney remarked:

Legal education before World War I was essentially Anglocentrist in character. British schools were the locus of such post-graduate education in law as was then undertaken by Canadian lawyers and law professors; and English legal traditions and English judicial attitudes were widely admired and imitated within Canada. Between the two World Wars, the emphasis shifted to the United States. The lessons from American constitutional experience were then taught in the Canadian law schools.\textsuperscript{30}

As the world’s lawyers and future judges went to study in the centres of legal thinking, these countries’ influence increased even more.

For all these reasons, it was appropriate, until recently, to speak of the interaction among judges in different places as a process where some courts impacted others. Colonies, countries with less developed jurisprudence in areas like human rights, and smaller or developing countries all received, through various processes, the jurisprudence and approaches of others.

B. Dialogue

Current trends, however, show how dramatically this picture is changing.\textsuperscript{31} Rather than a one-way transmission, the development of human rights jurisprudence, in particular, is increasingly becoming a dialogue. Judges look to a broad spectrum of sources in the law of human rights when deciding how to interpret their constitutions and deal with new problems. To a greater and greater extent, they are mutually reading and discussing each others’ jurisprudence.\textsuperscript{32} Of course, language barriers may inhibit the ability to read other countries’ judgments, and this poses a particular challenge.

For instance, in the recent Namibian case of Mwellie v. Ministry of Works,\textsuperscript{33} the High Court had to interpret the guarantee of equality in the country’s new constitution. In doing so, the Court looked to decisions from high courts in India, the United States, Canada, England, Malaysia, and South Africa, as well as the European Court of Human Rights. Another example is the South African case of State v.

\textsuperscript{31} See, e.g., Bruce Ackerman, The Rise of World Constitutionalism, 83 VA. L. REV. 771 (1997).
\textsuperscript{33} 1995] 4 L.R.C. 184 (Namib.).
Makwanyane,\textsuperscript{34} where members of the Constitutional Court, in determining the constitutionality of the death penalty, examined in considerable detail decisions from India, Zimbabwe, Jamaica, Germany, Canada, the United States, the European Court of Human Rights, Hungary, the United Nations Committee on Human Rights, Botswana, Hong Kong, and Tanzania.\textsuperscript{35} In England, a recent Privy Council decision dealing with the Constitution of Antigua and Barbuda considered cases from Canada, the European Court of Human Rights, the European Commission on Human Rights, the United States, India, South Africa, and Zimbabwe.\textsuperscript{36}

A few further examples will illustrate how this dialogue is taking place, and how I hope it will develop. Courts worldwide have struggled with the definition of the right to equality. In Canada, as in the United States, differences over what constitutes an appropriate definition of equality are prominent on our Court.\textsuperscript{37} Our decisions in these equality cases have been considered in various other jurisdictions; for example, one approach in Egan \textit{v.} Canada\textsuperscript{38} formed the basis of the test adopted by the Constitutional Court of South Africa in Hugo \textit{v.} South Africa (President).\textsuperscript{39}

Another interesting example of cross-pollination is seen in the New Zealand Court of Appeal’s decision in Police \textit{v.} Smith \& Herewini.\textsuperscript{40} In that case, the issue was whether a person whose blood sample was taken in a hospital following a motor vehicle accident was entitled to a right to counsel warning under section 23(1) of the \textit{New Zealand Bill of Rights Act 1990}. Canadian courts had previously decided that there was a right to counsel in an equivalent situation under the \textit{Charter}. The New Zealand judgment gave extensive consideration to Canadian jurisprudence. Affidavits of the Chief Coroner of Ontario and Ontario Crown counsel were filed with the New Zealand Court about the effects of the right to counsel requirement in Canadian hospitals, which were useful to the High Court since one of the arguments raised was that granting a right to counsel would be unworkable in practice. Although the majority of the New Zealand Court rejected the Canadian approach, an examination of the Canadian process of reasoning and at least two individuals’ views of its effects enabled the court to make a more informed decision about the proper rule for New Zealand.

Like the development of rights themselves, the practice of looking to global sources has grown as some jurisdictions have built upon the approaches of others. In interpreting its new \textit{Charter} in the 1980s, Canada looked to pioneers like the United States and the European Court of Human Rights. Other jurisdictions, among them Australia, New Zealand, Zimbabwe, South Africa, Namibia, and Israel,

\textsuperscript{34} 1995 (2) SA 391 (CC).
\textsuperscript{35} See id.
\textsuperscript{36} See De Freitas \textit{v.} Permanent Secretary of Ministry of Agric., Fisheries, Lands and Hous., 142 SJLB 219 (P.C. 1998) (transcript).
\textsuperscript{38} Egan \textit{v.} Canada [1995] 2 S.C.R. 513 (Can.).
\textsuperscript{39} 1997 (4) SA 1 (CC).
\textsuperscript{40} [1994] 2 N.Z.L.R. 306 (C.A.).
\textsuperscript{41} Transport Act, 1982, § 58D (N.Z.) (authorizing the taking of the blood samples).
demonstrate the importance of looking to an even wider variety of jurisdictions in interpreting human rights provisions. It is time now for others to build on these examples.

C. Reasons for Globalization

There are a number of reasons why the legal community is becoming a global one, and why this increasing dialogue is taking place. Some of the same factors are those leading to change and globalization in the world at large, while others are internal to the legal community.

1. Similar Issues

First, perhaps more than ever, the same issues are facing many courts throughout the world. Issues like assisted suicide, abortion, hate speech, gay and lesbian rights, environmental protection, privacy, and the nature of democracy are being placed before judges in different jurisdictions at approximately the same time. As social debates and discussions around the world become more and more similar, so, of course, do the equivalent legal debates. This social similarity can be partially attributed to advances in global communications. With increasing transmission of news and information, potential litigants are made more aware of the results of litigation elsewhere, and may be encouraged to pursue a similar cause in their own country.

A good example of how parallel changes in social thinking can lead to more “international” solutions is jurisprudence on Aboriginal law, which has been particularly prominent and controversial in recent years in Canada, Australia, and New Zealand. Within the past several decades, Aboriginal peoples in these countries have been demanding judicial recognition of their ownership of lands and other Aboriginal rights. Courts have become more responsive to these claims than they were in the past. In developing doctrines to modernize and recognize Aboriginal land claims, they have referred extensively to the solutions developing elsewhere. The fact that this development of the law is occurring in parallel in different jurisdictions is a result of changing social attitudes to Aboriginal peoples worldwide; the recognition that previous legal doctrines were unfair and improper is being reflected across borders and continents. Though legal solutions have not been identical, I believe that they would not have been so similar had the dialogue not taken place.

2. The International Nature of Human Rights

A second factor leading to globalization in the field of human rights is the nature of those rights and their guarantees. Since the Second World War, there has been a global emphasis on human rights, which led to the passage of the Universal Declaration of Human Rights, and the signing of International Covenants on Civil and Political Rights and on Economic, Social, and Cultural Rights. These have been reflected in regional human rights treaties and in human rights guarantees in national constitutions. In fact, the United States stands out for the fact that its Bill of Rights predates this explosion of international human rights.

There are numerous genealogical “links” between national human rights guarantees and international rights documents. For example, the drafters of the Canadian Charter drew extensively on international human rights treaties, while later South African and Israeli drafters looked both to those treaties and to the Charter among their sources. These links are reflected in the similar language, organization, and principles of many human rights guarantees. Since the drafters of human rights protections have drawn on earlier documents, it only makes sense for judges to make use of the expertise and experience of interpreters of similar documents. Because the legal protection of human rights is new to many countries, there is sometimes little or no domestic jurisprudence to consult in giving them meaning, and judgments from elsewhere are particularly useful and necessary. Foreign decisions are often used as a “springboard” to begin development of human rights jurisprudence, and to fill in gaps when no precedent exists. It is not surprising that reference to foreign jurisprudence is made most frequently when human rights protections are new, such as in Canada in the 1980s and early 1990s, and in New Zealand, Israel, and South Africa today.

Links to international law help form a kind of “common denominator” of understanding for judges interpreting national or regional human rights documents. National human rights guarantees are inspired by or linked to internationally guaranteed rights, and jurists around the world are increasingly trained in international human rights law. Unlike private law or public law regarding the structure of government, there is a common understanding of the language of human rights that comes from a shared study and knowledge of international treaties and decisions. In addition, international law constitutes, for many countries, an important source of constitutional authority, and international standards are often used as


interpretive aids for domestic constitutional law.\textsuperscript{45} As Justice Kirby of the Australian high court remarked:

To the full extent that its text permits, Australia's Constitution, as the fundamental law of government in this country, accommodates itself to international law, including insofar as that law expresses basic rights. The reason for this is that the Constitution not only speaks to the people of Australia who made it and accepted it for their governance. It also speaks to the international community as the basic law of the Australian nation which is a member of that community.\textsuperscript{46}

His words reflect the importance of interpreting constitutions in accordance with international law for all countries which aspire to live up to their international human rights obligations.

3. Advances in Technology

A third factor leading to the growing internationalization of the judiciary is the advancement of communication technology.\textsuperscript{47} With the existence of computers and electronic databases, access to decisions in a broad range of jurisdictions is possible. For example, anyone with a connection to the World Wide Web can obtain recent decisions of the Canadian Supreme Court, free of charge, as soon as they are released. Decisions of other courts worldwide are diffused electronically, while numerous internet sites consolidate access to banks of case law, statutes, and other materials from various jurisdictions. These developments make it much easier to consult comparative constitutional sources in argument and in judgments. It also means that a library's failure to subscribe need not preclude access to law reports from a particular jurisdiction. Changes in technology have had a particularly strong impact in the legal field, because the gathering and management of supportive information are fundamental to advocacy.

I think it is important, though, for lawyers and judges to work together to increase the opportunities for access to other courts' decisions. Along these lines, the International Commission of Jurists, of which I am president, passed a resolution at its meeting in July to support the establishment of a database of decisions from jurisdictions all over the world relating to the independence of the judiciary. In this age where so much legal research is done through computer searches, it is particularly important to be able to search all international decisions on a given topic for appropriate principles or citations. It is to be hoped that the subject matter of this database will be expanded to facilitate the location of foreign decisions of use to jurists.

\textsuperscript{45} See, e.g., Bayefsky, supra note 43.

\textsuperscript{46} Newcrest Mining (WA) Ltd. & Another v. Commonwealth of Australia & Another (1997) 147 A.L.R. 42, 148 (Austl.).

4. Personal Contact Among Judges

A fourth contributor to the increasing internationalization of the judicial world is the growing personal contact between members of the judiciary from different countries. Judges often discuss common problems at international judges' conferences, by e-mail, and over the telephone. While until recently it was uncommon for judges on different continents to get to know each other, let alone communicate regularly about issues of mutual concern, close interactions are now becoming commonplace. I know that the friendships I have developed with judges from countries like the United States, Zimbabwe, South Africa, and Israel, to name just a few, have enabled me to discuss and correspond with them about decisions of our court and theirs, and about issues that cross national boundaries. I believe that attending conferences like this one helps to improve the decisions we make, as well as our reasoning, through contact with the ideas and insights of colleagues from all over the world. Communication with those from outside the country provides perspectives that would not otherwise be heard.

An international summit of the world's most brilliant judicial minds from courts of last resort (an exceptional pool of talent), who would discuss the judicial process in a broad way, would be a welcome development. Such a meeting, and the writing and discussion it would provoke, would be an excellent tool to facilitate cross-pollination and dialogue in judicial thinking and decision making. Meeting face to face, building relationships and sharing ideas between judges from different jurisdictions is bound to improve and refine the process of judicial globalization, while also letting us identify the pitfalls to which we must be attentive when using the decisions of other countries.

D. Pitfalls of Globalization

For indeed, despite these positive aspects of increasing globalization, there are dangers that judges must recognize. First, though the solutions of other countries or of the international community are useful and important considerations, we must ensure that foreign reasoning is not imported without sufficient consideration of the context in which it is being applied. There are important reasons why the solutions developed in one jurisdiction may be inappropriate elsewhere. Political and social realities, values, and traditions differ across borders, regions, and levels of development. In particular, pressing human rights issues often differ significantly from developed to developing countries, and different solutions in different places are unquestionably necessary.

This does not mean that it is not useful to look to decisions from jurisdictions where the context is different—only that simply importing foreign solutions is not always appropriate. Considering and articulating the differences that mandate the adoption of a different solution is, in my view, a particularly useful exercise. Cross-
pollination helps not only when we accept the solutions and reasoning of others, but when we depart from them, since even then, understanding and articulating the reasons a different solution is appropriate for a particular country helps make a better decision. As Justice Breyer noted in his dissenting judgment in *Printz v. United States*, after referring to the constitutions of several other countries:

Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem.

Secondly, the legal community must be encouraged to continue to look elsewhere even after jurisprudence on constitutional human rights has been developed. We should not be global jurists only when constitutions are new, and then turn inward once jurisprudential principles have been developed. Changing interpretations, as well as solutions to specific problems are useful tools that apply whether there is one case interpreting a human rights provision, or one hundred. Dialogue must continue long after the rights themselves are articulated and tests for interpretation have been developed.

Finally, and perhaps most importantly, it is necessary to remember that this should be a process of dialogue, and jurists in all countries must be careful to ensure we do not slip into the familiar pattern of giving and receiving law. Though the Canadian Supreme Court, for example, is willing to look elsewhere, and does so frequently, it is cited by courts like those in Zimbabwe, South Africa, and Israel far more often than it refers to their cases. In part, this is because litigants do not put these cases before us as often as they should, and I think more reference to such foreign cases would help courts like Canada’s take a greater part in this international dialogue. Even though we have a head start on these countries in developing modern human rights jurisprudence, we have much to learn from them through considering their judgments and addressing them in our own decisions. Since their decisions interpret and evaluate our own, our thinking and knowledge will be strengthened by examination of and reflection upon them.

III. THE REHNQUIST COURT IN THE ERA OF GLOBALIZATION

Having set the stage by outlining the changing relationship between many high courts around the world, I will now turn more specifically to the impact and role of the Rehnquist Court in that changing world. I will suggest that, in general, the Rehnquist Court is less influential internationally than its predecessors. I will suggest several reasons for this decline in influence, some of which are within the Court’s control, while others are beyond its power to change.

49. Id. at 2405 (citation omitted).
A. The Difficulty of Assessing Impact

First, it is appropriate to note the difficulty of coming to conclusions about the impact of a given court on others. Though an examination of the number of citations to the judgments of a certain court may generate impressive statistics, these statistics only give a partial picture of a court’s “impact”. A large number of citations, for example, may reflect great influence, or may simply show a number of authorities all standing for the same proposition. Similarly, a judgment of a foreign court may influence the deciding judge, or instead may be simply another authority used to buttress a conclusion already reached. Citations to the judgments of a foreign court may be passing references, or may reflect extensive consideration of that court’s approach. Finally, decisions of other courts may be considered or applied in a very narrow area of the law, or may instead influence an approach to interpretation or to an area of law in general.

Indeed, courts (especially the U.S. Supreme Court under different Chief Justices) are often defined by their general approach to constitutional decision making. Commentators often embark on a search for the defining mood or tenor of a court’s approach, and there is frequent debate over the direction in which a court is heading. The tenor or general approach of a court can also have an impact internationally, and indeed, this is in many ways what is most important in terms of impact. The Warren Court’s two decisions in Brown v. Board of Education50 are cited in judgments ranging from a decision about the expulsion of a student from school in Trinidad and Tobago for wearing a hijab,51 to a judgment in New Zealand applying a treaty on Maori fishing rights,52 not only because the cases are directly applicable, but because they stand for a principle and an approach to constitutional interpretation taken by the court that rendered it. Though this spirit incontestably has an impact, it is hard to capture or measure.

In addition, the fact that decisions often build on each other makes it hard to assess “impact.” For example, a citation from the Rehnquist Court may show that court’s influence, or it may show the impact of a long line of precedents that are confirmed or developed by that decision. In addition, the impact of a given court may not be seen right away. During the period when the Warren Court was sitting, references to U.S. cases by the Canadian Supreme Court were fewer than in any other period in Canadian history.53 However, as I have already noted, the influence of the Warren Court on Canada’s Charter jurisprudence is incontestably very strong, and is reflected by stronger, more dramatic statistics in subsequent years. In addition, the impact of a court always takes some time to be felt, since it may be several years before other courts have the opportunity to consider the jurisprudence and apply it as

53. See Bushnell, supra note 29.
appropriate cases arise. Therefore, an assessment of the impact of the Rehnquist Court during its term, just twelve years after it began sitting, is necessarily preliminary and may be different over time.

"Impact," in short, is impossible to completely assess in a scientific way and its measure will necessarily be based on general impressions formed by talking to judges and reading judgments from around the world. As one judge, working in one country, I cannot give a complete picture of the impact of the Rehnquist Court in jurisdictions throughout the world and how this has changed relative to other U.S. Supreme Courts in history. What I can do, however, is add to any data that is available my impressions and observations, formed while being a judge in Canada, reading judgments from courts in different jurisdictions, and talking and meeting with judges from around the world. These observations, I hope, can be combined with those of others to form a more comprehensive picture of the place of the Rehnquist Court on the international judicial scene.

B. A Declining Impact

Despite these cautions, there is a general perception that the Rehnquist Court’s impact has declined relative to that of its predecessors. First, this is borne out by statistical analysis, at least of the situation in Canada. An informal analysis of Canadian Supreme Court decisions since 1986 revealed that the Rehnquist Court was cited in fewer than one-half as many cases as the Warren Court, and in just under one-third the number of Burger Court cases. This suggests a sharp drop in influence. There is an even greater disparity if one compares the number of Rehnquist Court decisions cited by the Canadian court to the number of its predecessors’ cases cited; Burger court cases, in particular, vastly outnumber cases from the Rehnquist Court.

Though I have not compiled statistics, a similar trend is easily discernable through reading judgments from other countries. When the U.S. Supreme Court is cited, it is usually Warren or Burger Court decisions, and sometimes older ones. The Rehnquist Court is much less frequently cited. A couple of examples will suffice, beginning with the Indian Supreme Court decision in Rajagopal and Another v. State of Tamil Nadu.54 Central to the case were issues of balancing freedom of expression and of privacy, and the court relied heavily on American jurisprudence. The court devoted several pages to the cases of New York Times Co. v. Sullivan,55 Cox Broadcasting Corp. v. Cohn,56 Griswold v. Connecticut,57 and Roe v. Wade,58 all classic Warren and Burger Court cases. It included extensive descriptions of the facts and holdings, and provided lengthy citations from several of these cases. The only reference to Rehnquist Court jurisprudence, however, was a one sentence

54. [1995] 3 L.R.C. 566 (India).
55. 376 U.S. 254 (1967).
57. 381 U.S. 479 (1965).
comment that "[t]hough [Roe v. Wade] received a few knocks in the recent decision in Planned Parenthood v. Casey (1992), 120 L. Ed. (2d) 683, the central holding of this decision has been left untouched—indeed affirmed."59 This decision illustrates the trend of focusing on Warren and Burger Court decisions, and giving less attention to Rehnquist Court judgments modifying or explaining those decisions. The contrast between the strong focus on the reasoning of the older decisions and the passing reference to the Rehnquist Court decision is striking.

Another example is the opinion of Justice Ackermann of the Constitutional Court of South Africa in Ferreira v. Levin NO.60 The case dealt with the right to liberty and freedom from self-incrimination. The court examined the protections of the Fifth Amendment, and referred to the judgments in Miranda, Feldman v. United States,61 Hoffman v. United States,62 United States v. James,63 Ullmann v. United States,64 Bolling v. Sharpe,65 Board of Regents v. Roth,66 and Meyer v. Nebraska,67 quoting from several of them. Again, though the court cited a wide variety of Fifth Amendment decisions from various eras of constitutional jurisprudence, no Rehnquist Court decisions were considered. The Ferreira decision also illustrates the declining prominence of American constitutional jurisprudence in general, since American cases were much less prominent in this opinion than those of Canadian, German, and British Courts, as well as the European Court of Human Rights. This is true of other cases as well. Thus, though the Rehnquist Court's impact has declined internationally, so has the influence of the United States Supreme Court in general.

Therefore, though it is not scientifically demonstrable, at least not at this stage and not without more in-depth research, a variety of indicators show that the Rehnquist Court's international impact is smaller than that of its predecessors, and corresponds to a general relative decline in influence of the U.S. Court, particularly on human rights issues. As a force driving the definition of human rights around the world, the United States is not as influential as it used to be. This does not mean, however, that American decisions are not still very prominent in human rights jurisprudence in all jurisdictions; the Rehnquist Court's jurisprudence is regularly consulted and considered. The "overseas trade" in the Bill of Rights, described by Lord Lester, is far from being at an end. But numbers and general perceptions suggest a decline relative to previous courts. There are several reasons for this new phenomenon, particularly in the area of human rights. Some of these are within the control of the Rehnquist Court; others are beyond its power to change.

60. 1995 (4) BCLR 437 (W) (S. Afr.).
63. 60 F. 257 (1894).
64. 350 U.S. 422 (1955).
67. 262 U.S. 390 (1923).
C. Reasons for the Decline

1. Structural Differences

In my view, one of the most significant reasons for the diminished influence of the United States Supreme Court is the structural dissimilarity between the U.S. Constitution and those written more recently. Many twentieth century constitutions, particularly in common law countries, share similar language and structure, which make it more likely for judges in those countries to turn to each others' jurisprudence as being more relevant to their experience.

One of these fundamental commonalities is the existence of justification provisions. In many human rights documents, unlike in the U.S. Bill of Rights, the rights themselves are not absolute, and courts are called upon to determine whether laws that infringe them are justifiable. The language of many justification provisions is similar. The European Convention on Human Rights, for example, contains justification clauses for many of the rights enumerated in it, which note usually that limitations on the rights must be "prescribed by law and justified in a democratic society." 68 The Canadian Charter states that the rights and freedoms guaranteed in it are guaranteed "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." 69 Justification provisions that are similar in language and intent exist in South Africa, 70 Israel, 71 Namibia, 72 and New Zealand; 73 many other constitutions contain various types of justification provisions.

Several courts have emphasized the importance of looking to countries where constitutions are similar in structure and language to their own. For example, in

69. Charter, supra note 13, § 1.
70. See S. Afr. Const. § 36(1):
(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—(a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

Id.
71. See Basic Law: Human Dignity and Liberty, 1992 § 8 (Isr.). "There shall be no violation of rights under this Basic Law except by a Law fitting the values of the State of Israel, designed for a proper purpose, and to an extent no greater than required . . ." Id. See id. at § 1a. "The purpose of this Basic Law is to protect human dignity and liberty, in order to anchor in a Basic Law the values of the State of Israel as a Jewish and democratic state." Id.
72. See NAMIB. Const., art. 21(2):
[Fundamental freedoms in this constitution] shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said paragraph, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

Id.
73. Bill of Rights Act, 1990 § 5 (N.Z.). "Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits as can be demonstrably justified in a free and democratic society." Id.
Kauesa v. Minister of Home Affairs, Justice O’Linn of the Namibian High Court emphasized the importance of the distinction in that country’s constitution between fundamental rights and fundamental freedoms, and suggested that Indian jurisprudence was of the greatest use in interpreting that document because of the strong similarities in structure and language between the two documents. Similarly, in S. v. Zuma, Kentridge A.J. of the Constitutional Court of South Africa held that section 11(d) of the Canadian Charter “bears a close relationship to section 25(3)(a) and (c) of [the South African] Constitution. In both Canada and South Africa the presumption of innocence is derived from the centuries-old principle of English law . . . Accordingly, I consider that we may appropriately apply the principles worked out by the Canadian Supreme Court . . .” Other courts have also emphasized that similarities in definitions of rights make the jurisprudence of certain countries, on certain questions of interpretation, particularly worthwhile.

That is not to say that where there are differences in the language or structure of a constitution, the jurisprudence from these countries is useless or unhelpful. On the contrary, comparing the human rights provisions of another country with one’s own, articulating the differences, and using them to analyze why the jurisprudence of that country should or should not be followed is particularly useful. For example, in Kauesa, though Justice O’Linn had already noted that Indian law was most useful, he went on to consider the jurisprudence of several other countries, examining whether their approaches were appropriate in Namibia.

The United States Bill of Rights reads quite differently than most twentieth-century constitutions, which are drafted in language which has its sources in European and international human rights conventions, are more detailed, and frequently expressly permit limitations of the enumerated rights, either within the rights themselves or as a general limitation provision. These make it less likely that American jurisprudence will be cited as directly applicable to the interpretation of the human rights provisions of another country. Nevertheless, since it remains useful to consider American jurisprudence even when constitutional provisions are different, to fully explain the decline in influence of the Rehnquist Court, other factors must also be considered.

2. American Debate Over the Intent of the Framers

A second factor contributing, in my view, to the decline in the influence of the Rehnquist Court is the frequently expressed belief of many of its members that the Court’s interpretations of the Constitution should be based on originalism—a search

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75. 1995 SACLR LEXIS 219.
76. Id. at * 48.
for the intent of those who drafted a given provision. Indeed, much constitutional debate in the United States is focused on the question of whether an originalist or evolving approach should be taken to Constitutional interpretation. While I would not want to express an opinion about the appropriate method of interpreting the U.S. Constitution, the fact that the debate has been structured in this way has, in my view, contributed to the diminished international impact of the Court for several reasons.

First, if an American constitutional decision is focused on the intent of those who passed a given provision of the Constitution or the Bill of Rights in the late eighteenth century, this is unhelpful to those who are interpreting constitutions or human rights provisions drafted in the latter half of the twentieth century. A decision based on what the American framers had in mind, in short, is not relevant to others whose constitutions were written at a different time and in a different context. By definition, decisions with a greater emphasis on originalism are less useful outside the country where they are written, since the basis for the decision does not apply elsewhere.

Second, and perhaps more important, there is generally less debate elsewhere over the question of whether the intent of the framers of a constitution is what should govern its interpretation. Originalism, an extremely controversial question in the United States, is usually simply not the focus, or even a topic, of debate elsewhere. That is not to say that there are not heated differences of opinion about “judicial activism” or whether judging can be merely the interpretation of words on a page, but this debate is for the most part not as focused on textualism and originalism as that in the United States. Though the legitimacy of judicial review is certainly controversial, and there are many different views of the appropriate role of a judge, the debate does not usually occur within the same terms as it does in the United States. In Canada there are few judges or commentators who would dispute the notion that the rights and other provisions in our Constitution should be interpreted, “as a living tree capable of growth and expansion within its natural limits” in the words of Lord Sankey in a 1930 Privy Council case from Canada about whether the term “persons” in our Constitution included women.

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82. Lord Sankey decided that women were “persons,” even if the intention of the drafters of the Constitution was that the term did not include female persons. See id.
Examples of just how different the dialogue on constitutional interpretation often is from the American approach are two judgments of the Australian High Court rendered in 1992. In these decisions, the High Court determined that the Australian Constitution, which does not contain any enumerated rights guarantees, nevertheless contained an implied freedom of political communication and discussion, and this meant that laws that interfered with that freedom could be overturned by the High Court. Justice Brennan, in a manner similar to that of other members of the Court, reasoned that:

Once it is recognized that a representative democracy is constitutionally prescribed, the freedom of discussion which is essential to sustain it is as firmly entrenched in the Constitution as the system of government which the Constitution expressly ordains.

In a subsequent case, discussing the “implied” rights found in the constitution, Justice Deane noted that there was no evidence that the framers of the Australian Constitution intended to preclude the implication of constitutional rights by the absence of the inclusion of a bill of rights. But, he held that:

even if it could be established that it was the unexpressed intention of the framers of the Constitution that the failure to follow the United States model should preclude or impede the implication of constitutional rights, their intention in that regard would be simply irrelevant to the construction of provisions whose legitimacy lay in their acceptance by the people. Moreover, to construe the Constitution on the basis that the dead hands of those who framed it reached from their graves to negate or constrict the natural implications of its express provisions or fundamental doctrines would deprive what was intended to be a living instrument of its vitality and adaptability to serve succeeding generations.

Since elsewhere it is generally accepted, as Justice Deane argues, that a judge’s role is to determine the appropriate current meaning of the words of a Constitution, contemporary American constitutional debates often do not “speak to” judges and lawyers elsewhere, and the judgments at the centre of those debates may be less useful for us. This also suggests why judgments of the Warren and Burger Courts, written at a time when the dominant American approach was arguably closer to our current approach (although the Court admittedly moved away from it during the Burger Court years) may be more attractive and influential outside the United States.

86. Id. at 51.
3. A Smaller Caseload, Fewer “Groundbreaking” Decisions, and a Focus on Federalism

The diminished influence of the American Supreme Court may also be partially explained by changes in its caseload, the nature of the decisions it has reached, and the topics on which decisions are being made. It has been generally noted that the Rehnquist Court’s docket has shrunk since the early 1990s. Justice Souter, in a recent interview, attributed the drop to the fact that fewer controversial issues came out of legislation from recent presidential administrations, that the basic standards on criminal justice had been determined in the 1960s, ‘70s, and ‘80s, and there was generally a lower level of division between federal courts than in the past. In terms of international impact, the shrinking caseload necessarily means fewer decisions upon which to rely, and therefore would naturally contribute to a declined impact.

Justice Souter’s explanations for the decreased caseload also help explain the reasons for the decreased influence. At a time when a larger percentage of the Supreme Court’s work consists of clarifying or modifying the details of previous precedents, it is understandable that this jurisprudence is less influential than the broad changes in approach to Constitutional rights that characterized the Warren Court and some of the decisions of the Burger Court.

In addition, an important part of the Rehnquist Court’s work has been in the area of American federalism. Many of the important and influential cases that will likely constitute an important part of the Rehnquist Court’s legacy, such as, for example, the decision on the Brady gun legislation, focused on the principles of American federalism. Decisions on federalism, which are necessarily focused on the particularities of the United States Constitution, are less likely to be influential elsewhere in the world than those on principles that are more universal and have application in different jurisdictions. Though the Rehnquist Court’s federalism jurisprudence is an important part of its work, it is the part of American constitutional law likely to make the smallest impression elsewhere.

4. Differing Constitutional Philosophies

A fourth factor which I believe makes the United States more isolated from other countries in the field of human rights is a fundamental difference between the approach and goals of the Bill of Rights and those of many other Constitutional documents. In my view, the Bill of Rights and its current interpretation are focused on individual civil liberties, while the Charter and other twentieth-century human

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rights instruments are more concentrated on balancing the rights of individuals and those of society, and on recognizing the importance of group identity and group values. Rather than being documents whose primary purpose is to protect individuals from infringements of their freedom by the state, the goal of other human rights documents is to protect the dignity and equality of all people, and to ensure that the attributes of democratic societies are respected.

Let me give several examples. The first section in the South African Bill of Rights states that it "is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom." 91 It also says that "[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights." 92 The South African Bill includes, among others, rights to citizenship, fair labour practices, the protection of the environment, housing, health care, education, language and culture, all rights that are fundamentally different from those in the American Bill. As Justice Ruth Bader Ginsburg has noted:

Modern human rights declarations in national and international documents do not follow the United States Bill of Rights' spare, government-hands-off style. Not only do contemporary declarations contain affirmative statements of civil and political rights; they also contain economic and social guarantees, for example, the right to obtain employment, to receive health care and free public education, even—more grandly—the state's assurance of the conditions necessary to the development of the individual and the family . . . . Our courts, through judicial review, are accustomed to telling government what it may not do; they are not, by tradition or staffing, well-equipped to map out elaborate programs detailing what the government must do. 93

It is also notable that some of the areas which are particularly controversial among the members of the Rehnquist Court, and on which its most important decisions have been made, are less contentious in other countries, because of these different attitudes and because of express provisions in their constitutions. For example, the Rehnquist Court's decisions on the validity of racially-based restructuring of electoral districts emphasize the majority view on the Court that the equal protection clause mandates laws that are colour-blind. 94 In the words of Justice Kennedy, writing the opinion of the Court in Miller v. Johnson, the "central mandate" of the equal protection clause is "racial neutrality in governmental decision making." 95 He emphasized that this required strict scrutiny of any racial or ethnic
distinctions "regardless of 'the race of those burdened or benefited by a particular classification.'"\(^{96}\)

However, these principles are inapplicable in many other parts of the world, since these debates are settled elsewhere by the language of human rights provisions. For example, the *New Zealand Bill of Rights Act 1990*\(^ {97}\) states that "measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief do not constitute discrimination."\(^ {98}\) In Canada, we have a similar provision.\(^ {99}\) But more importantly, Canadian jurisprudence has emphasized that, for our Court, equality "entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. It has a large remedial component."\(^ {100}\) Similar approaches to equality have been taken in other parts of the world as well. Because of these differences in approach, which also affect our Court's approach to many other issues such as hate speech, pornography, and the rights of the accused, American jurisprudence is often less influential upon us than that of those countries where the basic approach is closer to ours in terms of defining the appropriate balance between the rights of individuals and of society. Therefore, the combination of the fact that the Rehnquist Court has put out fewer groundbreaking decisions that define major areas of the law, and the fact that many of the decisions that do so are in areas where the terms of the debate are different, help explain the Court's diminished impact.

**5. Failure to Take Part in International Dialogue**

Finally, I want to turn to the factor that I think is playing one of the most important roles in the Rehnquist Court's diminished influence, one which is entirely within the control of the Justices. In my opinion, the failure of the United States Supreme Court to take part in the international dialogue among the courts of the world, particularly on human rights issues, is contributing to a growing isolation and diminished influence.\(^ {101}\) The U.S. Supreme Court has failed to look with any regularity outside the borders of the United States for sources of inspiration. In my view this tendency to look inward may well make the judgments of U.S. courts increasingly less relevant internationally.

An examination of the Rehnquist Court's jurisprudence shows how infrequent references are to the decisions of other courts. For example, on human rights issues, the Court has referred to Canadian Supreme Court judgments only twice—once

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96. *Id.* (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989)).
98. *Id.* at § 19(2).
noting that our Court, like other courts around the world, also had dealt with the question of assisted suicide, \textsuperscript{102} and once referring to a prominent judgment of our Court on the issue of abortion. \textsuperscript{103} Several decisions have cited the Supreme Court of Canada's judgments in matters which have an obvious international component: issues of private international law \textsuperscript{104} and the interpretation of the Warsaw Convention. \textsuperscript{105} Finally, one other case noted the Canadian position on exemplary damages. \textsuperscript{106} Other than these, there are no other citations to Canadian cases. In addition, none of these citations was accompanied by any analysis of the details of the judgment or the reasoning in the Canadian Supreme Court. References to other jurisdictions, including Britain, are similarly scarce, and American judgments almost never consider the reasoning of other courts. Of particular note is the fact that the United States Supreme Court has never referred to any decisions of the European Court or Commission of Human Rights. In short, the United States Supreme Court is not a participant in the international dialogue about human rights and other issues mentioned earlier. Indeed, use of international material by the U.S. Supreme Court is so rare that Justice Breyer's references to foreign constitutions in \textit{Printz} attracted newspaper comment. \textsuperscript{107} As noted by constitutional law scholar Mark Tushnet, "[t]he Supreme Court has almost never treated constitutional experience anywhere else as relevant." \textsuperscript{108}

Why might the United States Supreme Court's failure to consider the judgments of other courts lead to its diminished impact elsewhere? In my view, the most useful judgments for courts looking to comparative sources are those that use comparative materials themselves, and situate their judgments in the context of international debates and discussions. Decisions which look only inward, which see only the situation in the place where they are rendered, have less relevance to those outside that jurisdiction than do decisions which take account of international debates and discussions. American decisions which fail to articulate the similarities with and differences from other countries' legal systems are less useful than decisions that consider their jurisdiction's place in the judicial world and consider that place relative to other countries'.

I want to be clear that I am not advocating that the United States Supreme Court should change its constitutional interpretations to accord with decisions

\textsuperscript{104} See American Dredging Co. v. Miller, 510 U.S. 443, 466 (1994) (Kennedy, J., dissenting) (citing cases from Canada, England, France and Scotland); Sun Oil Co. v. Wortman, 486 U.S. 717, 741 n.3 (1988) (Brennan, J., concurring) (citing cases from Canada and South Africa).
\textsuperscript{106} See Browning-Ferris Industries v. Kelco Disposal Inc., 492 U.S. 257, 273 n.18 (1988) (Blackmun, J., delivering the Opinion of the Court) (citing various cases from Canada, as well as Canadian and Australian decisions to show they have not followed the English approach to the issue).
\textsuperscript{108} Id.
I have not considered, and shall not consider elsewhere in this paper, the issues of the constitutionality of the same. Nor am I suggesting that the doctrines and approaches particular to American constitutional law that I discussed earlier should be abandoned. However, I do believe that considering and comparing judgments from various jurisdictions makes for stronger, more considered decisions, even if the result is the same. Foreign comparison broadens the perspectives for decision-making, and leads to consideration of the solutions of others who have considered the problem in a world facing increasingly similar issues.

I want to conclude, therefore, by pointing to several examples where recent Rehnquist Court judgments could have considered judgments of other appellate courts from around the world. In Miller v. Albright, for example, the Court was asked to decide on the constitutionality of a statute that imposed more stringent requirements for U.S. citizenship upon children born out of wedlock to American fathers and foreign mothers than upon those born to American mothers and foreign fathers. The previous year, our Court had decided a case on the constitutionality of a statute denying citizenship to children of Canadian mothers, but not to children of Canadian fathers. Though the issues were somewhat different, since the Canadian statute denied citizenship based on the nationality of the mother, rather than the father, surely some of the opinions written by the U.S. Supreme Court Justices on both sides of the issue might have been strengthened by referring to the unanimous judgment of Canada’s Supreme Court on the question of gender-based citizenship distinctions.

Similarly, in Glucksberg, the assisted suicide decision, the Court could have done much more than simply note that assisted suicide is a crime in most other western democracies in a reference to the Canadian case of Rodriguez. Instead, it might have considered the reasoning of the four opinions by the Canadian Supreme Court Justices. The Canadian Court divided on the constitutionality of allowing a crime, splitting 5-4, with considerable convincing and careful reasoning on both sides. The U.S. Court also might have considered the judgment of the Supreme Court of India in Gian Kaur (Smt) v. State of Punjab, which unanimously upheld the constitutionality of the criminalization of assisted suicide, after having considered American, British, and Canadian decisions. Surely a closer examination of the reasoning of those who had considered this issue before would have contributed to the strength of the decision in Glucksberg.
Finally, in another of the most important decisions of the Rehnquist Court’s Term, the Court considered, in *R.A.V. v. City of St. Paul, Minnesota*, the constitutionality of the St. Paul Bias-Motivated Crime Ordinance. A consideration of the Canadian cases which have dealt with the constitutionality of hate speech, and the strongly reasoned opinions on both sides of the issue, surely would have helped both the majority and minority decisions place the issue in our Court, surely would have helped both the majority and minority decisions place the issue in an international context. The U.S. Supreme Court could also have considered various decisions written by United Nations and European human rights decision-making bodies.

IV. CONCLUSION

Judging at the turn of the millennium is undergoing fundamental changes. Among these is the fact that consideration of foreign decisions is becoming standard practice for more and more courts throughout the world. What has been called by Professor Tushnet “the globalization of constitutional law” is a fundamental reality of decision making. No longer is it appropriate to speak of the impact or influence of certain courts on other countries, but rather of the place of all courts in the global dialogue on human rights and other common legal questions.

So far, the Rehnquist Court has not often taken part in this dialogue. It is to be hoped, however, that the United States Supreme Court will begin to consider, in more depth, the opinions of other high courts around the world. In doing so, perhaps the Court will benefit from the work of others, as those around the world have learned and continue to learn so much from the United States. If we continue to learn from each other, we as judges, lawyers, and scholars will contribute in the best possible way to the advancement not only of human rights but to the pursuit of justice itself, wherever we are.

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118. ST. PAUL, MINN., LEGIS. CODE § 292.02.
120. See Keegstra, 3 S.C.R. at 753 (citing these decisions).