

Gender and Transnational Legal Discourse

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Two years ago the Women, Justice, and Authority (WJA) Conference sponsored a panel on gender issues in a transnational context, whose discussion focused on how to advance and achieve gender equality.¹ My own remarks focused on interfaces between different sources of law (state, national and international), on citizenship and on the constitutional state. Since that conference, the United States Supreme Court has held that the civil rights remedy of the VAWA is unconstitutional.² It also has invalidated federal remedies against states for violations of other federal anti-discrimination statutes,³ and it has upheld a federal statute discriminating on the basis of gender in United States citizenship law.⁴ Since that conference, as well, citizenship and nationality have assumed new and frightening saliency in our political and legal lives in the wake of terrorist attacks and government and public responses thereto.⁵

These developments only make more important understanding the possibilities of law at multiple levels as instruments of equality. We need to articulate how citizenship has both inclusionary and exclusionary implications and we need to appreciate the benefits of constitutional states, including federal states, in a global legal environment. I do not take up all those challenges here, but rather offer a brief discussion, based on my conference remarks, of the possibilities of law at multiple levels and from multiple sources in the work for

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1. I participated in that panel along with then-Justice Claire L'Heureux-Dubé of the Supreme Court of Canada, U.S. Administrative Law Judge Arline Pacht of the International Association of Women Judges, Justice Elizabeth Gwaunza of the High Court of Zimbabwe, Rosa Ehrenreich Brooks (then working at the U.S. State Department, now Assistant Professor, University of Virginia School of Law), and Brenda Smith (Associate Professor, Washington College of Law, American University). My thanks to Professor Judith Resnik for organizing the conference and for encouraging me to publish this short summary of some of my remarks at that conference. My thanks as well to Rebecca Lee, Alida Dagostino and Amber Dolman for research assistance on the footnotes for this publication.

2. *United States v. Morrison*, 529 U.S. 598 (2000).

3. *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000). Pending decision at this writing is *Hibbs v. Dep't of Human Res.*, 273 F.3d 844 (9th Cir. 2001), *cert. granted sub nom. Nev. Dep't of Human Res. v. Hibbs*, 122 S. Ct. 2618 (2002).

4. *Nguyen v. Immigration and Naturalization Service*, 533 U.S. 53 (2001).

5. *See USA Patriot Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272; *Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism* (signed Nov. 13, 2001), 66 Fed. Reg. 57,833 (Nov. 16, 2001).

equality. A thorough treatment of this issue will require a systematic analysis of the relationships between different sources of law, which I do not undertake here. Instead, my hope is to encourage further exploration of whether looking beyond our own borders may enrich the adjudicatory process, particularly on issues of gender equality.

I spoke then and write now in praise of multiple legal strategies to achieve gender equality—through international law, through transnational understandings of equality as reflected in the public law of other nations, as well as through domestic constitutional and statutory law. This view is grounded in the history of feminism which, from its inception, has been a multi-national and multi-sourced movement. Rian Voet writes that the first self-proclaimed “feminist” was a French woman, Hubertine Auclert, who began using this term in 1882 in her magazine, *La Citoyenne*.⁶ Susan B. Anthony and Elizabeth Cady Stanton worked not only on reform in the United States but in international settings.⁷ And Mary Wollstonecraft’s *Vindication of the Rights of Woman* (1792), and Virginia Woolf’s *A Room of One’s Own* (1929) were read and had influence not only in Britain but around the world.⁸

Just as the 19th and 20th-century legal, literary and political pioneers of feminism were not confined in their understanding or influence to a single nation, those who today seek to advance equality rights should be familiar with and try to use law at the local, national and transnational levels. The legal world today exists at multiple levels with interactive, permeable boundaries: domestic systems look to international norms and to other domestic systems, and international or transnational legal communities look to developments domestically to advance legal understandings of human rights, including gender equality.⁹ International law may come into play in domestic courts either

6. RIAN VOET, FEMINISM AND CITIZENSHIP 8 (1998) (and citing Karen Offen, *Defining Feminism: A Comparative Historical Approach*, 14 SIGNS 119, 126 (1988)).

7. Anthony, for example, chaired the International Council of Women in Berlin in 1904, see Biography of Susan B. Anthony, at <http://www.susanbanthonyhouse.org/biography> (last visited November 3, 2002), and it was Stanton’s anger at the treatment of women at the World Anti-Slavery Conference in London in 1840 (at which she met Lucretia Mott) that contributed to the decision 8 years later to hold the Seneca Falls Convention and draft the Seneca Falls Declaration of Sentiments—which included a bill of rights for women. See generally Judith Resnik, *Women Meeting (Again)*, in *and Beyond the United States*, in THE DIFFERENCE “DIFFERENCE” MAKES (Deborah L. Rhode ed., 2003).

8. See also HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 212-13 (2000) (noting “the concerted activity of women’s groups at the international level from early in the twentieth century”) (citing Jane Connors, *NGOs and the Human Rights of Women at the UN*, in THE CONSCIENCE OF THE WORLD: THE INFLUENCE OF NON-GOVERNMENTAL ORGANISATIONS IN THE UN SYSTEM (P. Willets ed., Brookings Institution 1996)).

9. For an example of the first phenomenon, see, e.g., *Kindler v. Canada* (Minister of Justice), [1991] 2 S.C.R. 779 and *United States v. Burns*, [2001] 1 S.C.R. 283 (both citing international and other constitutional law); see also *R. v. Butler*, [1992] 1 S.C.R. 452 and *R. v. Keegstra*, [1990] 3 S.C.R. 697 (discussed *infra*); Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 1 RUTGERS RACE & L. REV. 193, 227 (1999) (noting willingness of courts in India and Germany to consider other nations’ judicial decisions in resolving affirmative action measures). For an example of the second, see *Coote v. Granada Hospitality Ltd.* [1998] E.C.R. I-5199, [1998] 3 C.M.L.R. 958, paragraphs 21 and 22 (holding that EU requirement of recourse to courts

because domestic constitutions incorporate international human rights, or have their own equality clauses or commitments that judges interpret in light of international or transnational understandings and decisions. But formal declarations do not alone secure enforcement of the equality they aspire to guarantee. Enforcement of these sources of law depends in important part on judicial independence, as well as on people willing to assert their injuries as legally redressable, on lawyers who have the knowledge and courage to press claims, and on judges with the knowledge, courage and authority to act.¹⁰

The United States' development of statutory and constitutional norms of gender equality in the workforce,¹¹ and in educational institutions,¹² has contributed in significant ways to women's equality. At some times during the twentieth century legal fora in the United States were open to and influenced not only by claims of equality grounded in United States constitutional traditions but by learning from developments on gender equality in other nations.¹³ In the United States today, however, obstacles exist to bringing forth understandings of gender equality norms from other national settings and the transnational settings in which many constitutional courts, legislatures, and U.N.-related committees work. Liberal and conservative jurists alike are

"reflects a general principle of law which underlies the *constitutional traditions common to the Member States*" that requires effective remedies for gender discrimination in employment, including, there, a remedy for an employer's failure to provide a reference for a former female employee who had previously sued the employer for sex discrimination) (emphasis added). *See also id.* at para. 27 ("the objective of the Directive . . . is to arrive at real equality of opportunity for men and women"). *But cf.*, e.g., Case C-273/97, *Sirdar v. The Army Board* [1999] E.C.R. I-7403, [1999] C.M.L.R. 559 (invoking "constitutional traditions common to member states" to assert importance of principle of equal treatment of men and women and its application to access to military employment, but holding that the total exclusion of women from the Royal Marines could be justified as a derogation from the equal treatment requirement given Royal Marines' commitment to "interoperability"). The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which articulates international gender equality norms, contemplates international consideration (through the CEDAW process) of different national laws and practices in the further specification of international equality norms, as well as national implementation of its international norms. *See CEDAW, opened for signature* Dec. 18, 1979, art. 18, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) (requiring reporting by member states on gender equality measures and conditions); Elizabeth Evatt, *Finding a Voice for Women's Rights: The Early Days of CEDAW*, 34 GEO. WASH. INT'L L. REV. 515, 525 (2002) (describing CEDAW reporting and meeting process as enabling "widely divergent views" e.g., on female genital mutilation, to be considered).

10. For these reasons, the work of women like Arline Pacht and Susan Deller Ross in spreading information about legal rights to and thereby empowering lawyers and judges around the world deserves praise.

11. *See* Title VII, 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a); Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2000).

12. *See* Title IX, Education Amendments of 1972, 20 U.S.C. § 1681 (2000) (prohibiting discrimination on the basis of sex in federally funded education programs).

13. *See, e.g.,* *Roe v. Wade*, 410 U.S. 113, 130 (1973); FAMILY AND MEDICAL LEAVE ACT OF 1993, S. REP. NO. 103-3, at 19-20 (1993). Experience at the state and foreign level was also significant in *Muller v. State of Oregon*, 208 U.S. 412, 419 n.1 (1908), upholding hour limitations for female workers, a policy of protective legislation favored by many progressives of its era (though controversial among contemporary women's movements) and regarded by many U.S. feminists today as ill-advised.

sometimes wary of looking to other legal systems in the process of deciding legal questions in the United States.

This reluctance has many sources. It may spring in part from a belief in the superiority of United States legal institutions; in part from concerns over the perceived legitimacy of using foreign law to aid in interpreting American law;¹⁴ in part from concerns about a lack of expertise or competence to evaluate foreign sources of law; in part from awareness of the difficulties and nuances of comparison; and in part from a positivist attitude about legal interpretation.¹⁵ This attitude is perhaps best captured in the Supreme Court by Justice Scalia's opinion in *Printz v. United States*,¹⁶ suggesting that comparative constitutional experience is relevant only in making a constitution, not in interpreting it.¹⁷

The hypothesized distinction between writing and interpreting law cannot be sustained as a reason for excluding comparative knowledge. At the edges of interpretation the content of the law is by definition in doubt. A court "makes" it, or "writes" it—not in the same way as a legislature, or a constitutional convention—but with the exercise of reasoned judgment (framed by the past but not wholly defined by the past), and thus by selecting from an array of plausible interpretive choices. Moreover, and despite other concerns about comparability and competency noted above, deliberately to close one's eyes to how other tribunals address similar problems under similar constitutional language is unjustifiable. Giving meaning to such large concepts as equality, or freedom of speech, can be illuminated by examining the reasoning, disagreements, and practices of other countries committed to similar basic normative values. Let me briefly sketch examples in two different areas of law that affect equality.

First, both the United States and Canada have faced constitutional challenges to legislation designed to prohibit or punish hate speech and pornographic literature. Proponents of such legislation often invoke equality

14. To the extent that constitutional law and court decisions are respected because they are understood as elaborations of "our" Constitution, there is a question whether their political legitimacy would be undermined by candid consideration of practices elsewhere. This is an empirical question. Given that constitutional courts in countries like Canada, India and South Africa consider other legal sources to help determine the law that will bind their own countries, I have some skepticism that in the United States this would not be possible. For further discussion, see Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 261-63 (2001).

15. For more complete exploration of the possible sources of this reluctance, see Jackson, *supra* note 14, at 247-74; Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 592-601 (1999).

16. 521 U.S. 898 (1997).

17. *Id.* at 921 n.11 ("such comparative analysis [is] inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one. . ."). *But see id.* at 976-77 (Breyer, J., dissenting) (suggesting that foreign constitutional practices shed light on empirical consequences of different interpretations of United States Constitution); Ginsburg & Merritt, *supra* note 9, at 227-28 ("comparative analysis emphatically is relevant to the task of interpreting constitutions").

values as a normative justification for regulating speech.¹⁸ Let us briefly compare the opinions in *R.A.V. v. St. Paul* (United States)¹⁹ and *R. v. Keegstra* (Canada).²⁰ The issue in both cases was the constitutionality of prohibitions of hate speech. In both cases the courts were significantly divided. In Canada, the hate speech prohibition was upheld; in the United States, it was struck down.

The issues discussed by both the majority and the dissent in *Keegstra* are ones on which feminists find themselves internally divided—recognizing the harm from hate speech to members of the identifiable group under attack and to society at large,²¹ but worried about the efficacy of such restrictions (e.g., in possibly creating “martyrs” out of those prosecuted) and the difficulties of drawing lines.²² The Canadian majority’s emphasis is on the perniciousness of

18. See, e.g., Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 434 (1990) (referring to tension between free speech and equality); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320 (1989) (arguing for punishment of some racist speech to vindicate equality values and overcome racial subordination); Catharine A. MacKinnon, *Pornography Left and Right*, 30 HARV. C.R.-C.L. L. REV. 143 (1995) (review essay) (pursuing argument that pornography should be understood as form of male dominance over women inconsistent with anti-subordination equality norm). Others have argued that hate speech (or pornography) is silencing to its victims and thus their regulation should be seen, not as in tension with, but as a protection of freedom of expression. See, e.g., Owen M. Fiss, *The Supreme Court and the Problem of Hate Speech*, 24 CAP. U. L. REV. 281 (1995).

19. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). At issue there was a cross burning on the lawn of an African-American family’s home, conduct prosecuted under a statute prohibiting the placement on public or private property of “a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.” *Id.* at 379. The ordinance in the United States case was broader in some respects than that in Canada, in its categories (including gender), in the locations to which it was applicable (both public and private), and in the prohibited aims of the conduct—that is, arousing “anger, alarm or resentment” based on proscribed categories (as compared to “the wilful promotion of hatred” as in Canada). The state supreme court construed the statute’s reach as limited to “fighting words” proscribable under prior decisions. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). (Pending decision at this writing is *Black v. Commonwealth*, 262 Va. 764, 553 S.E.2d 738 (2001), *cert. granted sub nom.* *Virginia v. Black*, 535 U.S. 1094 (2002) (presenting First Amendment challenge to Virginia’s cross burning law).)

20. [1990] 3 S.C.R. 697 (Supreme Court of Canada). The Court upheld the conviction of a high school teacher who taught and required his students to reproduce antisemitic views in class, under a statute penalizing the wilful promotion of hatred through non-private communications against an identifiable group, defined to mean “any section of the public distinguished by colour, race, religion or ethnic origin.” See *id.* at 698, 715-16.

21. See *id.* at 745-49 (Dickson, J., for the four-justice majority) (describing the silencing effects of hateful speech on its victims, the “humiliation and degradation” they suffer, the potential risks of violence arising from promotion of hatred and the consequent harms to the entire society “caused by expression promoting the hatred of identifiable groups”). The court relied on a number of investigative reports. See *id.* at 749 (“The 1981 Report Arising Out of the Activities of the Ku Klux Klan in British Columbia by John D. McAlpine noted evidence of racism and racial violence in British Columbia, and among its conclusions recommended the strengthening of existing remedies, including the criminal offence of the wilful promotion of hatred. The 1984 report of the Special Committee on the Participation of Visible Minorities in Canadian Society, investigated, among many topics, legal and justice issues pertaining to and affecting members of visible minority groups in Canada.”)

22. See *id.* at 852-54 (McLachlin, J., dissenting) (raising concerns about administration of statute to censor or suppress valuable literature and about its efficacy based, inter alia, on experience in Nazi Germany where hate speech provisions existed and were on occasion used to prosecute those defaming Jews under the Weimar Republic with the possible effects of making “martyrs” of those prosecuted).

hate speech in diminishing the ability of its victims to exercise their own expressive rights,²³ the emotional pain that they experience, and the “potentially catastrophic” risks that hate speech will lead to hate-motivated violence.²⁴ The majority also emphasizes the limitations and safeguards within the statute, including the need to prove willfulness, and the statutory limitation on public forms of expression.²⁵ The dissent fully acknowledges at the outset of the opinion the evils of hate speech but emphasizes the importance of unconstrained speech in a democracy, speech that might be chilled by the statute.²⁶ Raising concerns grounded in history for the potential for misuse of such a statute, the dissent also emphasizes the possible backlash such legal efforts may inadvertently but harmfully create.²⁷ Each opinion, within these terms, has strong degrees of persuasiveness.²⁸ It is interesting to note what the justices in Canada agree about—that the suppression of racial hatred is a compellingly important government purpose.²⁹ It is also important to note what it is that they disagree about—that is, the substantive effects of the law both in its aspiration to diminish racial hatred and its efforts to avoid suppression of free and open speech.³⁰

23. See *id.* at 763 (Dickson, J.) (noting that defendant’s autonomous rights of free expression were being used to inhibit his victims from exercising their own capacities for autonomy and expression).

24. See *id.* at 747 (Dickson, J.) (“... the triumphs of impudent propaganda such as Hitler’s, have qualified sharply our belief in the rationality of man”); see also *id.* at 758.

25. *Keegstra*, [1990] 3 S.C.R. 697, at 773-75 (Dickson, J.).

26. See *id.* at 803-06, 859-60 (McLachlin, J., dissenting). See also *id.* at 863 (noting that challenged act “does not merely regulate the form or tone of expression—it strikes directly at its content and at the viewpoints of individuals. . . . It is capable of catching not only statements like those at issue in this case, but works of art and the intemperate statement made in the heat of social controversy.”)

27. See *id.* at 852-54 (McLachlin, J. dissenting).

28. The persuasiveness of the opinions is due in part to their authors’ acknowledgment of the difficulty of the issue. See, e.g., *id.* at 801, 811 (McLachlin, J., dissenting) (describing issues as of “great importance and difficulty” and acknowledging that “[h]ate literature presents a great challenge to our conceptions about the value of free expression . . . [and] constitutes a direct attack on . . . principles . . . cherished by our society [including] [t]olerance, the dignity and equality of all individuals”).

29. See *id.* at 758 (suppressing hate propaganda is of “utmost importance”); *id.* at 787 (“Few concerns can be as central to the concept of a free and democratic society as the dissipation of racism . . .”); *id.* at 812 (McLachlin, J., dissenting) (“The evil of hate propaganda is beyond doubt. It inflicts pain and indignity upon individuals who are members of the group in question. In so far as it may persuade others to the same point of view, it may threaten social stability. And it is intrinsically offensive to people—the majority in most democratic countries—who believe in the equality of all people regardless of race or creed.”); *id.* at 848 (McLachlin, J., dissenting) (concluding that “[g]iven the problem of racial and religious prejudice in this country . . . the objective of the legislation is of sufficient gravity to be capable of justifying limitations on constitutionally protected rights and freedoms”).

30. The implications of the hate speech decision for the constitutional treatment of government regulation of pornography are perhaps more clear in Canada than in the United States. The Women’s Legal Education and Action Fund of Canada was an intervening party in the *Keegstra* litigation. Two years later, in *R. v. Butler*, [1992] 1 S.C.R. 452 (Supreme Court of Canada), the Canadian Court upheld a statute prohibiting the sale or distribution of obscene material where obscenity was defined as “any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence . . .” *Id.* at 470-71. After recognizing that the statute was a restriction on rights of free expression, the Court found that the regulation nonetheless met the standards of Section 1 of the Charter, see *infra* note 45, in part because,

By contrast, in *R.A.V.*, disagreement focuses primarily on what the appropriate categorical analogy is, a question that engages more indirectly with the substantive constitutional values at stake. For the Court in *R.A.V.*, the problem of hate speech is less visible; it almost does not exist as a distinct area of concern. The debate is over formal doctrine—what is content neutrality?³¹ What is viewpoint neutrality?³² Is prohibiting hate speech like prohibiting electioneering near the polls?³³ Is it like prohibiting obscene speech only when it is “antigovernment”?³⁴ That hate speech is a category arguably unlike the categories of doctrinal analysis being used—insofar as it is always calculated to target one segment of a society for feelings of hatred that can lead to group violence—is, compared to the Canadian opinions, far less discussed.³⁵

One final point of comparison between the *R.A.V.* and *Keegstra* opinions: In *Keegstra*, Canadian justices cited and discussed the relevance of international law.³⁶ The justices also discussed the legal practices of a number

as *Keegstra* recognized, “harm caused by the proliferation of materials which seriously offend the values fundamental to our society is a substantial concern which justifies restricting the otherwise full exercise of the freedom of expression.” *Id.* at 496. The Court’s opinion noted harms to women and to equality values, writing that

[a]mong other things, degrading or dehumanizing materials place women (and sometimes men) in positions of subordination, servile submission or humiliation. They run against the principles of equality and dignity of all human beings. In the appreciation of whether material is degrading or dehumanizing, the appearance of consent is not necessarily determinative. Consent cannot save materials that otherwise contain degrading or dehumanizing scenes. Sometimes the very appearance of consent makes the depicted acts even more degrading or dehumanizing.

Id. at 479 (Sopinka, J., for the Court); see also *id.* at 513-14 (Gonthier, J., concurring) (noting possible harm to women from violent and abusive depictions of sex). The court suggested that the portrayal of sex linked with violence would generally meet the undue exploitation test, *id.* at 485, though material could be saved from prohibition if it met certain artistic or literary standards, *id.* at 486. The opinion in *Butler* was joined by seven justices, including Justice McLachlin, who wrote the principal dissent in *Keegstra*. An anti-pornography ordinance focused specifically on the sexually explicit subordination of women was struck down on First Amendment grounds in *American Booksellers Assn., Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986) (noting, however, that three justices would have set the case for oral argument). So far as I am aware, the United States Supreme Court’s obscenity cases do not reveal an effort, like that in Canada, to examine the harms of obscenity insofar as they affect gender equality.

31. *R.A.V. v. City of St. Paul*, 505 U.S. at 388-90.

32. *Id.* at 391-92.

33. *Id.* at 396, n.8 (discussing *Burson v. Freeman*, 504 U.S. 191 (1992)); *id.* at 404-07 (White, J., concurring in the judgment) (suggesting that under *Burson* content-based regulation of fighting words that injure based on race would survive strict scrutiny).

34. *Id.* at 385, n.4; *id.* at 418-19 (Stevens, J., concurring in the judgment).

35. *But cf. id.* at 416-17, 425 (Stevens, J., concurring in the judgment) (“Conduct that creates special risks or causes special harms may be prohibited by special rules. . . . Threatening someone because of her race or religious beliefs may cause particularly severe trauma or touch off a riot. . . . There are legitimate, reasonable, and neutral justifications for such special rules.”); *id.* at 407 (White, J., concurring in the judgment) (agreeing that given the country’s “painful experience with discrimination,” the city’s interest in preventing harms based on race, color, religion or gender is “compelling”).

36. *Keegstra*, [1990] 3 S.C.R., at 749-55 (Dickson, J.) (citing, inter alia, the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (1950), Art. 10; the International Convention on the Elimination of All Forms of Racial Discrimination, Can. T.S. 1970 No. 28, Arts. 4, 5; and the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966), Arts. 19, 20). Likewise in *Butler*, a Canadian case upholding an obscenity statute reaching “undue

of other countries.³⁷ And both the majority and dissenting opinions devoted significant time to analysis of United States First Amendment law, discussing not only cases but also scholarly literature about United States law.³⁸ In *R.A.V.* no member of the Court, whether in the majority or not, referred to any legal materials other than United States materials—even though *Keegstra* had already been decided, and United States scholarly literature had begun to look seriously at how other constitutional democracies dealt with problems of hate speech.³⁹ In a sense, this omission is understandable since the United States has such a highly developed and complex body of free speech law. On the other hand, there were multiple strands in United States constitutional law that could have been drawn on in different ways to analyze the question in *R.A.V.*,⁴⁰ and in deciding what strand to develop comparative perspectives might well have been helpful.

Let me pause here on one important objection to looking to decisions in “outside” legal systems to help resolve domestic legal questions: the idea that law must always be understood in its context. Each national context is so unique, some would claim, that no component can be properly understood in isolation and hence cannot cast light on how to construe another constitution’s provisions, even if worded similarly.⁴¹ Canada does have some constitutional provisions concerning equality and multiculturalism that do not have textual analogues in the United States Constitution.⁴² And the Canadian justices in the

exploitation” of depictions of sex and violence, the Court cited U.S. caselaw on obscenity. See *Butler*, [1992] 1 S.C.R. 452, 503 (Sopinka, J. for the Court).

37. See *Keegstra*, [1990] 3 S.C.R., at 770 (citing to statutes in India, Netherlands, Sweden, the U.K., and New Zealand).

38. See *id.* at 738-44 (Dickson, J.); *id.* at 802-06, 812-20 (McLachlin, J., dissenting).

39. See, e.g., Matsuda, *supra* note 18, at 2341-48.

40. For discussion of these different strands of U.S. law, see *Keegstra* [1990] 3 S.C.R., at 738-45 (Dickson, J.) (discussing many U.S. cases, including *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (upholding group libel law); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); and even the circuit court opinion in *Collins v. Smith*, 578 F.2d 1197 (7th Cir. 1978) (the Nazi march in Skokie case), as well as work by Lawrence Tribe, Richard Delgado, Frederick Schauer, and Mari Matsuda, among others.)

41. For an argument that the problem of embeddedness is more substantial for federalism than for classic individual rights provisions, see Jackson, *supra* note 14, at 270-71; Vicki C. Jackson, *Comparative Constitutional Federalism: Its Benefits and Limitations* (unpublished manuscript prepared for McGill International Conference on Federalism, November 8-9, 2002) (forthcoming in *I.CON* Jan. 2004). Nonetheless, to some degree it is the case for any domestic constitutional provision.

42. For example, article 15, which includes the basic equality of rights provision in the Canadian Charter, specifically preserves government’s authority to have affirmative action programs. See Canadian Charter of Rights and Freedoms, Constitution Act 1982, Section 15(1) (“Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability”); *Id.* at Section 15(2) (“Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of” the factors set forth in (1)). And article 27, which may be regarded as primarily expressive, emphasizes a commitment to multi-culturalism in ways that differ significantly from the text of the United States Constitution. See Canadian Charter of Rights and Freedoms, Constitution Act 1982, Section 27 (“This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians”).

Keegstra majority ultimately say that even if under United States free speech rules such a statute would be unconstitutional, Canada should not necessarily follow the United States approach, given Canada's own constitutional commitments to gender, racial and religious equality in Charter Section 15 and to multiculturalism in Section 27.⁴³ These are serious questions that I cannot fully address here. One approach to the problems of comparability is to regard foreign law as relevant and informative but not binding as precedent in the interpretation and application of constitutional provisions, a solution adopted in many more modern constitutional systems, such as South Africa's.⁴⁴ Treating foreign law as relevant but not dispositive, it might be argued, does not answer the hard questions of knowing what it is relevant to and when it should or should not be used, followed, relied on, or distinguished. But before those hard questions can be answered, judges and lawyers need to be open to knowledge of possibly helpful materials on analogous issues from other constitutional systems; South Africa's approach invites lawyers to become familiar with foreign law and to present information and argument over its relevance.

Without advocating a "right" answer to the question whether the United States, Canada, or any other liberal democracy constitutionally must protect or constitutionally may prohibit "hate speech," I do want to suggest that the method of reasoning in *Keegstra*—in both the majority and the dissent—is more illuminating and candid on the substance of what is at stake than the opinions in *R.A.V.*⁴⁵ While one need not read foreign constitutional court

43. See *R. v. Keegstra*, [1990] 3 S.C.R. 697, 738-44 (Dickson, J).

44. See Constitution of the Republic of South Africa of 1996, ch. 2, § 39(1)(c).

45. This method of reasoning is associated with the Canadian Court's treatment of Charter Section 1, another provision (in addition to articles 15 and 27, discussed *supra* note 42) without a direct textual analogue in the U.S. Constitution. Section 1 of the Canadian Charter of Rights and Freedoms, Constitution Act, 1982, has been construed as a "salvage" provision. When a statute is challenged as violating a Charter-protected right, the Court first inquires whether there has been an infringement on the right. At this stage, the Court has treated rights very broadly and readily finds an infringement. See *R. v. Keegstra*, [1990] 3 S.C.R. 697 (finding hate speech statute to infringe freedom of expression under Section 2 of the Charter); Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Canada) [1990] 1 S.C.R. 1123 (the "Prostitution Reference") (prohibition on communication for purposes of prostitution infringes freedom of expression under Section 2); *R. v. Butler*, [1992] 1 S.C.R. 452, 489 (finding obscenity statute "no doubt" seeks to interfere with expressive activity and thus infringes freedom of expression under Section 2 of the Charter). In the next stage, the Section 1 question is presented, which is whether the challenged action is a reasonable limit prescribed by law that can be "demonstrably justified in a free and democratic society." Charter, Section 1. This inquiry in turn has essentially two stages (though the doctrine is expressed more complexly): first, the court determines whether the purpose of the challenged law is sufficiently important to warrant some infringement of rights, and if so, the Court considers the most central inquiry, whether the challenged law and its infringement of rights is proportional to the governmental purpose. This proportionality inquiry directs attention to the magnitude and severity of the problem to which the law is addressed within the scheme of Canadian constitutional commitments, the degree to which other alternatives are not effective, and the magnitude and severity of the infringement on protected rights (through analysis of what the Canadian Court calls the tests of "rational connection," "minimal impairment" and "balancing effects of limiting measures and legislative objective"). *Id.* at 499. See *Keegstra*, [1990] 3 S.C.R. 697 (upholding hate speech prohibition); *R. v. Butler*, [1992] 1 S.C.R. 452, 501-09 (upholding obscenity prohibition); Prostitution Reference Case, [1990] 1 S.C.R., at 1134-39 (Dickson, C.J.) (upholding prohibition on communication

decisions to come to appreciate the benefits (and pitfalls) of such a contextualized balancing approach,⁴⁶ encounters with other legal systems and with the opinions of other courts do increase what we might think of as checkpoints of reasoning that thoughtful jurists should take account of—either to disagree with, find persuasive, or find inapposite. The opportunity for confrontation and internal reason-giving to explain to oneself as a judge why an argument is or is not persuasive has the capacity to improve deliberation through the discipline of reasoned response.⁴⁷

But should feminists care about improved judicial deliberation? Or about whether national courts are aware of, engaged with (or even in some sense accountable to) a “transnational judicial conversation” about rights?⁴⁸ Could a United States jurist reading the *Keegstra* opinions remain committed to the more categorical analysis typical of United States free speech law as an approach that, on balance, secures better protection of rights? If so, would the jurist be likely to engage in more fully considered explanation of how those pre-existing categories apply in the context of hateful speech—and if so, would this in any way lead to a better legal situation for gender equality?⁴⁹ Is Canadian-style “proportionality analysis” more open to fair consideration of claims for gender equality, perhaps because of the need for subordinated groups to unmask the real effects of formally neutral laws or doctrine carried forward from when *de jure* discrimination also existed?⁵⁰

These questions point out the uncertain character of any claims that might be asserted about the relationship between transnational legal discourse and awareness and advances in gender equality. Further empirical research would

for purposes of soliciting prostitution). See generally *R. v. Oakes*, [1986] 1 S.C.R. 103, 135-43 (Dickson, C.J.); PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA*, § 33.4(c); § 35 (4th ed. 1997).

46. A still-leading work critical of balancing is T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *YALE L.J.* 943 (1987).

47. Although scholarly works have the potential to foster this internal dialogue, they may be less powerful a source than the decisions of other constitutional court judges who are in the same, or at least a similar, role to that of U.S. judges: they are deciding within some form of real time limitations; they are deciding cases that involve the rights of actual people—that is to say, they are issuing judgments, not publishing articles.

48. See Christopher McCrudden, *A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights*, 20 *OXFORD J. LEGAL STUD.* 499 (2000); Anne-Marie Slaughter, *Judicial Globalization*, 40 *VA. J. INT'L L.* 1103 (2000).

49. Questions are thus also raised about the relationship between candor in decisionmaking and advances in substantive justice (assuming one could agree on what constitutes substantive justice, in a situation in which important fundamental values, such as gender or racial equality, are in tension with other important values, such as freedom of speech.) One intuition is that more candid recognition of the substantive interests at stake advances substantive justice because it sharpens the prospects for debates in other fora of justice, but this is only one possibility that must be regarded as speculative until tested against more comprehensive data.

50. For discussion of Justice Breyer's emerging views on concepts of proportionality (widely used in constitutional analysis in Canada and Europe) in free speech problems, see Paul Gewirtz, *Privacy and Speech*, 2001 *SUP. CT. REV.* 139, 196-98 (2001). For an earlier discussion of proportionality, see Jackson, *supra* note 15, at 602-34 (1999) (arguing that proportionality analysis may be beneficial in U.S. constitutional law).

be needed, for example, to know whether courts that engage with the constitutional decisions of other nations are more open to claims of gender equality.⁵¹ And even if a correlation were found, further work would be needed to explore whether a causal relationship existed between the two phenomena or whether, alternatively, particular judges or courts, at particular moments in time, were—for reasons independent of either phenomenon—interested in transnational learning and more open to gender equality claims.

The importance (and difficulty) of these questions may be suggested by a second area of comparison—cases addressing the constitutionality of relying on gender distinctions in setting the rules for citizenship. A brief comparison of constitutional decisions from Botswana, Canada, and the United States—all on discrimination based on gender in the transmittal of citizenship—suggests the possible benefits (and limits) of transnational constitutional learning.⁵²

In *Unity Dow v. Attorney General*,⁵³ a female citizen of Botswana was, at the time of the litigation, married to an American citizen who had been resident in Botswana for 14 years. One child was born to them in 1979 (prior to their marriage) and two others were born after the marriage. Under the challenged law, the first child was a citizen of Botswana, but the later two children were not citizens because their father was not a citizen. The law in essence provided that a person born in Botswana is a citizen if at the time his father was a citizen or, in the case of a person born out of wedlock, his mother was a citizen.

In invalidating the limitation on Botswanan mothers married to non-Botswanan fathers to pass on citizenship, the Botswanan courts relied in important measure on a provision in the Botswana constitution giving every person fundamental rights and freedoms including protection of the law.⁵⁴ The lower court had said that the citizenship law was unconstitutional because it might inhibit women in Botswana from marrying the man they love; the effect would be to punish a female citizen for marrying a noncitizen.⁵⁵ The court rejected the argument that Section 3 of the Constitution (due process and protection of laws for all persons) was limited by the more narrow provisions

51. This research would not be simple, particularly if one sought to distinguish courts' citation or awareness of transnational legal materials from more substantive forms of consideration or engagement. Cf. Judith Resnik, *Categorical Federalism: Jurisdiction, Gender and the Globe*, 111 YALE L.J. 619, 676 (2001) ("neither transnational lawmaking nor globalism is necessarily an engine of equality").

52. For a more detailed analysis of cases around the world dealing with such limitations, see INTERNATIONAL LAW ASSOCIATION, COMMITTEE ON FEMINISM AND INTERNATIONAL LAW, FINAL REPORT ON WOMEN'S EQUALITY AND NATIONALITY IN INTERNATIONAL LAW (Report of the 69th Conference, held in London, July 25-29, 2000) (Karen Knop, Rapporteur); Kif Augustine-Adams, *Gendered States: A Comparative Construction of Citizenship and Nation*, 41 VA. J. INT'L L. 93 (2000).

53. *Unity Dow v. Atty Gen.*, Misc. 124/90 (High Court of Botswana, held at Lobaise), *reprinted in* 13 HUM. RTS. Q. 614 (1991); *Atty Gen. v. Unity Dow*, Civ. App. No. 4/91 (Bots. App. Ct. June 3, 1992), *excerpted in* Susan Deller Ross & Johanna Bond, *Course Materials: International and Comparative Law on the Rights of Women* (Fall 2001), and cited elsewhere as [1992] Law Reports of the Commonwealth 623 (Court of Appeal).

54. *Dow v. Atty. Gen.*, (High Court), 13 HUM. RTS. Q., *supra* note 53, at 615-16, 622.

55. *Id.* at 626.

of Section 15, which prohibited governmental discrimination but did not include sex as a prohibited category.⁵⁶ The court of appeals agreed and relied in part, as had the trial court, on international law.⁵⁷

The Botswanan courts' reliance on international law in this case seems particularly important because there was a substantial question of interpretation of the Botswanan Constitution which, in its specific equality provision (Section 15), did not explicitly prohibit discrimination based on sex. But under Botswana law, relevant international treaties and conventions may be referred to as an aid to interpretation. The Botswanan courts turned to the African Charter on Human and People's Rights. Article 2 of the African Charter provides that:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.⁵⁸

And Article 12 of the African Charter provides that: "Every individual shall have the right to freedom of movement and residence. . . ."⁵⁹ Notably, the courts upheld their power to rely on the African Charter as an aid to interpretation even before it was made fully enforceable by domestic legislation under the Botswana Interpretation Act.⁶⁰ The courts in Botswana, also referring to Lord Wilberforce's views on entry into the "comity of civilized nations" and international society, construed their own constitution to come into harmony with these transnational sources of equality law.⁶¹

Turning now to Canada, in *Benner v. Canada*,⁶² the Canadian Supreme Court invalidated a gender-restriction in its citizenship laws as a violation of the Canadian Charter of Rights and Freedoms. The Canadian citizenship law at the time provided that, for people born before 1976, if born abroad to a Canadian father they automatically were entitled to be Canadian citizens on making an application; but, if born abroad to a Canadian mother, the applicant for Canadian citizenship had in addition to swear an oath of loyalty and meet criminal clearance and security check requirements. Benner was born abroad in 1962 of a Canadian mother and asserted Canadian citizenship. Canadian authorities sought to exclude him from citizenship under this statute, however, because he had a significant criminal record. The Court rejected the

56. *Id.* at 622-26.

57. *Atty. Gen. v. Dow* (App. Ct.), Ross & Bond, *supra* note 53, at 497-500; *Dow v. Atty. Gen.* (High Court), in 13 HUM. RTS. Q., *supra* note 53, at 617-20.

58. African [Banjul] Charter on Human and People's Rights, *adopted* June 27, 1981, Art. 2, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986).

59. *Id.* at Art. 12.

60. *Atty. Gen. v. Dow* (App. Ct.), Ross & Bond, *supra* note 53, at 497.

61. *Id.* at 497-99 (also discussing the Universal Declaration of Human Rights).

62. [1997] 1 S.C.R. 358.

government's arguments, holding that the distinction, based on the gender of the parent from whom citizenship could be inherited for persons born abroad, violated Benner's rights under Section 15 to be free from discrimination based on gender; the distinction, moreover, could not be justified as necessary in a free and democratic society and thus could not be upheld under Section 1.⁶³ Ironically, the Canadian Court relied, in part, on a federal district court decision in the United States in 1989,⁶⁴ invalidating a predecessor to the federal law at issue in *Miller v. Albright*⁶⁵ and *Nguyen v. INS*.⁶⁶ But the United States Supreme Court treated a similar issue of gender discrimination in citizenship law quite differently—both in its methodology and in its judgment.

In *Miller v. Albright*,⁶⁷ decided one year after the *Benner* case, there were divided opinions on the merits and on justiciability, with Justice O'Connor, joined by Justice Kennedy, concluding primarily that the child could not raise the parent's equality claim because of the general rule against adjudication of third party rights.⁶⁸ The issue on the merits was the constitutionality of a provision of federal law that extended United States citizenship to children born abroad and out of wedlock to United States citizen mothers, but imposed additional conditions for establishing citizenship for those born in similar circumstances abroad to United States citizen fathers. There was no reference

63. See *id.* at 403-07; see also *supra* note 45 (discussing Section 1 of the Canadian Charter of Rights and Freedoms).

64. *Benner*, [1997] 1 S.C.R. at 399 (citing *Elias v. United States Dep't of State*, 721 F. Supp. 243 (N.D. Cal. 1989) in support of Benner's standing to challenge the discriminatory provision). In *Elias*, the relevant U.S. statute (dating from 1874) provided that "only a United States citizen father could transmit United States citizenship to a child born outside of the United States; a United States citizen mother could not." *Id.* at 244. The district court found this classification, based on the gender of the U.S. parent, to be unconstitutional. The invalidated statute thus required a form of gender discrimination that favored United States fathers over United States mothers in their capacity to transmit citizenship, a distinction working in the opposite direction from that at issue in the United States Supreme Court's 1998 and 2001 decisions discussed below.

65. 523 U.S. 420 (1998).

66. 533 U.S. 53 (2001).

67. 523 U.S. 420 (1998) (challenging statute which, for the relevant time period, provided more stringent eligibility requirements for citizenship claimed by children born abroad to an unwed United States citizen father than for those born abroad to an unwed United States citizen mother; essentially, children born abroad to an unwed United States citizen father were eligible for citizenship only if the father had formally acknowledged or been legally determined to have paternity prior to the child's 18th birthday).

68. *Id.* at 446-51 (O'Connor, J., joined by Kennedy, J., concurring in the judgment) ("although petitioner is clearly injured by the fact that she has been denied citizenship, the *discriminatory* impact of the provision falls on petitioner's father . . . [who is] no longer a party") (emphasis in original). Justice O'Connor then wrote that because the petitioner "cannot raise a claim of discrimination triggering heightened scrutiny," she could assert only that the statute irrationally discriminated between illegitimate children based on whether their mother or father were a citizen; but for rational basis review—in contrast to heightened scrutiny—Congress may "base its decisions on generalizations about groups of people." *Id.* at 451-52. Justice Stevens, joined by the Chief Justice, would have upheld the classification as reasonably tailored to reflect legitimate, biological differences between women and men. *Id.* at 422. Justice Scalia, joined by Justice Thomas, concluded that the Court lacked power to grant the relief requested by petitioner, in effect to confer citizenship. *Id.* at 452-59. Justice Ginsburg filed a dissent joined by Justices Breyer and Souter, *id.* at 460-71, and Justice Breyer filed a dissent joined by Justices Ginsburg and Souter, *id.* at 471-90.

in any of the opinions to the *Benner* case. Justice Breyer's dissent did, however, refer to international law sources on citizenship by birth for those born abroad.⁶⁹ But the *Benner* decision, which addressed whether the would-be citizen's own rights were violated, would have seemed relevant both to the standing question and to the equal protection issue in *Miller v. Albright*.

In *Nguyen v. INS*,⁷⁰ decided in 2001 (after the WJA conference), the United States Supreme Court upheld the challenged discrimination in this citizenship law. There is no reference to *Benner*, or to other foreign constitutional court decisions upholding or rejecting arguably similar gender classifications in citizenship by birth, or indeed to any contemporary source of law outside United States constitutional and statutory law, in either the majority or dissenting opinion. The majority opinion upheld the statute in part on the ground that the distinction was justified as one designed to assure the opportunity for development of a parent-child relationship because mothers are inevitably present at the birth of their child and thus have greater likelihoods of developing actual relationships with them than do fathers. The difficulty is that in this case the challenger was an unwed father of a child who had maintained a relationship for many years, but had not satisfied the statutory requirements of establishing paternity by court order prior to the child's eighteenth birthday.⁷¹ Notwithstanding its lip service to the demands of "intermediate scrutiny" for gender classifications, the Court concluded that the statute's special procedures and time limit on establishment of paternity "fit" sufficiently with the goals of establishing a biological parent-child relationship and assuring that children admitted as citizens by virtue of being born abroad to a United States parent had the potential for a relationship with that parent. As Justice O'Connor's dissent noted, however, the rule against reliance on stereotypes that intermediate scrutiny ordinarily represents was not intended to apply only when stereotypes are false.⁷² Were it otherwise, the exclusion of men from the nursing school at Mississippi University for Women,⁷³ or of women from the school at VMI,⁷⁴ might well have been upheld.

While the Canadian Court in *Benner* was concerned about the symbolic effects of its statute's discrimination based on the gender of the abroad parent in citizenship determinations,⁷⁵ the United States Court ignored any such effects. In the teeth of an actual parent-child relationship between the United States

69. *Id.* at 477.

70. 533 U.S. 53 (2001).

71. *See id.* at 57 (noting that petitioner child had been raised by his United States citizen father in Texas from age six but that the father did not obtain an order of parentage until the child was 28).

72. *See id.* at 74-79 (O'Connor, J., dissenting).

73. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

74. *United States v. Virginia*, 518 U.S. 515 (1996).

75. *See Benner*, [1997] 1 S.C.R. at 403 (Iacobucci, J.) ("This legislation continues to suggest that, at least in some cases, men and women are not equally capable of passing on whatever it takes to be a good Canadian citizen").

father and the born-abroad child, the Court upheld the gender classification—even though it disqualified the male citizen's child from citizenship and even though the child had the very kind of connection to a United States parent that the Court construed the statute to be aiming to promote. Moreover, both the Canadian and the Botswanan courts referred to nondomestic legal materials; the United States Supreme Court in *Nguyen* did not. My point here is not that courts that consider transnational legal materials necessarily reach better decisions,⁷⁶ nor that the United States Court was mistaken in *Nguyen* (although I believe it was). Rather, my point is that a comparison of the United States Court's opinion with those of other constitutional courts can illuminate paths not taken and choices made that constitute a challenge to the United States Court's reasoning.

In closing let me acknowledge again that the problems of comparison, and the question whether analyses of gender equality rights in one country have relevance to those in another, are more complex than I could treat in a panel presentation (or in this effort to provide a record of my remarks). I have elsewhere begun to identify some of these difficulties,⁷⁷ and will continue in future work to do so. Likewise, the range of interactions between laws of different nations and decisions of different tribunals is a complex subject deserving of more systematic analysis. My aim here has been to highlight the possibilities for scholars and courts in the United States to learn from the adjudicatory work of tribunals outside our boundaries on issues of equality. Let me end by applauding the degree of concern and cosmopolitan interest in the treatment of women around the world that many versions of feminism have long embraced and of which the WJA conference was an example, and by urging attention in the future not only to multiple sources of understanding equality rights but to multiple sources of understanding the design and operation of governmental structures to advance towards better opportunities for equality, for all men and all women.

76. International and transnational sources of constitutional law are by no means consistently progressive on gender issues, even in legal systems formally committed to gender equality. See *supra* text at notes 48-51. Thus, it is reported that the Bangladeshi Supreme Court upheld a discriminatory rule that only fathers (married or unmarried) could pass on citizenship to offspring. See Augustine-Adams, *supra* note 52, at 114-18. See also *id.* at 118-24 (discussing similar case in Japan, upholding discriminatory rule precluding married Japanese women from passing on citizenship); Women's Human Rights Resources Website, Bora Laskin Law Library, University of Toronto, at <http://www.law-lib.utoronto.ca/Diana/cases/htm> (last visited Jan. 28, 2003) (noting a 1998 constitutional decision in Pakistan, *Sharifan v. Federation of Pakistan*, upholding a form of gender discrimination in citizenship law and summarizing decisions on gender and nationality in twelve other countries); see also Case C-273/97, *Sirdar v. The Army Board*, [1999] E.C.R. I-7403, [1999] 3 C.M.L.R. 559. I do urge that at least the quality of deliberation can be improved by greater knowledge and engagement with the decisions of other responsible constitutional courts dealing with analogous issues. Although some might argue that the presence of different views in different national constitutional courts on an issue means that a court should ignore those views in resolving questions of domestic law, domestic courts may find both the source and the reasoning of different opinions from courts of other polities helpful in deciding what is persuasive and relevant, and what is not.

77. See sources cited *supra* notes 14, 15.

