

Asking for Directions: The Case for Federal Courts To Use Certification Across Borders

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For more than a decade, the bench, bar, and commentators have disagreed as to whether judges should look to decisions of international and foreign courts for guidance in resolving disputes that appear in U.S. courts. In 2003, Justice Scalia's dissent in *Lawrence v. Texas* warned darkly that the majority's citation to foreign and international sources was "[d]angerous dicta" that risked "impos[ing] foreign moods, fads, or fashions on Americans."¹ The next year, then-Attorney General Alberto Gonzales objected that "[r]eliance on foreign law threatens to unmoor the court from the proper source of its authority."² Members of Congress echoed those sentiments, some going so far as to threaten to impeach Justices who relied on such materials.³

As a member of the U.S. Supreme Court for more than two decades, Justice Stephen Breyer has been a quiet participant in this conversation—drawing upon decisions of foreign colleagues to enrich his opinions. Now, in his new book, *The Court and the World*,⁴ Justice Breyer offers a full-throated defense of the practice, arguing that it is not only permissible and desirable but unavoidable.⁵ New global challenges require renewed cooperation among judges across state borders. To decide cases in our globalized world, he contends, judges need to wrestle with foreign and international law. In some cases, U.S. judges must apply foreign or international law as controlling, not

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1. 539 U.S. 558, 598 (2003) (Scalia, J., dissenting.) (quoting *Foster v. Florida*, 537 U.S. 990, n.* (2002) (Thomas, J., concurring in denial of certiorari)).
 2. Charles Lane, *The High Court Looks Ahead*, WASH. POST (Nov. 12, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/11/AR2005111101645.html> [<http://perma.cc/ETH7-Z4V4>].
 3. Tom Curry, *A Flap over Foreign Matter at the Supreme Court*, NBC NEWS (Mar. 11, 2004), http://www.nbcnews.com/id/4506232/ns/politics-tom_curry/t/flap-over-foreign-matter-supreme-court [<http://perma.cc/69D9-56Z4>].
 4. STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* (2015).
 5. *See id.* at 236-46.

merely persuasive, authority.⁶ In others, U.S. judges must be aware of how foreign courts have resolved similar issues and consider what effects their decisions are likely to have in other states. Ultimately, Justice Breyer's argument is one of pragmatism, not ideology.

As professors who teach, write about, and litigate issues of foreign and international law, we fully agree with Justice Breyer's central claims. Indeed, his is a position that would be utterly uncontroversial in almost any other country. It is a position, moreover, that allows U.S. courts to extend the influence of U.S. law throughout the world—for judges the world over look to the decisions of our own courts for insights.

But there is a real-world problem that Justice Breyer fails fully to confront in his book, one that may undermine the effectiveness of his important message. And that is this: even if they are willing to look, U.S. courts often have no idea where or how to find the law Justice Breyer would have them consider.

To be fair, this is not the fault of the judiciary alone. The legal education system in the United States, until recently, offered little in the way of foreign or international law training (with the limited exception of courses on English common law). Many judges went to law school in the Cold War era, when they were not encouraged to learn the bodies of law that Justice Breyer would have them consult. Equally important, foreign and international legal sources are difficult to find. Westlaw, Lexis, and other legal research tools commonly used by U.S. lawyers offer little in the way of foreign law. And even if they did, judges' chambers are not often well-equipped to read decisions in foreign languages, much less appreciate their meaning in context. It is no coincidence that when judges do look to foreign legal decisions, they look most often to those written in English: decisions from the United Kingdom⁷ and Canada⁸ prominent among them.

As a result, U.S. courts—including the U.S. Supreme Court itself—are often hostage to the litigants to bring the most relevant information about foreign law to them.⁹ When a party makes a claim about foreign law, the Court is often not in a position to evaluate that claim. When, for example, litigants

6. See *id.* at 176-78, 199-218.

7. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 577 (2005) (“The United Kingdom’s experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment’s own origins.”).

8. See, e.g., *Knight v. Florida*, 120 S. Ct. 459, 461 (1999) (denying certiorari) (Breyer, J., dissenting) (citing *Kindler v. Minister of Justice*, [1991] 2 S. C. R. 779, 838 (joint opinion)).

9. In *Lawrence v. Texas*, 539 U.S. 558, 576 (2003), for example, the Court cited an amicus brief as the only authority for the proposition that, “[o]ther nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct.”

claimed that the Alien Tort Statute, the subject of *Kiobel v. Royal Dutch Petroleum Co.*,¹⁰ was alone in the world in providing for civil liability for violations of the law of nations, the Court was not well equipped to check the accuracy of the claim. To help address this gap, one of us co-authored an amicus brief to answer the claim.¹¹

One may think that this is simply the nature of the adversarial process: the courts rely on the parties to bring to light the material that best supports their cause. But courts usually do not rely on the litigants and amici—who are inevitably self-interested—for relevant legal materials to confirm or disconfirm important claims. Federal judges have small armies of law clerks and law librarians to do just that—to test the litigants’ claims against the relevant legal materials. But the courts, including Supreme Court, are not well equipped to do the same when it comes to claims about foreign and international law.

So what’s a judge to do? One obvious solution would be for legislatures to provide resources that would allow courts to better evaluate such claims. And, indeed, we think there is a case for the Supreme Court, at the very least, to devote more resources than it currently does to developing capacities that allow the Justices to better evaluate litigants’ foreign or international law claims. There is also a gaping hole in the current information infrastructure that an enterprising company ought to seek to fill—allowing lawyers and courts alike to better access the resources they require to make the kinds of arguments Breyer rightly emphasizes are so relevant in today’s world.¹²

But these are long-term and potentially costly fixes. Is there something that a judge who wants to answer Justice Breyer’s call to arms can do right now to ensure she is not receiving an incomplete or partial picture of foreign or international law, whether as controlling or persuasive authority? The answer is yes: U.S. courts could certify questions to foreign and international courts.

This may seem like a radical proposal, but in fact there is precedent for it. When a U.S. state court confronts a dispositive but unsettled question of law from another jurisdiction within the United States, it need not rely solely on the arguments of the parties. Instead, one court may “certify,” or submit, that

10. 133 S. Ct. 1659 (2013).

11. Supplemental Brief of Yale Law School Center for Global Legal Challenges as Amicus Curiae in Support of Petitioners at 28–36, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10–1491) (responding to the claim that the ATS was unusual in providing for civil liability for violations of the law of nations).

12. Few foreign law databases provide the summaries, commentaries, headnotes, and other helpful annotations that Lexis and Westlaw do. Many international tribunals publish their claims, filings, and decisions online. Again, however, users must navigate and search them individually. Among the subscription databases with the best international law coverage are the Oxford Reports on International Law and Brill’s International Law and Human Rights. But even these are far from complete, and U.S. judicial chambers often do not have easy access to them.

question of law to the high court of another jurisdiction.¹³ The Supreme Court has explained that certification of questions of law can “save time, energy, and resources and helps build a cooperative judicial federalism.”¹⁴ Connecticut, for instance, permits its supreme court to certify a question of law *to*, or receive a certified question *from*, the highest court of another state or of a federally recognized Native American tribe.¹⁵ Likewise, federal courts may certify a question of state law to the appropriate state court, and since a 1960 Supreme Court opinion¹⁶ inspired broader use of the practice, nearly all states have adopted formal rules governing certification.¹⁷ This practice preserves comity and facilitates sound adjudication, especially where important public policies are at stake or the issue is likely to recur.¹⁸

Lower federal courts may also certify questions up to a higher court where there a decisive question of law on which there is substantial difference of opinion and where an immediate appeal could resolve the dispute more quickly.¹⁹ In each case, courts may of course decline to respond to a certified question.²⁰ And while a court that certifies a question within the U.S. must generally treat the response as authoritative, that would not necessarily be the case in the event of a foreign or international certification.²¹ Nonetheless, this sort of exchange could further the collaborative judicial problem solving

13. See *Certified Question*, BLACK’S LAW DICTIONARY (10th ed. 2014).

14. *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974).

15. CONN. GEN. STAT. § 51-199b(c)-(d) (2015).

16. See *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207 (1960) (vacating and remanding a federal appellate decision for failing to take advantage of a Florida statute “which permits a federal court to certify such a doubtful question of state law to the Supreme Court of Florida for its decision”).

17. Wendy L. Watson, McKinzie Craig & Daniel Orion Davis, *Federal Court Certification of State-Law Questions: Active Judicial Federalism*, 28 JUST. SYST. J. 1 (2007) (describing evolution of state certification procedures after *Clay*); Eric Eisenberg, Note, *A Divine Comity: Certification (at Last) in North Carolina*, 58 DUKE L.J. 69 (2008) (discussing the fact that North Carolina was the only state without a certification procedure as of 2008).

18. See, e.g., *Parrot v. Guardian Life Ins. Co. of Am.*, 338 F.3d 140, 144 (2d Cir. 2003). Depending on state law, this can be done by a U.S. court of appeals, see, e.g., *Yesil v. Reno*, 172 F.3d 39 (2d Cir. 1998) (unpublished table decision) (certifying a question to the New York Court of Appeals), or a U.S. district court, see, e.g., *Jagger v. Mohawk Mountain Ski Area*, No. 3:01CV2163, 2002 WL 31433376 (D. Conn. Sept. 24, 2002) (certifying a state law question to the Connecticut Supreme Court).

19. 28 U.S.C. § 1292(b) (2012) (permitting certification from a district court to a court of appeals); 28 U.S.C. § 1254(2) (2012) (permitting certification from a court of appeals to the Supreme Court); SUP. CT. R. 19 (same).

20. See, e.g., *Yesil v. Reno*, 705 N.E.2d 655 (N.Y. 1998) (declining certification from the Second Circuit).

21. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS §§ 482, 483 (elaborating circumstances in which a U.S. court need not respect a foreign judgment).

encouraged by Justice Breyer. If state, federal, and tribal courts can communicate with each other, why not U.S. and foreign or international courts?

Some federal judges appear to have warmed to the idea. Not long ago, Judge Raymond Lohier suggested that, in “the context of cross-border commercial disputes, there is every reason to develop a similar formal certification process pursuant to which federal courts may certify an unsettled and important question of foreign law to the courts of a foreign country.”²² More recently, Judge Shira Scheindlin sounded a more urgent note. “Rule 44.1 requires me to determine the relevant foreign law in a dispute pending in a U.S. court,” she wrote. “While I can rely on all available sources, and credit whatever expert testimony I choose, there is one thing I cannot do which would be the most helpful. I cannot certify these unsettled questions of Russian law to the Russian courts.”²³

But local rules are not created by the legislature—Congress has authorized courts to adopt these rules themselves.²⁴ This problem is therefore entirely within the power of each federal court to change.²⁵ Nothing prevents a federal court from amending its local rules to permit certification to foreign or international courts. And even in the absence of a local rule, courts in an appropriate case may exercise their authority under the All Writs Act²⁶ or pursuant to their inherent judicial powers simply to *ask* a foreign or international court whether it will accept a certified question.²⁷ In other words, U.S. courts already have the power to request the views of a foreign or international court, either regarding a dispositive point of law in a U.S. case or even in the broader, consultative manner envisioned by Justice Breyer.

One might object, as critics of certification within the U.S. have done, that the practice can cause delays in adjudication, unduly burden the court to which a question is certified, and generate advisory opinions in response. None of

22. *Terra Firma Invs. (GP) 2 Ltd. v. Citigroup, Inc.*, 716 F.3d 296, 301 (2d Cir. 2013) (Lohier, J., concurring).

23. *Fed. Treasury Enter. Sojuzplodoimport v. Spirits Int’l B.V.*, 61 F. Supp. 3d 372, 386 (S.D.N.Y. 2014), *notice of appeal pending*.

24. *See* 28 U.S.C. § 2071; *see also* FED. R. APP. P. 47 (authorizing adoption of local rules); FED. R. CIV. P. 83 (same).

25. *See, e.g.*, Eisenberg, Note, *supra* note 17, at 81 & n.80 (noting that South Carolina adopted a certification procedure by court rule).

26. 28 U.S.C. § 1651(a) (2012). The All Writs Act was enacted in the First Judiciary Act of 1789 and has long been recognized as a broad grant of interstitial authority to issue all orders necessary to the sound adjudication of cases over which a court has proper jurisdiction.

27. Notably, some state courts have concluded that it was within their inherent judicial powers to *answer* a certified question, even in the absence of a state statute expressly authorizing the practice. *See, e.g.*, *Sunshine Mining Co. v. Allendale Mutual Ins. Co.*, 666 P.2d 1144 (Idaho 1983); *In re Elliott*, 446 P.2d 347 (Wash. 1968).

these objections have stifled the certification process in the United States, however, and there is no reason to believe courts could not manage a foreign or international version equally well. Judges are well-positioned to determine when delay is sufficiently prejudicial to a litigant to proceed with an adjudication even absent a response to a certified question; courts burdened by the receipt of certified questions can decline the certification; and the existence of a live dispute between parties in the certifying court tends to prevent a purely advisory opinion by another court (if that court's own rules even prevent their issuance).

Of course, we do not pretend that our proposal is a complete fix for the problem we have identified. As already noted, simply because U.S. courts make a request does not mean a foreign court must respond. If answers are provided, litigants may disagree with them (and, indeed, they should be permitted to offer their views in response). Moreover, the availability of certification should not absolve courts of the responsibility to become better informed and to develop resources that allow them to evaluate foreign and international law claims with the same rigor they do domestic law claims. There may be other avenues for obtaining information, as well, that judges might explore—for example, appointing an amicus to provide expert briefing on specific questions of foreign or international law²⁸ or issuing a letter rogatory to a foreign or international court.²⁹ But even if it is not a complete fix, certification offers courts an important tool. It also has symbolic value that other solutions might not. Certifying questions to foreign and international courts would demonstrate that U.S. judges value the informed opinions of their counterparts the world over.

The U.S. Supreme Court could lead the way. In the 1950s, the Court developed the practice of “calling for the views of the Solicitor General” when,

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28. The Supreme Court, in particular, can appoint expert amici and can use the process of “calling for the views of the Solicitor General” to obtain information on the content of foreign or international law. Indeed, the Office of Foreign Law at the Department of Justice (OFL) employs foreign lawyers to defend U.S. interests abroad, and those lawyers are in a particularly good position to opine on the content of foreign law. The Solicitor General would likely coordinate an answer from OFL and the Legal Adviser's Office at State in preparing its brief.
29. See *Letter Rogatory*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining a letter rogatory as a “document issued by one court to a foreign court” to facilitate service of process or taking of evidence); see also 28 U.S.C. §§ 1781(a)(2), 1782(a) (2012) (detailing procedures for issuing and receiving letters rogatory); FED. R. CIV. P. 28(b)(1)(B), (b)(2) (permitting discovery by letters rogatory); *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247-50 (2012) (discussing the development of letters rogatory). But a letter rogatory is not traditionally used to answer questions of law, and the device is often cumbersome. See, e.g., Offices of the U.S. Attorneys, *Letters Rogatory*, U.S. DEP'T JUST. § 275, <http://www.justice.gov/usam/criminal-resource-manual-275-letters-rogatory> [<http://perma.cc/G7DA-HQYZ>] (“Letters rogatory are customarily transmitted via the diplomatic channel, a time-consuming means of transmission.”).

for practical, political, or other reasons, the Justices sought help before deciding petitions for certiorari or cases on the merits.³⁰ This practice fostered a productive dialogue between the judiciary and the executive branch while facilitating the work of the Court.³¹ No rule of the Supreme Court governs this practice. Now, in the still early years of the twenty-first century, the U.S. Supreme Court could innovate again, this time by certifying a question to, or requesting the views of, a foreign or international court. In this way, the Court could begin to invite a truly informed and engaged dialogue with the world.

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30. One of the earliest instances of a “CVSG” occurred in the landmark school desegregation case from Little Rock, Arkansas, *Cooper v. Aaron*, 358 U.S. 1 (1958), a decision influential in Justice Breyer’s own conception of the judicial role. See *Aaron v. Cooper*, 358 U.S. 27 (1958) (Misc. Order) (calling for the views of the Solicitor General following oral argument); see also Stephen G. Breyer, *Making Our Democracy Work: The Yale Lectures*, 120 YALE L.J. 1999, 2006-10 (2011) (discussing *Cooper v. Aaron*).
31. Stefanie A. Lepore, *The Development of the Supreme Court Practice of Calling for the Views of the Solicitor General*, 35 J. SUP. CT. HIST. 35 (2010).