Toward an Inclusivist Constitutional Faith: Comparative Theology and the U.S. Supreme Court’s Foreign Law Debate

by William Gerard Godwin

As a lawyer and emerging theologian, I have come to appreciate the interdisciplinary conversation that is possible—and almost obligatory—between theology and law. They are importantly different but in meaningful ways they share a methodological concern for interpretation. They are both faced with a similar way of thinking about and responding to texts and controversies, within a comprehensive narrative that projects how the world ought to be and offers a path to an enlightened existence in a world filled with options. The lawyer and the theologian both ask in their own way: In light of our texts (written and oral-aural), our communal traditions (national and ecclesiological), and the present questions facing our constituencies (citizens and observers), how ought we to do theology or practice law? Moving beyond the sacred/secular bifurcations that compartmentalize and limit opportunities for valuable interdisciplinary insights, I am compelled to put these two fields into a dialogue. In this essay, I attempt to show that in facing similar hermeneutical challenges, the field of comparative law (specifically, U.S. courts’ use of foreign courts’ laws) can gain valuable insights from comparative theology.

Before going any further, two definitions are important for this kind of interdisciplinary enterprise. Comparative law is simply the study of similarities and differences between and among different legal systems. The following is an example of how this process plays out: Country A and B, often, but not always, have sufficiently similar legal systems or political philosophies. Country A observes how its law is like or not like Country B’s law. The similarity or difference is sometimes noted in judicial opinions to support a particular interpretation of Country A’s law. Comparative theology, on the other hand, has a much more nuanced meaning because it is not merely about comparing and contrasting A with B to support a particular outcome. Comparative theology demands being grounded faithfully in A and crossing over to learn deeply about B so that A is enriched and enhanced. Harvard Divinity School Professor Francis Clooney elegantly defines this comparative theology that he, along with theologians like Paul Knitter and James Fredericks, who I will also consider, are pioneering:

Comparative theology—comparative and theological beginning to end—marks acts of faith seeking understanding which are rooted in a particular faith tradition but which, from that foundation, venture into learning from one or more other faith traditions. This learning is sought for the sake of

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fresh theological insights that are indebted to the newly encountered tradition/s as well as the home tradition.\(^2\)

In US society, judges are charged with interpreting and expressing what the law is as issues arise. Comparative theology offers a comparative methodology whereby judges can be faithful to their home tradition but open to learning from the experiences of other nations. Engaging in comparative law through the methodological insights of comparative theology can move our justice system toward an inclusivist constitutional faith. I contend that comparative theology offers a framework to better think about, justify, and do comparative law. The U.S. Supreme Court’s debate over whether foreign law should be consulted or cited in U.S. court decisions provides a useful case study to explore comparative theology’s potential methodological contribution to comparative law.

The Supreme Court’s Foreign Law Debate

Over the past decade, a significant debate has emerged about the use and citation of foreign legal precedents to help resolve, explain, and shed light on legal issues facing U.S. courts. This issue has played itself out particularly strongly in the United States Supreme Court, where there are two highly oppositional sides to this debate, clearly opposing or clearly supporting the practice. I believe there is an important, inclusivist, middle ground that is relevant not only in theology but also law. It is of no small importance that this issue has been most fiercely debated when the Court has faced socially controversial issues like the death penalty and gay marriage: issues where the religious in the United States are also highly divided and equally in search for workable solutions that preserve traditions but maintain liberty, equality and justice. When our basic sense of right and wrong in search of the just solution has come before our nation’s highest Court foreign law has often been invoked.

The so-called Internationalists on the Court (including Justices Ruth Ginsburg, Sandra Day O’Connor, Stephen Breyer, and Anthony Kennedy) have embraced foreign law, usually, in ways that identify how other nations have reached progressive decisions where liberty, equality, and justice are expanded for the least advantaged: the victim of anti-gay rights laws or pro-death penalty laws. When faced with the language of the United States Constitution—our nation’s sacred text—a particular legal or policy option, and an affected public, these internationalist justices have invoked foreign law to the dismay of other justices. These include Justices Antonin Scalia, Clarence Thomas, Samuel Alito, and John Roberts who align on the other side of this debate. The latter cadre of justices are known as constitutional nationalists—who have a particular disdain for the appearance of foreign law citations in the legal opinions of federal courts. In terms of deciding controversies made in America, these justices are the preservers of a constitutional faith having little to no interest in mining the texts and interpretive decisions of similar Western, Democratic republics—or other countries—that have faced similar constitutional questions.

The divide between internationalists and constitutional nationalists plays out in the larger society—no less so than by representatives and senators in Congress. Over the past decade, Supreme Court Justice nominees’ position on the use of foreign law has almost reached the status of a litmus test for surveying whether a justice is fit to serve (and in the minds of constitutional nationalists: sufficiently loyal—read: faithful—to the U.S. Constitution, which they take an oath to uphold.). Even beyond the highly confrontational nomination hearings, sitting Justices who have cited foreign sources in their opinions have been chided in the media. In an editorial whose title tells it all, “We need to keep foreign law out of U.S. courts,” former Rep. Sandy Adams (R-FL), wrote: “Our Constitution laid the foundation for our nation’s judicial system, and referencing or using foreign law in American courts will lead to its erosion. Each case that cites foreign law is another opportunity to set precedent and for the

Constitution to be challenged or overrun.” Not content with merely a public editorial but determined to stop this process legislatively, Rep. Adams continued,

That is why I have introduced legislation to protect our Constitution and federal court systems from this type of practice. My two-page bill, H.R. 973, simply states that “in any court created by or under Article III of the Constitution of the United States, no justice, judge, or other judicial official shall decide any issue in a case before that court in whole or in part on the authority of foreign law, except to the extent the Constitution or an Act of Congress requires the consideration of that foreign law.”

Her conclusion illuminates one of the key issues that really is exorcised in this debate: the question of American exceptionalism. Rep. Adams resolutely declares, “We must remember that we have an American judicial system in place for a reason; it is based off of our country’s rich history and it is intentionally unique to our great nation. As we move forward as a country, we must work to protect it).³

From the perspective of U.S. Constitutional history, the irony in all of this is that “fortunately, it is not necessary to recount the full history of Supreme Court citations to foreign authority at length: that task has already been undertaken by others. Recently, Steven G. Calabresi and Stephanie Dotson Zimdahl coauthored a 164-page law review article that surveys the Supreme Court’s use of foreign authority since 1793.”⁴ This practice is not at all new, but the aggressive response in opposition to it could reasonably be fueled more by the subject of the prominent cases where critics have railed against the use of foreign law: homosexuality and the death penalty. Notwithstanding the length of this practice, constitutional nationalists have raised reasonable critiques, which could equally be leveled against comparative theology.

Why Compare Law and Religion?

For me, the worlds of law and religion collide when I consider the variety of methodological models available for wrestling with the intersection of law and religion for doing theology (contextual, orthodox, liberation, neo-Augustinian, etc.) as well as the myriad of ways to practice law (originalism, textualism, critical theory, economic analysis, casuistry, etc.). Whether one is talking about law or religion, one is encountering a (1) long and storied tradition that (2) is filled with symbols and multiple meanings that are (3) fervently believed in and relied upon by individuals and communities to bring order and resolve to the human experience in society. In both cases, the use of sacred texts are often but not always a foundational element of communal understanding and the reality of globalization has made the foreign much more familiar and readily accessible.

The prevalence of texts and their multiple interpretive models in law and religion provide an interesting framework for studying hermeneutics. In his book, Interpreting the Bible & the Constitution, the late Professor Jaroslav Pelikan precisely captures how both the Constitution and the Bible function in society as “normative scripture,” observing that “both texts are centuries old by now, whether two or twenty, and both are ‘venerable’ and even venerated and enshrined.”⁵ Following that line of analysis, Pelikan writes,

the Bible was taken to be ‘profitable for teaching, for reproof, for correction, and for training in righteousness, that the man of God may be complete, equipped for every good work’ (2 Tim 3.16-17); and the Constitution was likewise, in a description by Chief Justice John Marshall that was to become

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axiomatic for the Supreme Court ever after, “intended to endure for ages to come, and consequent-
ly, to be adapted to the various crises of human affairs.”

The sacredness of the Bible and the Constitution, as the most prominent, though not in the case of religion, exclusive texts of American law and religion have no meaning without a body of believers who subscribe to the authority of these texts. Invoking the importance of community, Pelikan continues his comparison, writing, “For although the historical sources of laws and of doctrines have been many and varied, each of these texts has been adopted by its community as its norm, in the expectation that in those ‘ages to come,’ with all their ‘various cri-
eses of human affairs,’ it would continue to be applicable to all kinds of crises and needs...”

These texts, as well as their followers and interpreters, do not exist in silos. Lawyers and theologians have histori-cally encountered and been influenced by globalization and human diversity. That diversity is powerfully intensified in today’s globalized, interconnected, and quickly accessible world with a 24-hr news cycle and the seemingly limitless ability to know what is going on anywhere in the world at anytime. How practitioners in law and religion interpret their texts, therefore, is in no way separated from how they internalize and react to the unavoidability of diversity, and more specifically, pluralism. For Francis Clooney, the very “context for today’s comparative theology is growing religious diversity”, both that which is around us but, also and more impactful, the diversity within us, which “not only envelops us, it works on us, gets inside us; if we are paying attention, we see that attentiveness to other religions affects even how we experience, think through, and practice our own religion...To make sense of their own faith lives, individuals have to make choices regarding how to form and balance their religious commitments.”

In a world where we are almost all—religious and non-religious—involuntarily engaged in comparative theology by mere existence, the religious other is no longer a myth, a freak of nature, or exemplar of the exotic: he or she is a human being, our neighbor, professor, doctor, employer, and sometimes spouse. If, as Clooney asserts, diversity has catapulted the need for and growth of comparative theology, diversity has played a key role in the autobiographies of some of comparative theology’s most noted thinkers. For example, Clooney observes how his path to comparative theology “started in Kathmandu” where as a Jesuit he taught English and moral science and in so doing his “Hindu and Buddhist students taught [him] much about how to think, act, and love religiously”, teaching him “how faith makes possible, even demands, that we learn deeply from our religious neighbors.”

Paul Knitter notes in his book’s preface that of the people he should thank for providing helpful feedback on his manuscript: “at the top of this list is my wife...who was a Catholic Christian when we married twenty-five years ago but has since found a Buddhist path to be more clear and comfortable.” And, in James Fredericks’ effort to promote inter-religious dialogue, he has personally taken on the importance of not merely writing about different religious traditions through textual analysis, but more practically and directly “doing theology in conversation with the other traditions.” Indeed, for Fredericks, comparative theology is at its core “critical reflection on the praxis of inter-religious dialogue” and more generally theology, itself, is “critical reflection on praxis done in service to a specific religious community.”

Like Clooney, Knitter, and Fredericks, American judges do not exist in social or jurisprudential isolation; they influence and are influenced by their fellow judges at home and abroad. Similar to the international councils and

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6 Pelikan, Bible and Constitution, 8.
7 Clooney, Comparative Theology, 4-7.
8 Clooney, Comparative Theology, 17-18.
11 Fredericks, Buddhists and Christians, 97.
inter-religious dialogues that religious organizations have participated in from time immemorial, Law Professor Daniel Farber has observed:

Internationalists also view transnational citation as a predictable incident of globalization, particularly given ready access to foreign law electronically. As in other fields, international contacts between judges are now much more frequent than in the past. As Justice Kennedy stated in an interview on the subject: “It really began with the Holocaust, when international law started to concern itself with how nations treated their own citizens.... So you had the beginnings of things like the European Court of Human Rights. They became the new kids on the block, but no one really knew what they did. Gradually, their work started to become known around the world. Then you started to have the formal exchanges of judges...And then you have informal exchanges, like in Salzburg. You can’t help being influenced by what you see and what you hear.”

The influence that Justice Kennedy discusses is real, tangible, and inescapable in today’s environment. Ignorance of the other and her way of life, not only socially and politically, but also legally, requires a kind of social isolation that is not only impossible for the modern judge but anti-intellectual and irresponsible.

Learning Across Borders

When I began to study the history of comparative theology and read examples of comparative theological exercises written by mainly Catholic Christian theologians who were also specialists or novices interested in the comparative study of other religions (especially Buddhism, Hinduism and Islam), I put on my lawyer hat and recalled American courts’ debate over the use and citation of foreign law in legal opinions to help resolve U.S. legal issues. In my study of comparative theology and the U.S. Supreme Court’s debate about whether foreign law should be cited in the Court’s opinions (essentially an exercise in transnationalism or comparative law), I was struck by the contrasting views of two Catholic Christians: one, a Supreme Court Justice; the other, a theologian and professor:

My conversation with Buddhism has enabled me to do what every theologian must do professionally and what every Christian must do personally—that is, to understand and live our Christian beliefs in such a way that these beliefs are both consistent with and a challenge for the world in which we live. Buddhism has enabled me to make sense of my Christian faith so that I can maintain my intellectual integrity and affirm what I see as true and good in my culture; but at the same time, it has aided me to carry out my prophetic-religious responsibility and challenge what I see as false and harmful in my culture. Right now, as I look back over my life, I can’t image being a Christian and a theologian without this engagement with Buddhism. And thus, the title of this book: Without Buddha I Could not be a Christian. Though the wording is perhaps provocative, it is definitely true.

I don’t know what it means to express confidence that judges will do what they ought to do, after having read the foreign law. My problem is I don’t know what they ought to do. What is it that they ought to do? You have to ask yourselves, Why is it that foreign law would be relevant to what an American judge does when he interprets—interprets, not writes—I mean, the Founders used a lot of foreign law. If you read the Federalist Papers, it’s full of discussions of the Swiss system, German system. It’s full of that. It is very useful in devising a constitution. But why is it useful in interpreting one? Now, my theory of what I do when I interpret the American Constitution is I try to understand what it meant, what was understood by the society to mean when it was adopted. And I don’t think

13 Knitter, Without Buddha, xii-xiii.
it changes since then. Now, obviously if you have that philosophy—which, by the way, used to be orthodoxy until about 60 years ago—every judge would tell you that’s what we do. If you have that philosophy, obviously foreign law is irrelevant with one exception: Old English law, because phrases like “due process,” the “right of confrontation” and things of that sort were all taken from English law. So the reality is I use foreign law more than anybody on the Court. But it’s all old English law. All right, if you have that theory, you can understand why foreign law is irrelevant. So he will never convert me.14

Paul Knitter, a Catholic Christian theologian in seeking to understand (to interpret) the meaning of his Christian faith has found Buddhism to be an essential interlocutor. Justice Antonin Scalia, a Supreme Court Justice, in seeking to understand (to interpret) the meaning of the U.S. Constitution finds no such essential use for pursuing foreign or comparative law sources to enlighten his understanding of the U.S. Constitution, even while noting that though German and Swiss systems aided the nation’s founders in devising its Constitution, he need not now turn to them to understand its meaning. No doubt, as I discuss below, there are some important differences between the comparative theologian and the comparative lawyer: the theologian has much greater creativity and writes without the burden of creating binding precedent that decides the merits of legal questions. Notwithstanding that difference, while judges may cite foreign law in their opinions, it is clear, as Justice Stephen Breyer pointed out in the aforementioned debate over the issue with Justice Scalia: When he and other judges cite foreign law it “doesn’t bind us.”15

Defending his approval of learning across legal borders to find solutions and gain important insight into U.S. issues, Justice Breyer explains further why he engages in comparative law:

I am at a seminar sort of like this. And suddenly, the member of Congress... started to say how terrible it was to use foreign law in decisions. And I said, ‘Well, I guess, Congressman, that’s aimed at me.’ (Laughter.) And I said, ‘Well, let me tell you.’...These are human beings, more and more, called judges...who have problems that often, more and more, are similar to our own. They’re dealing with this certain text, texts that more and more protect basic human rights. Their societies more and more have become democratic, and they’re faced not with things that should be obvious—should we stop torture or whatever—they’re faced with some of the really difficult ones where there’s a lot to be said on both sides. Hard to decide. I said, ‘If here I have a human being called a judge in a different country dealing with a similar problem, why don’t I read what he says if it’s similar enough? Maybe I’ll learn something.’ To which the congressman said, ‘Fine. Read it. Just don’t cite it.’ (Laughter.) I thought, ‘All right.’16

All of what Justice Breyer said above is instructive and if read carefully sounds similar to Paul Knitter’s statement above. One could reasonably re-word Breyer’s statement with the following: “These are human beings, more and more, called Buddhists, who have problems that often, more and more, are similar to our own...If here I have a Buddhist who believes in a different religion dealing with a similar problem, why don’t I read what he says if it’s similar enough?” The Congressman’s response, “Fine. Read it. Just don’t cite it,” reveals the main problem that both comparative law and comparative theology face: exceptionalism. Given that once we sentient beings have read something we are forever affected by that experience; what we have read will no doubt affect—even if only to affirm or give us confidence for—our ultimate opinion which may highlight citations from our own traditions

15 USACL, “Constitutional Relevance of Foreign Court Decisions.”
16 USACL, “Constitutional Relevance of Foreign Court Decisions.”
while evading the citation from a foreign tradition whose power and insight might add so much. Why do constitutional nationalists fear the citation of non-binding foreign law in U.S. court opinions? An exclusive faith in one system or way of being tends to accompany a spirit of exceptionalism that paints anything different as deficient and suspect. While unyielding faithfulness to the familiar is part of the answer, theologian Paul Knitter offers students of comparative law a corollary to the well-known issue of American exceptionalism: Faithfulness in the hybrid sense. I will take that up more closely below.

Before exploring more thoroughly the question of faithfulness in law and religion, it is important to return to the arena of constitutional law to consider how everyday citizens, elected legislators, executives, courts, and judges on state and federal courts and even the U.S. Supreme Court are essentially debating a question that has been fairly well-developed, frequently written about and assumed in the sphere of religious studies and inter-religious dialogue: Can one be a faithful member of a particular religion and simultaneously learn from another religious tradition in ways that help one better understand questions and concepts grounded in one’s home religious tradition?

Consider the following comparative theological example: Can a Christian theologian faced with problem of greed and indifference to human suffering and poverty in her congregation prepare a sermon (read: an opinion) which explores Jesus’s Sermon on the Mount: “Do not store up for yourselves treasures on earth, where moths and vermin destroy, and where thieves break in and steal. But store up for yourselves treasures in heaven, where moths and vermin do not destroy, and where thieves do not break in and steal. For where your treasure is, there your heart will be also.”17 And then, moving from the text of her faith tradition, juxtapose the familiar wisdom of Jesus’ proclamation with the less familiar words of Buddha’s 2nd Noble Truth from his sermon on the 4 Noble Truths: “And this, monks is the noble truth of the origination of dukkha (suffering): it is craving that makes for further becoming—accompanied by passion and delight, relishing now here and now there—craving for sensual pleasure, craving for becoming, craving for non-becoming.”18 Putting these texts into conversation, seeing how each informs the other, looking for wisdom in a tradition outside of her home tradition, going deep into one of the foundational truths of Buddhism vis-à-vis Jesus’ words; in doing all of this: Has this Christian theologian become an unfaithful heretic? Can we imagine pastoral colleagues and parishioners who might question her faith commitment by treating these texts (almost) equally, by turning to the foreign to illuminate the known? I certainly could see a very similar critical response akin to what the Court’s constitutional nationalists have leveled against the Court’s internationalist justices. Faith matters.

Constitutional Faith

Sociologist Robert Bellah is perhaps best known for his work on what he called American Civil Religion where he considered how the nation-state in many ways looks and functions like a religious body in its practices, ceremonies, traditions, and symbols. In that spirit, Professor Sanford in his book Constitutional Faith admits his concerns with defining Americanism in terms of constitutional fidelity, but acknowledges the relationship between membership in the body-politic and faith in the law and its institutions. Levinson quotes Whittle Johnson: To the question “What, then, does it mean to be an American?” Johnson responded: “To be an American means to be a member of the ‘covenanting community’ in which the commitment to freedom under law, having transcended the ‘natural’ bonds of race, religion, and class, itself takes on transcendent importance. The central ‘covenant’ of the community, from this perspective, is the Constitution.”19 Levinson draws from the work of Irving Kristol,

17 Mt 6:19-21 (NIV)
symbolizing the comparative synergy of faith in law and religion. Adapting Johnson’s argument, Levinson writes, Kristol “has recently cited the Constitution as part of the holy ‘trinity’ of the American Civil Religion, along with the Declaration of Independence and the Flag. Pledging faith in the Constitution, therefore, presumably defines one as a ‘good American,’ a full member of our political community.”

Faith, a sense of belief in and loyalty to a normative framework, provides a useful way of thinking about how both theology and law function for those subject to the actions of these disciplines: the theologian’s sermon, the judge’s opinion. St. Anselm of Canterbury famously defined the very aim of theology as “faith in search of understanding.” Similarly, constitutional law is a system whose ultimate arbiters, the Justices of the U.S. Supreme Court, are required to declare an oath of faith:

I, ________, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God (Emphasis added).

One could easily swap the phrase “Constitution of the United States” with, say, “The Roman Catholic Church” without endangering the meaning of the statement in either context. Faith matters—in religion and law. There is a sense that our nation’s judges like a religious institution’s clergy must choose whom they will serve, for in the words of Jesus in the gospels, “No one can serve two masters. Either you will hate the one and love the other, or you will be devoted to the one and despise the other.” So, the unnamed Congressman who asked Justice Breyer to stop citing foreign law, along with members of the U.S. Senate Judiciary Committee who most recently quizzed Justice Elena Kagan on her view of whether foreign law should be used, are really asking: Are you (and, can you be) faithful?

At the conclusion of his comparative theology between Christianity and Buddhism, Paul Knitter asks a similar, theological, question: Am I cheating? Am I being unfaithful? If Christ is exceptional—unique—in the purest sense, then can one claim faith to both Christianity and Buddhism without dishonoring either or both of these traditions; but most especially, one’s home tradition? After one has crossed over into a deep engagement with the texts and traditions of the religious other, and then attempts to bring those insights, syncretically, into the home tradition -- is this an unholy scenario where “religious people raised in one tradition end up willy-nilly, in either diluting or shifting their religious commitments? They’re Christians having an affair.” In resolving this question, Knitter embraces hybridization as natural, writing, “our religious self, like our cultural or social self, is at its core and in its conduct a hybrid. That means that our religious identity is not purebred, it’s hybrid...It takes shape through an ongoing process of standing in one place and stepping into other places, of forming a sense of self and then expanding or correcting that sense as we meet other selves.” But this hybridity doesn’t have to precipitate into a liminal space of relativism; one can be open to the diversity around and within but still be faithful to the home faith because “being religious hybrids doesn’t mean that we don’t have an identity. It doesn’t exclude that some relationships that form our identity have a primacy or greater influence on us over others. Hybridity...doesn’t rule out monogamy.”

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20 Levinson, Constitutional Faith, 6.
21 Mt 6:24.
Knitter’s assertion and the rationale of the internationalists on the Supreme Court begs the question: Could there be an Inclusivist Constitutional Faith: faithful to the texts, precedents, and traditions of U.S. Constitutional law but simultaneously open to expanding our understanding of and critical reflection on those texts, precedents, and traditions from our global neighbors’ insights and experiences? Comparative theology offers such an opportunity. The existence of faith commitments alongside the prevalence of religious diversity requires the faithful—both constitutional and religious—to respond. Gavin D’Costa has outlined three well-known responses in theological circles, which I shall briefly define here: Pluralism holds that “all religions are equal and valid paths to the one divine reality and Christ is one revelation among many equally important revelations. Exclusivism asserts that “only those who hear the gospel proclaimed and explicitly confess Christ are saved.” Inclusivism, a sort of third or middle way, provides: “Christ is the normative revelation of God, although salvation is possible outside of the explicit Christian church, but this salvation is always from Christ.”

In thinking about the use of foreign law in interpreting the U.S. Constitution, the theological response of inclusivism is most useful and best mirrors the practice of internationalist judges, who, as we have already discussed, can merely be persuaded or influenced by foreign law. They cannot hold it as binding precedent. Exclusivism merely restates theologically the constitutional perspective of constitutional nationalists who wish to eschew the practice altogether. Pluralism works better in theology than law because of one important difference between these fields: theologians can think and act (for the most part) boundlessly in their creative imagination in seeking understanding. Judges, however, must decide matters with real people and organizations’ existence—money and freedom—at stake within the confines of the rule of law. Constitutional inclusivism, then, continues to hold that U.S. law is normative, it is our aim to which our faith is pledged. That said, we recognize that other legal traditions and responses to phenomena can illuminate and help us better understand our own normative positions, deepening our knowledge and widening our perspective: and hopefully, enhancing—not diminishing—our constitutional faith by the very process of comparison.

**How Comparative Theology’s Method Enhances Comparative Law**

Comparative theology is an inclusivist enterprise in the sense that the practitioner remains committed to and espouses a particular faith in one religious tradition. This works for law in that judges, as cited above, must pledge their faith and allegiance to the United States and its Constitution. In so doing, they can be like Knitter: hybrids. While some commentators have referred to judges who hold this view as internationalist, they are in my view better described as constitutional inclusivists; that is, proponents of an inclusivist constitutional faith. In their essence, internationalists align more closely with something that constitutional judges cannot be and highlights what critics accuse them of being: pluralists. While the distinction is important, the point is not the label. The important matter is seeing how comparative theology methodologically offers important insights for constitutional inclusivists. Together, Clooney and Fredericks provide four helpful insights which I will briefly outline here.

**Particularity: A Focus on the Specific Comparison and the Close Reading**

Clooney carefully and meticulously outlines his approach to comparative theology which has been foundational in the development of what has been called the new comparative theology. That is, a comparative theology pointing to new directions beyond botany like classifications of religious systems for the sake of classification and ranking, without attention to bias toward the home tradition. Early comparitivists of the 19th century and earlier were deeply engulfed with the large-scale, grand meta-narrative seeking to explain religion always and

already everywhere. 

Hence, it is no surprise that Clooney’s foundational methodological principle for doing comparative theology centers around close, narrow, particular focus on specific texts from specifically and narrowly defined conceptions of the two traditions being compared.

Clooney, who compares Christianity and Hinduism, is careful to define autobiographically and theologically what he means by Christianity as a Catholic, Jesuit priest and what he means by Hinduism, as a scholar and close observer. He defines the subjects. Following that same pattern, Clooney is careful to look not merely to the texts that he is comparing, but to how those texts have evolved and been understood by their believing readers (the commentaries) and to the other texts, concepts and histories to which the compared texts direct the reader. Texts are not read alone, but always in context(s) (looking back, looking around, and looking forward) to gain a more comprehensive understanding of a very specific narrative. This requires defining the field, with a close and inter-textual reading of the texts within that field. The goal is not so much to understand religion, as such, but much more so to grapple with the insights and challenges that are gained by comparing two or more specific religious traditions.

The same methodological approach is possible for comparative law. Clooney’s approach, and perhaps any comparative approach, involves selection. Selection always carries some bias: why that text, that religion; why that legal system, that legal issue? For every text and commentary that seems to help make a point within our own tradition, perhaps, there are others (and overwhelmingly so) that point in the other direction. That is always a possibility. Justice Scalia points out this frustration in his debate with Justice Breyer on the issue:

take our abortion jurisprudence, we are one of only six countries in the world that allows abortion on demand at any time prior to viability. Should we change that because other countries feel differently? Or, maybe a more pertinent question: Why haven’t we changed that, if indeed the court thinks we should use foreign law? Or do we just use foreign law selectively? When it agrees with what, you know, what the justice would like the case to say, you use the foreign law, and when it doesn’t agree you don’t use it. Thus, you know, we cited it in Lawrence, the case on homosexual sodomy, we cited foreign law -- not all foreign law, just the foreign law of countries that agreed with the disposition of the case. But we said not a whisper about foreign law in the series of abortion cases.”

I believe Scalia makes a relevant point that does not go without notice in comparative theology: judges should define the field they’re operating in, noting the exceptions and explaining why a particular tradition is useful for comparison: perhaps, a similarly situated demographic, a similar development in the law, a similar orientation to Western cultural and political values; and/or the influence of the U.S. Constitution and American values more generally on the development of foreign and international law (like the United Nations Declaration of Human Rights). The field should be carefully defined. Courts should not merely cite foreign law, but they should go deep into the text of the tradition they are comparing. Secondly, the citation of cases should explain how that particular law has developed and how it stands in contrast to its global peers, and the judge, I think, should note why alternative laws do not fit into the American tradition, which is reflected in the court’s ultimate decision on an issue based on its interpretation of U.S. Constitutional law. The foreign law does not replace the U.S. law; it should, at its best, complement such law.

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26 USACL, “Constitutional Relevance of Foreign Court Decisions.”
Returning to the Home Tradition

For Clooney, the goal of comparative theology does not stop with useful insights, and, as stated above, is not interested in displacing the deeply held faith of the traditions we hold dear and to which we profess our belief and loyalty. After comparativists have ventured deeply into the complexities of other nations’ laws and put those laws in conversation with existing U.S. law, the constitutional inclusivist should demonstrate how the compared traditions enrich, enhance, enlarge, or even challenge prevailing American law. It should show how the home tradition is made better by its comparativist exploration, or by its constitutional inclusivism.

Reflection on Praxis

While Clooney focuses more on reading and thinking about how to compare texts, Fredericks is more inclined to define the comparative theological space as the place where conversation and action (praxis) occur. Fredericks calls this “reflection on praxis.” Judges and lawyers, like theologians and the religious in their various religious traditions, encounter their peers in a variety of fora, conferences, academic exchanges and so on. Inter-religious dialogue has been at the forefront of the practice of comparative theology; and in many ways, it seems to ignite the kind of deeper engagement with texts that Clooney seems to prefer. U.S. courts’ citation of foreign law is not merely a reason for xenophobic public outcry or suspicion of judicial intent; instead, lawyers and judges can learn from the centuries of inter-religious dialogue where such dialogue is celebrated, solutions and agreements are embraced, and renewed understanding of the other in order to better understand the familiar are welcomed. When courts turn to foreign law, there should be an invitation to increase dialogue around the issues being discussed and debated between the compared legal systems. There should be a reflection on the legal environment—the decisions, the implementations, the public reactions, and the learned experiences—in both countries in ways that inform why the law is developing in such a way. I also believe law schools that are slowly embracing comparative and international law as part of their required curricula can learn from seminars and divinity schools that have more swiftly embraced serious learning of religious traditions other than one’s own, through required and strongly encouraged elective courses in inter-religious studies and dialogue toward completing degrees in professional ministry.

In framing inter-religious dialogue from the perspective of a Christian practice, Fredericks outlines how dialogue becomes a Christian practice in the following three ways: Such dialogue (1) creates a concrete form of “the church’s pilgrimage toward the Kingdom of God”; (2) reveals how non-Christians are not merely “supporting actors” in service to the Christian story; they too, have tremendous value to add in understanding the Truth toward which the Church strives; and finally, (3) such “dialogue is a form of service to the world” wherein the Church participates in and facilitates ways for all to better understand how together we can repair the world. In no small way, law and religion are similar in the aforementioned three ways: Comparative law at its best creates real, tangible ways to step back and understand how a variety of systems wrestling with constitutions and controversies are developing a path toward an ultimate sense of what justice looks like for society. Secondly, it reminds high ego-prone democracies, like the United States, that other countries—many of whose precedents, as already acknowledged, helped develop our own system—have important contributions to make toward our understanding of what justice looks like. This second principle brought out in such dialogue puts a check on the same kind of exceptionalism that is found among the religious who strongly embrace exclusivism; or in the comparative law sense, who demand what has been called a constitutional nationalist stance. Thirdly, judges from different jurisdictions encountering similar problems should be seen as serving, and complementing, one another—making the way easier for fellow judges now and in the future seeking to traverse waters that other nations have already passed. Why not learn from their experiences as we seek solutions for our own challenges?
Conclusion

This essay is only an initial attempt to put comparative law and comparative theology in dialogue; it is, I believe, a solid framework to think more deeply and methodologically about the comparative method in general. But more specifically, it is an invitation to consider how faith, whether in our systems of law or our systems of religious life, plays a significant role in guiding how we view the other, and how open we are to learning across the imaginary borders we erect. Borders, which increasingly become less real and more obviously imagined as our interconnectedness, from peoples to a human race, increases.

The noted comparative philologist, Friedrich Max Muller, approached the comparative methodology vis-à-vis religion in his “Lectures on the Science of Religion.” Muller asked, “Why, then, should we hesitate to apply the comparative method, which has produced much great results in other spheres of knowledge, to a study of religion?” Muller quoted Goethe’s paradox, “He who knows one language knows none,” equating it with religion, stating,

There are thousands of people whose faith is such that it could move mountains, and who yet, if they were asked what religion really is, would remain silent, or would speak of outward tokens rather than of the inward nature...and if we will but listen attentively, we can hear in all religions a groaning of the spirit, a struggle to conceive the inconceivable, to utter the unutterable, a longing after the Infinite, a love of God.27

While comparative theology does not advance a meta-narrative to understand religion, Muller’s assertion in relation to philology and then religion holds use for law: He who knows one law knows none. By looking to the hopes and aspirations of various systems—similar to and even different than our own—we can better understand what law means. We need not fear the other; they are, as Fredericks indicates, fellow pilgrims in search of the Truth. Constitutional nationalists, like religious exclusivists, should learn to appreciate the power of incorporating wisdom derived from diverse places into their own systems: we need to mold a constitutional faith of inclusivism to reshape the debate over the use of foreign law in U.S. Constitutional interpretation.