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“Justice Roberts: Open to the World?”

“Looking at foreign law for support,” quipped Judge John Roberts at his confirmation hearing, “is like looking out over a crowd and picking out your friends. You can find them. They’re there. And that actually expands the discretion of the judge.”

Judge Roberts was responding to Arizona Republican Senator Jon Kyl, who opposes the consensus among six justices of the Supreme Court to take foreign and international law into account in interpreting our Constitution.

That consensus was exemplified earlier this year when a 5-4 majority, noting that the United States was the last country in the world officially to permit executions of 16 and 17 year old offenders, ruled that the juvenile death penalty violates the Eighth Amendment ban on cruel and unusual punishment.

In a separate opinion, Justice Sandra Day O’Connor, even while upholding the juvenile death penalty, joined the majority in acknowledging the relevance of foreign and international law to interpret the US Constitution.

Only Justices Rehnquist, Scalia and Thomas closed their eyes to overseas jurisprudence in reading the Eighth Amendment. As Justice Scalia once insisted, “We must never forget that it is a Constitution for the United States of America that we are expounding.”

Judge Roberts voices three objections to looking beyond the water’s edge. The potential for selectivity – “picking out your friends” – is one. Another is democratic theory: foreign judges are neither elected by nor accountable to American voters. And a third is a point of law: foreign decisions cannot bind American judges.

No one disputes the third point. Foreign decisions do not bind American judges, any more than decisions by Indiana courts bind Illinois courts. Yet our state courts commonly consider rulings by courts of other states, not as binding, but as shedding useful and sometime persuasive light on common or similar questions.

Judge Roberts’ other objections to citing foreign law would also logically apply to citing decisions from other states. Indiana judges are not elected by Illinois voters. And allowing Illinois judges to consider decisions from other states opens the door to their picking and choosing favorites. Yet no one suggests that the Illinois Supreme Court should be barred from citing law from other states.

The six current justices of the US Supreme Court who consider foreign and international court decisions when interpreting our Constitution are simply doing the same thing on an international scale.

There is a difference, of course. The fifty states of our union are bound together by a federal Constitution that embodies shared values and norms, and by the common traditions that make Americans one people, in spite of our regional differences. The larger world is not so tightly knit together.

But when they look at foreign law, the six justices of our Supreme Court take this difference into account. They give most weight to rulings by British judges, from whom we inherited our common law, and secondly, to rulings by courts of other nations that inherited that same tradition.

For example, the constitutions of nearly all common law nations prohibit cruel and unusual punishment. Why should our justices, in interpreting those words in our Constitution, refuse even to consider how other common law judges read the same words in theirs?

Our justices also consider laws of other nations that, although not common law countries, share our constitutional commitments to democracy and the rule of law, especially the nations of Europe. In contrast, our justices would not cite constitutional precedent from Cuba or Iran, except perhaps as negative examples.

The six justices in our current majority are neither blind nor indiscriminate, but judicious in considering foreign law and jurisprudence. They are like Illinois judges in considering precedent from Louisiana, which was not originally a common law state and whose laws remain distinctive today. Both similarities and differences must be taken into account.

And on matters of fundamental rights, the common bonds among the democracies of the world grow ever stronger. For example, the US is a party to the International Covenant on Civil and Political Rights, which guarantees a set of rights similar to those in our Bill of Rights. Should not the prohibition of the juvenile death penalty in that treaty, joined by over 150 nations including nearly all the world's democracies, be taken into account in interpreting the meaning of our own constitutional ban on cruel and unusual punishment?

In answering that question, "yes," the six justices of our Court act no differently than the high courts of other democracies, which commonly cite US Supreme Court precedent, as well as rulings from courts of other democracies, when interpreting their laws.

One understands the pressures on a Supreme Court nominee. It must be tempting for Judge Roberts to allay conservative doubts about his ideological purity by bashing an easy target like foreign law, especially if he is already inclined, as would appear, to join the Scalia camp of constitutional isolationism.

One can only hope that once he joins the bench, Judge Roberts will become more open to the world. Two centuries ago our founders proclaimed the Declaration of Independence in order to show "a decent respect for the opinions of mankind." We should expect no less of our first chief justice of the 21st century.

Doug Cassel's commentaries are broadcast Wednesdays during the 1:00 p.m. hour of the Worldview program. All views expressed are the personal views of the author and not necessarily those of Notre Dame Law School, the Center for Civil and Human Rights or Chicago Public Radio.