

Twenty Ninth Annual Donahue Lecture Series

Citation to Foreign Decisions in Constitutional Adjudication

PANEL DISCUSSION¹

DEAN ALFRED C. AMAN: Good afternoon and welcome to part two of our Donahue Lecture Series. We are honored to have a very distinguished panel who will be commenting on Justice Kirby's talk that you have just heard. I want to introduce all the members of the panel all at once and then they will speak in an order that goes across the table. When they finish I am hoping that Justice Kirby will have some comments, responses, or resonances. At that point, we want to open it up to questions and discussion from the audience.

We have with us four commentators today, beginning with Professor Eric Blumenson, who needs no introduction at Suffolk Law School. He came here from criminal law practice in Seattle and later in Boston and has been teaching Criminal Law at this law school as well as Moral and Legal Philosophy, Human Rights, and Jurisprudence. He has been a Fulbright scholar in Lahore, Pakistan, and a visiting professor at the University of Witwatersrand in South Africa. He was a reporter to the Supreme Judicial Court's Criminal Rules Advisory Committee. He was responsible for drafting the first major revision to the Massachusetts Criminal Rules. His scholarly work includes a two-volume criminal law treatise, numerous articles on criminal law, human rights, and philosophy.

The Honorable John M. Greaney, our own Justice Greaney, is the director of the Macaronis Institute for Trial and Appellate Advocacy here at the law school. He also, as you know, is someone who shares his wisdom and experience in the classroom, teaching Constitutional Law this semester, perhaps to many of you in the audience. Prior to joining the faculty at Suffolk University Law School, he was a justice of the Supreme Judicial Court of Massachusetts for twenty years. He received his B.A. with honors from the College of the Holy Cross, and his J.D. from New York University Law

1. The panelists were: Professor Eric Blumenson, the Honorable John M. Greaney, the Honorable Peter Rubin, the Honorable Margaret Marshall, and the Honorable Michael Kirby. The moderator was Dean Alfred C. Aman. Judge Peter Rubin and Chief Justice Margaret Marshall have chosen not to have their comments published.

School, where he was a Root Tilden Scholar and Chairperson of the Annual Survey of American Law. After law school, he was a practicing lawyer, a trial judge and an appeals court judge. He has co-authored several books and numerous articles and has lectured and spoken frequently in connection with judicial and law-related programs. It is really a great pleasure to have this distinguished panel with us and it is up to you if you want the podium or to speak from your seats. We begin with Professor Blumenson.

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Constitutional Kabuki: Fidelity and Opportunism in the Foreign Law Debate

Panel Remarks: Professor Eric Blumenson

PROFESSOR ERIC BLUMENSON: I want to start by thanking Justice Kirby for coming from so far away to deliver his very thoughtful lecture. He has provided our community and this panel with a provocative and fertile context for thinking about the use of foreign law by our judicial system, from the Supreme Court on down. I am grateful as well to the student editors of the *Suffolk University Law Review* for making that lecture and this dialogue possible.

I am in general agreement with Justice Kirby's conclusion that judicial opinions from abroad may be a helpful resource for American judges, and may be legitimately used and cited for this purpose. But at the outset, I note that Justice Kirby and most other commentators on all sides of the issue evaluate the use of foreign law according to a particular yardstick. That yardstick is jurisprudential legitimacy: is it a proper exercise of judicial power to invoke, and be influenced by, foreign court decisions in interpreting domestic constitutional or statutory law? That is an important question, but it excludes alternative normative criterion which might or might not generate different conclusions. If, instead, we were to evaluate the use of foreign law pragmatically, applying a consequentialist yardstick, we would ask such questions as whether doing so would allow the Supreme Court to extend the influence of human rights both abroad and at home, or whether advocates may be able to use foreign law to good effect in their cases. We might ask what the political impact of foreign citations would be on Supreme Court power and prestige, or on its persuasive powers in the particular case at issue. These are all good questions, and they may reflect the unacknowledged stakes for some

of the actors on all sides whose public discussion is limited to claims concerning interpretive methodology.

In these comments, I shall focus on the opposition to Supreme Court use of foreign cases, offering first a brief taxonomy of the jurisprudential criticisms lodged against the practice, and then some thoughts on the opportunistic use of these criticisms as stand-ins for a different, more political concern—namely, how the United States should respond to a new global culture that deems national law subordinate to universal human rights norms.

The use of foreign law has become passionately contested only recently, even though the Supreme Court has cited foreign law since its beginnings. Justice Kirby mentioned the proposed Congressional resolution of 2003, one of several bills that sought to prohibit the Supreme Court from citing foreign law for *any* purpose.² That was an obvious overreach by any reasonable standard, and even Justice Scalia, the strongest opponent of citing foreign law, opposed its passage, which never came to pass.

There are some uses of foreign law by domestic courts that should be beyond dispute. These include the invocation of international treaties to which we are a party, which is the law of our land according to the Constitution's Supremacy Clause.³ They include customary international law, also binding on American courts at least since 1900 with the Supreme Court's ruling in *The Paquete Habana*.⁴ Nor can one reasonably question looking to a particular foreign law when the domestic governing statute explicitly incorporates that law. Judges would be violating the rule of law were they to ignore the Geneva Conventions in applying the War Crimes Act, or were they to ignore "the law of nations" in applying the Torture Victim Protection Act, since both of these statutes incorporate those laws.⁵ Nor does anyone deny the propriety of

2. See American Justice for American Citizens Act, H.R. 4118, 108th Cong. (2004); Constitution Restoration Act of 2004, H.R. 3799, 108th Cong. (2004); H.R. Res. 468, 108th Cong. (2003); Constitutional Preservation Resolution, H.R. Res. 446, 108th Cong. (2003).

3. U.S. CONST., art. VI, cl. 2 provides that:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

4. 175 U.S. 677, 700 (1900). In *The Paquete Habana*, the Court held:

[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling or executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.

Id.

5. War Crimes Act of 1996, 18 U.S.C. §§ 2441(a) and (c) (punishing grave breaches of the Geneva Conventions and certain other international laws); Torture Victim's Protection Act of 1991, 28 U.S.C. § 1350 (authorizing alien civil suits for certain violations of international law).

looking to pre-constitutional English law in some cases, least of all Justice Scalia who, as an originalist, wants to interpret constitutional terms like “confrontation of witnesses” or “due process” by discerning their meaning to the framers in the eighteenth century.⁶

There is another use of foreign law that I believe is wholly legitimate, and quite distant from the concerns of the critics: looking to foreign opinions as a source of empirical data. A foreign court may examine and expound on the demonstrated consequences of a certain statute, or the efficiency of a grant of administrative or judicial powers; that American judges can sometimes learn from such experiences should be obvious. When Chief Justice Rehnquist, in ruling against a state assisted suicide law in *Washington v. Glucksberg*,⁷ cited the experience of the Netherlands to support his concern that such a law might promote involuntary euthanasia, he was effectively drawing on relevant foreign facts, not foreign law. This is learning from experience, or in its ideal form, learning from social science. When courts use empirical data from other sources, no one asks if there’s any problem with its provenance, or whether the ideas are purely American. Nor should they here.

Let us specify, then, the kind of citation to foreign law that *is* arguably problematic. The legitimately contested area is the use of foreign law that is neither incorporated into our law nor an ancestor of it, for the purpose of interpreting an American constitutional or statutory provision. A majority of Supreme Court justices believe this is appropriate in at least some cases, and they take pains to state that such foreign law is by no means invoked as binding authority that should determine the outcome. They, like Justice Kirby, argue that they look to foreign law, when they do, to learn from any insights it may offer, or to see how other countries have dealt with similar problems, or as a way to discover and question their own assumptions.⁸ That sounds not much

6. Justice Antonin Scalia, Keynote Address at the American Enterprise Institute for Public Policy Research Event: Outsourcing of American Law (Feb. 21, 2006), summary available at <http://www.aei.org/EMStaticPage/1256?page=Summary> (conceding that foreign law was used by founding fathers, but arguing that modern foreign law is not relevant to Constitutional interpretation).

7. 521 U.S. 702 (1997).

8. See, e.g., Justice Michael Kirby, *Citation of Foreign Decisions in Constitutional Adjudication: The Relevance of the Democratic Deficit*, 43 SUFFOLK U. L. REV 117 (2009). Justice Kirby argues that judges have found foreign cases

helpful and informative and therefore useful in the development of the municipal decision-maker’s own opinions concerning apparently similar problems presented by the municipal constitution or other laws . . . [D]ecisions of foreign courts . . . are not studied because they provide a binding *rule* that governs a municipal case and determines its outcome. They offer no more than a contextual setting that helps the municipal decision-maker to see his or her problem in a wider context.

Id. at 117, 130. In *Roper v. Simmons*, Justice Kennedy stated that the

opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions It does not lessen our fidelity to the

different from consulting a law review article for whatever ideas and persuasive force it might have, which has never garnered controversy.

However, critics contest that description on three counts. First, they argue that a justice who cites a foreign case is not merely drawing from it whatever persuasive value its reasoning provides, but is likely affording it some kind of *weight* based on its status as a court decision as well. Opinions that cite foreign cases in string cite form, without reference to its reasoning, open themselves to this objection. Is such an opinion implicitly saying that because foreign judges have so found in other cases, we should consider following suit? Critics might also unpack Justice Kennedy's words in his opinion finding the juvenile death penalty unconstitutional, that "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."⁹ Whatever weight "confirmation" offers appears to be based on the disposition of foreign cases rather than on their reasoning.

There is logic behind this idea, to be sure: If many minds agree on certain ideas that have thrived in a variety of places, all else being equal, it would be rational to give their consensus some weight. However, opponents of the practice say that doing so imposes a "democratic deficit" on American law. The decisions of foreign courts do not derive from constitutional or statutory law promulgated by *our* citizens or their representatives, or from judges appointed by them. Our representatives rejected the United Nations Convention on the Rights of the Child, but the Court in *Roper* cited it in banning juvenile capital punishment.¹⁰ Of course, the term "democratic

Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.

543 U.S. 551, 578 (2005). Justice Ginsburg shares this opinion. Ruth Bader Ginsburg, A Decent Respect to the Opinions of Humankind: The Value of a Comparative Perspective in Constitutional Adjudication, Address to American Society of International Law (Apr. 1, 2005), *available at* www.asil.org/events/AM05/ginsburg050401.html (stating that "We refer to decisions rendered abroad . . . not as controlling authorities, but for their indication, in Judge Wald's words, of 'common denominators of basic fairness governing relationships between the governors and the governed.'"). Justice Ginsburg also noted that other legal systems "continue to innovate, to experiment, and to find new solutions to the new legal problems that arise each day, from which we can learn and benefit." *Id.* (quoting Justice O'Connor). Justice Breyer has stated that:

in today's world . . . , where experiences are becoming more and more similar, I think that . . . in a finite number of instances there is something to learn about how to interpret [the Constitution] I think Franklin and Hamilton and Jefferson and Madison and maybe even George Washington all would have thought that we, on occasion at least, can learn something about our country and our law and our document from what happens elsewhere.

Justice Stephen Breyer & Justice Antonin Scalia, Constitutional Relevance of Foreign Court Decisions, Dialogue at American University, (Feb. 27, 2005), *available at* <http://www.freerepublic.com/focus/news/1352357/posts>.

9. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

10. *Id.* at 576.

deficit” fosters confusion, since even the critics accept the Supreme Court’s counter-majoritarian role. Nevertheless, the critics believe that *counter-majoritarian* decisions of the Supreme Court should not be bolstered by citing *majorities* in other countries, or a majority of countries; they must only be rooted in our Constitution, promulgated with the democratic consent of our citizens however long ago.

Second, even if a court considers foreign law solely for its persuasive power, without giving any weight to its judicial source, opponents think doing so generates bad substantive judgments. The argument is that the vast differences between laws and cultures of different countries, coupled with a domestic judge’s acontextual understanding of a foreign court opinion, makes looking to cases abroad likely to mislead rather than educate. Even among those Western cultures most like our own, a country that spawned Nazism may have a justifiably different take on free speech than we do; a country with an official religion or history of religious oppression may generate different establishment norms; a country whose legislature may easily override its court’s constitutional rulings may develop different norms of judicial review; and a welfare state may require a very different legal culture than our individualist, entrepreneurial one.¹¹ (There are obviously other cultures that diverge far more from our own whose laws are unlikely to find their way into American opinions for precisely that reason—Islamic cultures that believe their civil law should reflect Islamic law, for example, or traditional cultures that spurn individual choice in favor of traditional roles and codes of honor and shame.) Of course, this particular grievance cannot co-exist comfortably with originalism, since surely most Supreme Court questions today would be more recognizable in twenty-first century Europe than eighteenth century America.

Now, briefly, the third objection: critics argue that looking to foreign law to construe the Constitution, even in the modest way claimed by its proponents, is an illegitimate method of interpretation. Whether this critique persuades you is dependent on your theory of interpretation. The use of contemporary foreign law cannot co-exist with Justice Scalia’s originalism, since law promulgated long after our constitution was written is *prima facie* useless in elucidating the original understanding of the framers (*unless*, of course, the framers intended that future judges look abroad in interpreting the constitution, in which case it would be a betrayal of originalism to ignore foreign law).¹² Some of those who see the Constitution as a “living” or evolving instrument have a different

11. In Justice Scalia’s words, “we don’t have the same moral and legal framework as the rest of the world, and never have. If you told the framers of the Constitution that we’re after is to, you know, do something that will be just like Europe, they would have been appalled.” See Breyer & Scalia, *supra* note 8.

12. There is evidence that at least some of the founders did understand constitutional interpretation to include the analysis of foreign law. See David Siepp, *Our Law, Their Law, History, and the Citation of Foreign Law*, 86 B.U. L. REV. 1417, 1431 (2006); David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 574-91 (2001).

methodological complaint: that given the massive and conflicting body of foreign law, its use offers American judges an unconstrained opportunity to cherry-pick those cases that serve their own policy preferences—or if there are none, to ignore foreign law entirely.

That summarizes the indictments put forward by various critics. I will defer to my co-panelists, along with Justice Kirby, to address these claims on the merits. Instead, I want to note that these criticisms don't fully explain the opposition or its intensity. The full explanation, I believe, has more to do with politics than with jurisprudential theories about the place of foreign law. One piece of evidence for that claim is how politically selective the critics are in their targets.

Compare, for example, Justice Scalia's bitter critique of foreign citations with one of his own opinions. If citing foreign law in a constitutional opinion is objectionable on grounds that it cannot elucidate the framer's historical understanding and merely masks policy-making, why then does Justice Scalia feel so free in his dissent, in the *Boumediene* Guantanamo detainee case, to bemoan "the disastrous consequences of what the court has done today," which will "make the war harder on us . . . [and] almost certainly cause more Americans to be killed."¹³ Is directly preaching policy in an opinion any less out of place than foreign citations in originalist constitutional interpretation? Opponents also never object to one state's supreme court citing another state's constitution or case law, which should raise some parallel concerns.

Exhibit 1, however, is the Supreme Court's 200-year history, which from the beginning has cited or discussed foreign cases, constitutions, and customs. You will recall that in *Bowers v. Hardwick*, the case upholding criminal punishment of homosexual sex, Chief Justice Burger's concurrence cited Roman law and stated that homosexual conduct has "been subject to state intervention throughout the history of Western civilization."¹⁴ That reference has garnered no comment from Justice Scalia. Only after the European position on homosexuality changed to one of tolerance and legality did the Court's citation of European law (in *Lawrence v. Texas*, overturning *Bowers*) raise the critics' hackles—and the Court's discussion involved an effort to show that *Bowers*' sweeping claim about the law of other countries was unbalanced and inaccurate!¹⁵

13. *Boumediene v. Bush*, 128 S. Ct. 2229, 2294 (2008) (Scalia, J., dissenting).

14. 478 U.S. 186, 196 (1986) (Burger, J., concurring).

15. Justice Kennedy's opinion stated that the "sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction." *Lawrence v. Texas*, 539 U.S. 558, 572-573 (2003). Noting Britain's legalization of homosexual sex in 1967 and the European Court of Human Rights ruling in *Dudgeon v. United Kingdom* invalidating anti-sodomy laws (which was binding on forty five European countries), Justice Breyer reasoned that the decision in the *Dudgeon* case "is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization." *Id.*; see also *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981).

This is an old and recurring story. Historian Paul Finkelman has shown that foreign law was used consistently in Supreme Court cases until the 1960's to justify the literal or metaphorical shackling of slaves, of Indians, of Chinese immigrants, and of Mormons. The use of foreign law is as old as our Supreme Court; only its use to advance human rights is new. To Finkelman, it is rank judicial hypocrisy for some justices to say that the Court must not use foreign law only now, when it might undo some of the damage its earlier foreign citations helped produce.¹⁶

This pattern helps us understand why the opponents have singled out the particular cases they have, and what it is about these cases that draws so much fire. The cases that disturb the critics—cases invalidating the death penalty when applied to juveniles¹⁷ or to the mentally retarded,¹⁸ and extending constitutional protection to homosexual sexual conduct¹⁹—are ones that vindicate rather than constrict human rights, and shift power to the vulnerable. That political movement rings alarm bells for some people. And there are also opponents who object to these cases on cultural grounds. Cases that advance human rights necessarily alter past understandings and call some American traditions into question. For a believer in the kind of American exceptionalism that is coupled with jingoism, who believes America can learn nothing from other countries and should be shielded from their influence, these human rights cases appear to disparage America in ways that foreign cases upholding the status quo do not.²⁰ Thus, these cases have mobilized both political and cultural opponents who have strengthened each other by aiming at a common target, foreign law citations in human rights cases.

Jingoism was a particularly potent force in the post-9/11 period during which the foreign law debate took hold. Around the time Congress was considering resolutions to bar court consideration of foreign law for any purpose, the Bush Administration was exuding disillusionment with its allies; the Congressional cafeteria was forced to rename French fries “Freedom Fries”; John Bolton, a man best known for his opposition to United Nations, was appointed Ambassador to the UN; the Administration tried to scuttle the International Criminal Court; and Congress authorized the President to use

16. See Paul Finkelman, *Foreign Law and American Constitutional Interpretation: A Long and Venerable Tradition*, 63 N.Y.U. ANN. SURV. AM. L. 29, 36, 50-59 (2007); see also Siepp, *supra* note 12, at 1437 (urging that we “[b]e clear about what is new—the intimidation of and attack on the Supreme Court—and what is old: the practice of citing foreign and international law”).

17. See *Roper v. Simmons*, 543 U.S. 551 (2005).

18. See *Atkins v. Virginia*, 536 U.S. 304 (2002).

19. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

20. If one were looking for an interpretive principle that would fortify political opposition to both of these developments, one could hardly do better than Justice Scalia's own statement that “where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.” *Thompson v. Oklahoma*, 487 U.S. 859, 869 n.4 (1988) (Scalia, J., dissenting). This one way formula permits the citation of foreign law only to reinforce the cultural status quo, not to advance it.

military force to rescue any American soldier held at the ICC by passing the American Serviceman's Protection Act (known in Europe as the "Hague Invasion Act"). This supercharged milieu, extreme relative to other countries,²¹ is the backdrop against which the jurisprudential issues we are discussing unfolded.

In my view, the foreign law complaint and these other issues are best understood as manifestations of a larger conflict—a conflict over how to respond to the relatively rapid rise of a global human rights consensus over the last four decades. Legally, this consensus pictures the sovereign status of a nation and its laws in radically new terms. Previously, international law had largely left each state free to define its own powers over its people, but in the post-colonial period states came to be seen as mutually bound by universal human rights norms which their national laws should reflect. Human rights treaties garnered wide acceptance, and NGOs designed to hold governments to account proliferated. Newly-independent countries established constitutions modeled after our own, or after the 1948 Universal Declaration of Human Rights. We now live in a legally converging and politically interconnected world, and this has dramatically shifted the ground we, and our courts, stand on.

Although jurisprudential discussions on the use of foreign law rarely acknowledge this context, in my view the contrasting convictions regarding how America should respond to the global human rights consensus has spawned the foreign law debate, and helps explain the importance both sides attach to it. Through that debate and in many other ways, opponents can wage a rear-guard effort to resist the governmental accountability this new global consensus demands. I also believe that justices who have cited foreign cases are likewise interested in more than merely looking abroad for potentially helpful information. They seem to welcome the chance to attach our Bill of Rights to an emerging universal human rights consensus, and to help foster and define that human rights consensus abroad by doing so.²²

21. The contrast is evident on the legal question we are discussing. Foreign courts look abroad and often explicitly consider foreign cases. For example, the South African Constitutional Court regularly cites foreign law, as explicitly allowed by its constitution. *See* S. AFR. CONST. 1996, Ch. 2, § 39 ("When interpreting the Bill of Rights, a court . . . may consider foreign law). The Argentine Supreme Court has found authority in its constitution to afford authority to American Supreme Court decisions. *See* Corte Suprema de Justicia [CSJN], 1877, "De la Torre", 19 Fallos 231 (stating "we can and ought to use [United States jurisprudence] in everything which we have not decided to change with specific constitutional provisions."); *see also* Carlos F. Rosenkrantz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 INT'L J. CONST. L. 269, 270-77 (2003) (describing Argentine reliance on United States Constitution in formulating its own constitution). Indeed, European countries created the European Court of Human Rights as the highest authority in the area, with the power to bind a country's national courts and invalidate its statutes. *See* Council of Europe, Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Nov. 1, 1998) (replacing existing temporary European Commission and Court of Human Rights with permanent Court of Human Rights).

22. *See* Breyer & Scalia, *supra*, note 8. On occasion, some justices have made this interest explicit. Justice Breyer stated in one speech that if the Supreme Court uses foreign cases in a decision, those cited "will

Of course, the proponents have the tide of history on their side. It would be surprising if the Court's opinions did *not* ultimately reflect the rise of this universal human rights era, but were written in isolation from the understandings that have come to dominate United States and international cultures. As the United States continues to insist that human rights norms protect others abroad, and supports those rights through measures ranging from public speeches to warfare, it will be hard to deny that the same norms must protect Americans as well. And as the Court comes to view our Bill of Rights as not merely an artifact of American history, but rather an instantiation of universal human rights, it will likely seek help in discerning and understanding these rights by looking to other countries that also adhere to them. It will want to see how other countries have applied shared human rights norms to unprecedented issues accompanying the rise of biotechnology, transnational corporations, comprehensive databases, powerful surveillance techniques, and so on. Some justices have begun to suggest as much. Justice Kennedy says that foreign law may elucidate "some underlying common shared aspiration, underlying unified concept of what human dignity means;"²³ and Justice Ginsberg finds in foreign law some "common denominators of basic fairness governing relationships between the governors and the governed."²⁴

In the long run, I believe the Court as a whole will legitimate the influence of foreign cases in its interpretation of constitutional rights. Just as the great depression led to a regulatory state and a sea-change in constitutional thinking to accommodate it; just as the advent of a national economy utterly changed our constitutional understanding of federalism; so too our post-colonial interdependent world, with its rapidly developing jurisprudence of universal human rights, is likely to cast a new light on constitutional provisions and interpretive methodology, and consign the overheated confrontation over foreign law citations to history.

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then go to some of their legislators and others and say, 'See, the Supreme Court of the United States cites us.' That might give them a leg up, even if we just say it's an interesting example." *Id.* In another speech, Justice Ginsburg observed that:

National, multinational and international human rights charters and courts today play a prominent part in our world. The U.S. judicial system will be the poorer, I believe, if we do not both share our experience with, and learn from, legal systems with values and a commitment to democracy similar to our own.

Ginsburg, *supra*, note 8.

23. Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, THE NEW YORKER, Sept. 12, 2005 (quoting Justice Kennedy).

24. Ginsburg, *supra* note 8 (quoting Judge Patricia Wald). Justice Kirby shares this view. He says that "[i]nternational human rights law is useful in expressing and clarifying what such rights entail . . . [t]o the extent that familiarity with relevant processes of international law reminds judges of these simple truths, it helps them to discharge their municipal tasks more accurately and carefully." Kirby, *supra* note 8.

An Argument Against Citation of Foreign Decisions in Constitutional Adjudication

Panel Remarks: The Honorable John M. Greaney

THE HONORABLE JOHN M. GREANEY: I thank Justice Kirby for his excellent paper. I am honored to be on a panel to discuss the subject he addressed, and to do so in the company of our Dean, a teaching colleague, and two former judicial colleagues.

The thesis presented by Justice Kirby, in basic terms, is this: citation, as persuasive authority in our constitutional decisions, to international authority, including, decisions and materials in foreign constitutional adjudications and other proceedings, is not undemocratic. Rather, the practice is a beneficial exercise which can harmonize international law and domestic law, in keeping with what I call, and I do not mean this in an adverse sense, “the world is now one” concept.

There is, as has been mentioned by the previous panelists, reasoned arguments for and against the propriety of the thesis. I intend to suggest to you today that the thesis is not a good idea.

I will not spend time discussing in detail several arguments on why citation to foreign law is not appropriate, but some reference to these points is important. The points include the following.

The first is the uniqueness principle; the singularity of our law. Professor Sanchez has stated this argument in succinct terms, and I quote him:

[A] nation’s laws stem from its own unique social, historical, and political background. Consequently, no foreign law can ever be completely ‘transferable’ to another country, even if the same country’s courts refer to that law as persuasive rather than binding authority. To hold that a law’s presence or absence in a peer nation is an important, if not central, reason why a state should or should not enact a similar law simply ignores the contextual milieu of each country’s social, cultural, and historical background.²⁵

These observations apply with particular force to our federal and state constitutional adjudication.

A second reason for avoiding foreign precedent is that appellate judges in

25. Ernesto J. Sanchez, *A Case Against Judicial Internationalism*, 38 CONN. L. REV. 185, 226 (2005).

the United States are selected in critically different ways than comparable judges in foreign countries. As a consequence, the approach of foreign judges, to what I style as the art and science of judging, in their unique contextual milieu, is very different from that of American judges, thereby creating a misleading mystique. The mystique suggests that, if European and other judges can decide cases a certain way, then we ought to consider adopting their methods.

There is also the problem of what is called “cherry-picking.” As an American judge, you have foreign authority before you, and you decide to select what supports the result that the court wants to reach. Many scholars criticize this approach, finding it to be a sort of opportunism that is incongruent with American constitutional adjudication. I suggest to you that these criticisms have merit.

I want to posit, however, two other considerations for you to evaluate as you think about Justice Kirby’s thesis. First, that the foreign authority we are urged to cite will invariably be unnecessary to support our decisions. As we have always been taught, good appellate litigators and judges should refrain from referring to unnecessary authority and materials in their briefs and opinions. Second, and complimentary to the first point, foreign authority has a tendency to undermine the basic purposes of our Constitution.

Why are the decisions unnecessary? Let us look at two examples of recent United States Supreme Court opinions that are held out as paradigms of the new practice. These decisions, I suggest, establish that citation to foreign authority is superfluous. The first case is *Lawrence v. Texas*,²⁶ which declared unconstitutional sodomy laws in Texas that made criminal consenting sodomy by homosexuals conducted in private. In that decision, Justice Kennedy cites, among other authorities, the European Court of Human Rights in *Dudgeon v. United Kingdom*.²⁷ The citation, and others of the same type, by Justice Kennedy add little, if anything, to the value of the opinion, for several reasons. First, and foremost, *Lawrence* was amply supported by domestic law. By the time *Lawrence* was decided, most states had repealed statutes like the Texas statute, and the states that had sodomy statutes on the books did not prosecute cases under them. There, thus, had developed a consensus in the United States that these laws were either unconstitutional or unenforceable. Secondly, *Lawrence* was foreshadowed by footnote four in the long prior *Carolene Products*²⁸ case, which spoke about protecting the rights of “discrete and insular minorities.” In protecting “discrete and insular minorities,” the *Lawrence* decision was also pervasively underpinned by the Supreme Court’s opinion in *Romer v. Evans*,²⁹ which held that homosexuals constitute a quasi-

26. 539 U.S. 558 (2003).

27. 4 Eur. H.R. Rep. 149.

28. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

29. 517 U.S. 620 (1996).

suspect class. *Romer*, and the ample domestic precedent cited therein, to some extent, predicted the holding in *Lawrence*. Thirdly, *Lawrence* proceeded analytically, and in result, on the lowest constitutional review standard. No fundamental right was created in *Lawrence*. Rather, *Lawrence* was determined under the rational basis test for constitutional adjudication pertaining to the validity of a statute. We do not need a foreign court to tell us how to apply the rational basis test. Finally, Justice Kennedy does not explain, in any reasonable way, why he is citing the *Dudgeon* case. As Professor Sanford Levenson has said: “The citation [to *Dudgeon*] is mere ornamentation, like a trill in a cadenza.”³⁰ Moreover, the trill raises numerous questions that distort the clarity and forcefulness of the *Lawrence* opinion. Those questions have been posed by constitutional law scholars in the following terms: Does Justice Kennedy

regard [*Dudgeon*] as authoritative precedent, as persuasive authority (like a state Supreme Court decision construing a related provision in the state’s own constitution), or merely as evidence of changing views in the West about the morality of homosexuality? Suppose it is merely the latter. Recall Justice Harlan’s justification of looking to the evolving traditions of the American people in *Poe v. Ullman*. If substantive due process decisions are justified with reference to the evolving norms of Americans, why are the decisions of foreign courts relevant? Couldn’t opponents of *Lawrence* point to a wide range of countries throughout the world that continue to regard homosexuality as sinful or immoral? And wouldn’t some countries be inappropriate sources for guidance on basic human rights? What assumptions must a court make in deciding which foreign sources should count as persuasive, either as offering a plausible set of arguments about human rights or merely as evidence of changing norms among ‘civilized’ nations? Are these assumptions uncontroversial? Are they legitimate?³¹

I shall not speak at length about *Roper v. Simmons*,³² which was the juvenile death penalty case. Justice Kennedy, writing for the majority in *Roper*, cites a plethora of foreign law. Again, I suggest Justice Kennedy did not need to do so because a consensus had developed among our own states that juveniles should not be executed, even for the most serious of crimes. Further, well-established jurisprudence under the Eighth Amendment also fully supported the result reached in *Roper*. By citing foreign law, Justice Kennedy provoked Justice Scalia, who severely criticized his colleague’s reliance on foreign law. Justice Scalia, among other considerations, makes the not so fanciful conjecture that

30. Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 TEX. INT’L L.J. 355, 363 (2004).

31. BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 1505 (5th ed. 2006).

32. 517 U.S. 620 (1996).

reliance on foreign law may influence the Court to change established doctrines of constitutional law in areas such as the Exclusionary Rule in search and seizure cases, and the school prayer decisions, because European law can be quite different from our law in these areas. Justice Scalia's warning may be prophetic and, if his prophecy comes true, there will be much to regret in taking the *Lawrence* and *Roper* path that Justice Kennedy trod.

What follows is my second, and final, point: citations to foreign decisions threaten to undermine the basic purposes of our Constitution. Our Constitution has at least four main purposes: the first purpose is to establish a structure of government. The Constitution begins by saying, "We the people of the United States, in order to create a more perfect union . . . do ordain and establish the Constitution of the United States."³³ The Constitution does not say that it is establishing the United States of Europe, or the country of India, or the Republic of Ireland, or any other foreign nation. There is value, it seems to me, in sticking to the inferential mandate of the preamble to the Constitution which is to adjudicate constitutional cases by means of domestic law.

A second important purpose of the Constitution is federalism, which, in essence, mandates that the federal government, including the federal courts, should, whenever possible, respect the autonomy of the individual states. When individual states reach a consensus, as they had with respect to the issues in *Lawrence* and *Roper*, a determination of similar issues by the Supreme Court will be accepted in a much less grudging manner by state courts and legislatures because the court's decision is based principally on that domestic consensus. Some day I think we might see a cartoon in the *New Yorker* magazine, where Justices of the Supreme Court of, say, Kansas, will be reading a decision of the United States Supreme Court, and comment, "We have been overruled by the Supreme Court of Europe." We do not want to create, within the doctrine of federalism, a new branch of what I call Article IV courts.

The third purpose of our Constitution is judicial deference to elected officials, particularly Congress. By citing foreign authorities, we are delegating power to groups that are unaffiliated with our democratic Congress and our democratic form of government, thereby undermining that purpose.

The fourth purpose of the Constitution is protection of "discrete and insular minorities" which the Bill of Rights does most eloquently. As I have mentioned, relying on foreign authority may come back to bite us on that protection. When, and if, foreign authority is used to limit rights of minorities in order to promote majoritarian views on issues concerning speech or religion (such as school prayer) or to limit the rights of criminal defendants, we may regret that we began the practice of citing foreign authority.

For the reasons stated, the thesis proposed today grants an unprecedented level of influence to sources that are far outside the three types of authority

33. U.S. CONST. pmbl.

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identified in Article VI, clause 2 of the Constitution, as the supreme law of the land.³⁴ We must think seriously before doing this. My argument is not exclusively about American exceptionalism or the relevance of the democratic deficit, although these considerations are of weight. It is an argument about necessity, as distinguished from opportunism, and established constitutional doctrines, as distinguished from elusive, and sometimes delusive, foreign authority.

I conclude by directing your attention to John Adams on my neck tie.³⁵ John Adams looks worried. If John Adams had looked to the future and seen today's discussion, we might say that his perplexion is caused by the thesis of Justice Kirby. John Adams's concerns, I suggest to you, should be concerns of all of us. Thank you.

* * *

Citation of Foreign Decisions in Constitutional Adjudication

Response by: The Honorable Michael Kirby

THE HONORABLE MICHAEL KIRBY: I feel very privileged to have been here in this debate by judges and scholars, citizens of the United States. Privileged to hear the reflections on my paper. I feel very well-done-by in the consideration of the issues that I've presented for your response. When the new Pope is elected, the senior cardinal burns the ballot papers in front of him. As we all know, he famously says, "*Sancte Pater, sic transit gloria mundi!*" (translation: "Holy Father. Thus pass away the glories of the world.") This is done to signify that the glories of the world pass. And it is my melancholy duty to tell you here today that when I was a boy, on the twenty-fourth of May, that being Queen Victoria's birthday, throughout the British Empire, we celebrated a festival that you had cut yourself off from in 1776. I refer to Empire Day. We gloried in the fact that a quarter of the world was ruled under the British Crown. That a quarter of the map of the world was colored red. That this was our great civilizing mission: to bring to the world institutions, the rule of law, civilization. At the time, we didn't much talk about the deprivation of the Aboriginals of their land rights or of the racial prejudice and bias, of the inequalities we imposed. We did reflect upon the many good things. It was, in

34. See U.S. CONST. amend. VI (enumerating "This Constitution", "the laws of the United States", and "all treaties . . . made . . . under the authority of the United States" as "the supreme law of the land").

35. Note: Justice Greaney was wearing a necktie decorated with a depiction of John Adams, the second President of the United States.

fact, a bit like the American Empire. Many good things; and some not so good. Some things of which we were proud; some things of which, even then, we knew we were, or should be, embarrassed by. Although it wasn't entirely triumphalist, it was certainly a story of great achievements.

It's very important for somebody from outside the United States of America to tell you, as you reflect upon this subject, that the years of American dominance of the world will pass. I've seen it myself. The British Empire passed. It passed much more quickly than everybody expected because of the drain on the treasury and the manpower and the will in the Second World War, on the top of the First World War. Therefore, the lesson we all have to learn was the lesson Eleanor Roosevelt taught as the chair of the United Nations committee that drafted the Universal Declaration of Human Rights, the Magna Carta of humanity, a very American idea. That international bill of rights even came about in the way that the American Bill of Rights came about. It was at first expected to be part of the United Nations Charter. It was expected it would be part of the constitution of the world, of the United Nations. The Charter began in the same American way as President Roosevelt and President Truman insisted, with the words: "We the people of the United Nations" But it was Eleanor Roosevelt's declaration that heralds us to a new way of thinking, if you'd like, a sort of new covenant. Under it, we as human beings have a lot in common. They are called human rights. Note that they are not called civil rights, because civil rights compose a smaller circle within the human rights conception. As I mentioned within my lecture, we in America and Australia came to think in civil rights terms; but human rights are significantly broader.

When I was serving the United Nations in Cambodia, the people used to tell me that what mattered most to them was clean water. To drink clean water. The French colonial officials had laid the water line beside the sewer line. The consequence, I was told, was the urgent need to keep your mouth shut in the shower. Please do not drink any water. Secondly, the Cambodian people, when they talked of rights, insisted on education for their daughters. The boys might get rudimentary education, but the daughters nothing. And thirdly, they demanded emergency healthcare. That's something that Americans could certainly pay a lot of attention to just now. So, for most people on the planet, economic, social, and cultural rights are very important aspects of human rights. They're mentioned in the Universal Declaration. This is the new world order, the real new world order. So if America is a beacon, if the American Constitution has been a beacon to the world, the world is now returning the compliment. It's very important for Americans to realize the stage their country has reached in history. American exceptionalism will give way to American involvement: increasing involvement and participation in the growing understanding of human rights. It is this involvement that underscores the need for American judges and lawyers to be open to the idea of human

rights that are coming from other lands on the planet where these rights are being proclaimed, defined and applied.

Now, I have a few comments on the brilliant expositions we have heard today. I do hope this has all been recorded, because it has been a very thoughtful, respectful reflection with different points of view, which befits a democracy. In our democratic traditions, we don't have to agree with each other. In fact, the essence of democracy is sometimes disagreeing with each other. By that discourse, we take the mind to the next stage on the journey.

First of all, Professor Blumenson's statement about the Supreme Court's use of foreign authority. I know, having participated in a final national court, that what is done on a supreme court trickles down. It affects judges in every court in the land. That is how it should be in our legal hierarchy and system. So we're not just talking about the Supreme Court's use of international law and foreign legal authority. We're talking about the effect this has on judges everywhere. Can they, especially in the federal courts, be interested in such sources? Or is that forbidden? Is it permitted but with the order that the judges musn't cite such materials in their opinions? On such questions, the standard is set by the nation's supreme court.

If the Supreme Court of the United States, for example, bullies judges out of referring readers of their opinions to matters of international consideration, then judges lower in the line won't do it. That will be, I suggest, a bad thing for America's involvement in the growing world of legalism, world-wide.

Secondly, and this was an interesting thought that I hadn't heard in these debates before, Professor Blumenson said we're not talking about the consequentialist arguments—what are the consequences of the stance that has been taken by Justice Scalia so vehemently in the Supreme Court of the United States? Well, maybe we should be thinking, a little bit at least, about the consequences. I happen to have been brought up after the Second World War in the belief that the United States was a most noble country. It had rescued civilization twice in great wars. It had rescued the shattered economies of the world after the Second World War. So my concept of the United States was of an involved nation, engaged with the world, leading the world by example, but also by participation. So for myself, I am sorry if it is the case that the United States Supreme Court's opinions are not now cited as much as they previously were.

You don't decide a case in a final court (or any court) in order that somebody somewhere will cite it and that will make you feel great. You don't do it for that reason. Yet incontestably, it's a good thing if judges in Romania and judges in Azerbaijan are looking at the decisions of the Supreme Court of the United States. This is so because it has the longest history of any constitutional national court in the world. It has a famous history. So it's a good thing that these countries should be looking to your final court and finding there guidance and wisdom and courage in the determination of their

own difficult problems.

There has to be a reciprocal arrangement in the world today. A non-imperialist world is a world in which all spokes of the wheel don't go back to London. They don't go back to Washington either. There has to be a dialog, a "conversation," as Justice Barak has often described it.³⁶

Professor Blumenson talked of Justice Scalia's love of pre-1776 English authority. If you think of it, that's a very odd way, a very odd way to rule a modern nation. To be looking at what was happening with those old gentlemen—and they were all rich, propertied gentlemen in England transplanted to the New World, solving their problems with no conception of the world of the Internet, of the world of the human genome, of the world of the split atom, of the world of the exploration of Mars.

If you stand back from this controversy about foreign legal authority, it would be a weird way to govern a mighty nation to be hostage to the ideas of 1776. It certainly isn't a necessary way. If it were absolutely necessary, if it were spelled out in the U.S. Constitution in words of one syllable, I could understand the theory of originalism. But it isn't necessary. In fact, it's inimical to the very nature of a constitution, which speaks from age to age. So I find that a really odd infatuation with 1776. I think it is time that a new love affair should be beckoning. A theory in harmony with the age of Twitter and Facebook.

In response to my fellow panelists, I do think there's more than I conceded earlier about the democratic deficit. I can say this because I'm just fresh from reading a book, which I bought at Borders, here in Boston. It's by Jan Greenberg, called *Supreme Conflict*.³⁷ It's the story of the appointments process for Supreme Court Justices in the United States. I have to tell you if, in Australia, the executive government closeted future justices of the High Court of Australia, and sounded them all out on their opinions and values and so on, it would be regarded as a tremendous scandal. What happened in 1913, very early in the Australian Commonwealth (because we're a Commonwealth, named in the same way as Massachusetts), was that a telegram was sent to Justice Piddington. The telegram from the government asked a single question: What is your view on federal power? The answer that Mr. Piddington gave was that he was generally in favor of the supremacy of federal power. Given the appointing power, this was not all together surprising perhaps. Piddington was appointed. But he never took his seat on the High Court of Australia. Such was the scandal occasioned by that inquiry and response. But, the valid point in the democratic deficit issue is that it is pointing our attention to the fact that a lot depends on the personalities and values of the justices. A lot. And if

36. Justice Aharon Barak was, until 2008, President of the Supreme Court of Israel and a leading proponent of a transnational dialogue amongst judges confronting similar problems.

37. JAN CRAWFORD GREENBERG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* (2007).

Justice Souter, for example, had been the judge who those who appointed him thought he was, what a different story the recent decisions of the United States Supreme Court would have been. Would *Lawrence v. Texas*³⁸ have been decided as it was? No way. Would *Atkins v. Virginia*³⁹? Would any of the borderline constitutional cases have been decided in the same way? I think it very doubtful.

So this is the fragility of depending upon individual judges. It's probably inescapable. However, it's a fair point to keep your eye on the ultimate value of democratic accountability, because putting all your eggs in the basket of changing judges is a very risky process.

One of my critics has said: "I am a believer that America is utterly exceptional." Well, I'm standing here to tell you that you are not utterly exceptional. In part, this is because of the very triumph of American legal ideas. Your ideas have been embraced wholeheartedly by countries you would never imagine, countries of Eastern Europe, which in our lifetime were our foes. They have embraced your ideas. And therefore you don't now have to look at them as enemies and suspect. Their high courts will sometimes have useful things to say, and often on the meaning of constitutional texts remarkably similar to your own text.

The German Constitutional Court frequently looks at the doctrines of the United States Supreme Court. Indeed, it does so all the time, and to the German court's advantage. I don't see why occasionally, we shouldn't look at them. Their most important decisions are often translated into English. They're extremely clever people. True, they have a different legal system. Self-evidentially, their norms and their legal decisions don't bind us. But occasionally they'll have insights that will be helpful to us.

Is this implementing cherry-picking? Well I thought Justice Breyer gave the correct answer to that admonition. If a judge is going out there to be dishonest, if you're just going to pick out the ideas and reasoning that you like, if you're going to shove them in your opinions, and give what you wrote decoration, well, that's dishonest. If judges want to be dishonest, then they'll be dishonest. But if you're honest, if you use law review articles by professors, and foreign decisions as background and information, honestly, you will refer to any that you know of that are persuasive and support the propositions you're advancing. They too will perhaps help you. I can tell you it definitely helped the decision-making in the Australian High Court, in looking recently at the prisoners' voting rights case, to look at what the Canadians had said in a very similar situation, where a legislature had tried to take votes away from prisoners because it was a popular move to act in such a way against a very vulnerable class.⁴⁰ Who's going to stand up for the prisoners? No one. No one's going to

38. 539 U.S. 558 (2003).

39. 536 U.S. 304 (2002).

40. See *Roach v. Electoral Commissioner* (2007) 233 C.L.R. 162, 177-179 ¶¶ 13-18, 203-04 § 100

stand up for prisoners. Only courts, looking at equality doctrine and principles of equality.

So far as the yoke of monarchy, a critic of my theories has said of the United States: “we have thrown off the yoke of monarchy.” Now, I don’t wish to appear sensitive about this just because yesterday was the birthday of Her Majesty the Queen. However, the fact is, constitutionally speaking, that the United States didn’t throw off the yoke of monarchy. You embraced it enthusiastically. Too enthusiastically. It’s we in the British dominions who threw off the yoke of monarchy. Our constitutional democracy continued to evolve. You poor things are stuck with a 1776 constitution. It embraces a monarch who is a temporary monarch. But he or she—not yet a she—is placed in position as a person with extraordinary power that we would never allow to a single person in our constitutionalism. Head of state. Head of government. Head of the armed forces. Head of the bureaucracy. Head guru. On the television every morning. Head Hollywood star. Owner of “first dog.” These are the trappings of monarchy, ladies and gentlemen. I hope you realize that. So, don’t give me, “throwing off the yoke of monarchy.”

Justice Greaney told me yesterday (and I’m not going to let the cat entirely out of the bag), that he was going to work overnight, slaving to put together the best case that he could against my arguments. Boy, what an advocate he is. He did indeed pull together the best case that he could. But he told me that his heart wouldn’t be in it. Well, I think he did a great job. Today, he wears most provocatively his John Adams tie, flaunts it in my face: a great friend of the British Crown who turned his back on the Crown. This is the unkindest cut of all.

In Australia, picking up something said by Justice Ian Binnie of the Supreme Court of Canada, we think this American infatuation with the founders of 1776 is blatantly undemocratic. In fact, it is a kind of romantic ancestor worship. But, I’ll put that to one side.

Justice Greaney also talked about the uniqueness of United States law. Well, it is true there are some aspects of uniqueness. However, there are also some aspects where you can learn. You can even learn in the department of liberty. And I’ll just give you one for starters. Let’s look at prisoners’ voting rights. Just look at the situation in this country. In many parts of this country, for relatively trivial crimes, people suffer very long periods of imprisonment, under the democratically elected laws. In some parts of your country, people who have suffered imprisonment lose their voting rights. Sometimes they do so not only whilst they are in prison, but for life. And for relatively minor infractions of the laws. Now, it wouldn’t be such a bad thing in the United States of America, the land of the free, for you, you lawyers and judges, to have a close look at the decision of the Supreme Court of Canada in *Sauvé v.*

(Austl.). *Cf. id.* at 220-221 ¶ 163; 224-25 ¶ 181.

Canada (Chief Electoral Commission).⁴¹ And, whilst they were at it, to have a look at the decision of the European Court of Human Rights in *Hirst v. United Kingdom [no. 2]*.⁴² They could even now have a look at the decision of the High Court of Australia, by majority, in the case of *Roach v. Electoral Commissioner*.⁴³ In the reasoning found in these decisions, you will learn a few things, about liberty and essential civil rights. I'm sure that some might find a few foundations in your Constitution, which has more foundations than ever we have in Australia, to defend the liberty of fellow citizens, who are prisoners but also human beings. Citizens of the United States, in many cases, who are nonetheless refused the right to vote. This is the most fundamental right of the citizens in a democracy. So, as for the uniqueness, well, where it is unique, so be it. But sometimes the uniqueness is undesirable and liberty denying. So perhaps you could learn from others. At the very least, looking at what these foreign courts held and said would oblige the contemporary American judges to question afresh the correctness in this country of the decisions on the validity of laws denying prisoners the right to vote.

Justice Greaney said that the references to the foreign cases in *Lawrence v. Texas*⁴⁴ were not really necessary. They undermined the purpose and force of the decision. Well, in my respectful view, they were necessary because, you see, in *Bowers v. Hardwick*,⁴⁵ you'll remember, the Supreme Court of the United States had said, in its majority opinion, that the laws against the sexual activity of gay people constituted a universal rule of civilization. Yet at that very time, the court with the widest jurisdiction of any court in the world, from Galway to Vladivostok had concluded that such laws were contrary to fundamental human rights and had to be disallowed. So the result was that, at the time *Bowers* was decided, the anti-gay rule was no longer part of the 'universal rule of civilization' (if it ever had been). It followed that, so far as *Bowers* had suggested, anti-gay discrimination was just a mistake. It was, therefore entirely relevant for the Supreme Court in *Lawrence* to refer to that line of authority. Doing so was not merely ornamental. It may be that Justice Anthony Kennedy is a natural law proponent. And it may also be that foreign law was cited in *Lawrence* to help support something fundamental and deep in the human entitlement to dignity, respect, and equality. Yet if we are searching for universals, that's exactly what final national courts do and what constitutionalism is all about. No nation has the total sum of all knowledge and wisdom. So, I don't think the citation was mere decoration. It was a demonstration of deep-lying principles of humanity, transcending purely local considerations.

41. [2002] 3 S.C.R. 519 (Can.).

42. 42 Eur. Ct. H.R. 41 (2005).

43. (2007) 233 C.L.R. 162.

44. 539 U.S. 558 (2003).

45. 478 U.S. 186 (1986).

I must say, as a gay man myself, reading that closing passage in Justice Kennedy's opinion for the court in *Lawrence v. Texas*,⁴⁶ far and away in distant Australia, in the sunshine I found its power tremendously moving. I refer to that passage where Justice Kennedy says:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.⁴⁷

I realize that judges are not in the emotion business. But we are in the persuasion business. And we are in the justice business. And I think there was a lot in *Lawrence* that was reinforced and strengthened by the fact that this wasn't just an issue that was arising and being addressed in one or two countries. This was something that had swept all of Europe. It needed to be considered in the constitutional court of this nation. As it was.

So why are some judges interested in the decisions of the House of Lords of the United Kingdom, the Constitutional Court of South Africa, the High Court of Australia, the Supreme Court of Canada? Well, they are interested, I suggest, because they are intellectual, thinking, experienced, highly professional, and talented judges. Judges everywhere in the world are interested in these things. And we now have the Internet. Relevant cases pop up and we see them. What are we to do? Put on our blindfolds and not look at these things? With all respect, that is a ridiculous notion in this age of technology.

An in vitro fertilization case, is mainly, as I would understand it (certainly in Australia) a non-constitutional problem. Therefore, it does not really touch the issues of constitutional sensitivity. Basically, the constitutional sensitivity comes from the thought that the United States Constitution is about "us alone", "this is political" and "it's our politics, just don't mix with us." It's the very essence of us. We've got to sort this out ourselves, without foreign interference. Well, in Chief Justice Marshall's opinion in *Goodridge v. Department of Public Health*,⁴⁸ at the end of it, refers to what had happened on the same issue in the courts of Canada. So their decisions were mentioned as a contextual matter. It is, after all, just across the border, as she points out. I thought that was entirely relevant; in no way offensive. It wasn't saying that

46. 539 U.S. 558 at 578-79 (2003). Cf. *Al-Kateb v. Godwin*, 219 C.L.R. 562 at 628 [187] (2004).

47. *Lawrence v. Texas*, 539 U.S. 558 at 578-79 (2003).

48. 440 Mass. 309, 343 (2003) (discussing consideration of same-sex marriage ban in Canada) (citing *Halpern v. City of Toronto*, [2003] 172 O.A.C. 276 (Can.)).

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we in Massachusetts are bound by what happens in Canada. All it was saying, by inference, was: “look, it’s just happened down the road. It’s not such a big deal, and it happens to have happened there. We will decide our cases by reference to our own law. But contextually it’s relevant to know what has just happened so close by.”

I’ve always found the decisions of the Supreme Court of Canada interesting. They are well argued. They follow our tradition. They use our language as well as French. They reflect our way of doing things. I just don’t think the Supreme Court of the United States or all the other courts in the hierarchy of this country should be cut off from this source of ideas. So, I consider this to be the way of the future. And the message that is apparent to the United States, the most universal nation on earth with global impact, is: “Get with it.”

* * *

Question and Answer Session Following the Panel Discussion on Citation of Foreign Decisions in Constitutional Adjudication

DEAN AMAN: Those were some extraordinary commentaries and a wonderful response. I think it’s time to open it up for some questions and for some conversation from the audience. Those who wish to do so, we want to use this microphone so we can record it.

QUESTION FROM AUDIENCE: This is not directed at anybody in particular. Take a crack at it, I’d love to hear from all of you. A little bit of background from Eastern Europe to make reference to Justice Kirby: a lot of those countries look to the American Constitution to now revise and come up with their own new constitutions, democratically speaking. But one thing that when I went through that process where I was, we looked at the American Constitution and the history of it, and how surprised we were to find that the American Constitution itself was very much informed by European philosophical thought at the time, and how that got imported into the founders’ drafting of the Constitution. And I don’t hear that aspect of the debate, that at its origins, the Constitution was very much affected by foreign interpretations of what human rights were thought to be at the time, and yet we acknowledge that, it’s a given fact now in the U.S. But now that we want to keep up with that tradition, so to speak, there’s a lot of resistance and I haven’t quite figured out why that is.

JUSTICE GREANEY: Let me say a word about your question, which I think breaks down into two parts. The first is that the framers of our Constitution were very much interested in European ideas and European thinkers and so on. Well, they were and they weren’t. Alright? They certainly were children of the

Enlightenment, so they knew what was going on. But in the Constitution, itself, they rejected an awful lot of European ideas, particularly the monarchies, France and England, as the first example. And while we're on human rights, in the Constitution itself, they embedded a lot of things that are completely antithetical to human rights. A woman couldn't vote, couldn't own property. Slavery. Minorities, blacks, were three-fifths of a citizen. The fugitive slave law. It's in the text of the original Constitution. The Electoral College. Many European countries at the time went by the popular vote. But here we've got this jury-rigged thing, called the Electoral College, which, frankly, was a compromise as we know. And as for Eastern Europe, sure they look to our Constitution, but have you looked at the constitution of the Russian Federation, lately? It's a wonderful constitution. It reads much better than ours in many respects. It has much more explicit language. In fact, we've gone over there, I've gone to Russia and Siberia, because they want a jury system and all that kind of thing. But do we want to cite Russian precedents in light of what's going on today? I don't think so. So the idea that the founders and Eastern Europe, contemporaneously, and others are embrasive of these wonderful, universal ideas of human rights, apart from the Bill of Rights, just doesn't wash with me.

QUESTION FROM AUDIENCE: I have a question for those on the panel who are against international law and foreign law informing U.S. courts. My question is how do you avoid it when you look at submission from amicus, from parties to amicus briefs, when you look at the parties who are submitting filings to you and are possibly not only citing law reviews and other scholarship, but ideas or cases or norms from other foreign sources? I guess the question is, how do you avoid it, if it's there in front of you, if you're going to read it as part of the process of deciding a case?

JUSTICE GREANEY: Well, of course you read it. If it's in an amicus brief, you read everything in an amicus brief, or almost everything. And I don't want to fall back on Scalia's comment that you don't cite it. You certainly take it in for what it's worth. And as I suggested today, it's not worth a lot, and you do not cite it. I mean, Chief Justice Marshall wrote a marvelous opinion in *Goodridge*,⁴⁹ which I joined, except for the citation to the Canadian Supreme Court. It seems to me too that we're burdening lawyers, now that the cat has gotten out of the bag, so to speak, requiring them to do this worldwide search, which is easy of course with the Internet, but hard in the sense of they've got to ferret through all these materials, once they get them, and they might be that high, to decide just what might be appropriate persuasive authority for the United States Supreme Court or a United States federal judge, or a state judge for that matter. So we do read it, but we give it the value that it's worth, which I suggest, at least in my cases, minimal, for today's purposes.

49. *Goodridge v. Dep't. of Pub. Health*, 440 Mass. 309, 343 (2003).

JUSTICE KIRBY: I think you've put your finger on a practical problem. This is, given the Internet, given the mountain of available possible legal and judicial material, how does one then use judgment and discernment? These are really important requirements for a practicing lawyer and of an efficient judge. Why is it, for example, that you wouldn't dream at this stage of using the Russian Federation Supreme Court? Well, mainly it is because that court's decisions will be written in Russian. Most of us don't know their alphabet, let alone their language. So it's just too difficult.

However, if you have a case (and I've thrown the gauntlet down today to the young lawyers here) about prisoners' voting rights. I don't know precisely what the constitution says on that score in Massachusetts, but there are certainly jurisdictions in this country where the position is, with respect, something that really deserves to be reconsidered. At the moment there are authorities of the Supreme Court of the United States that appear effectively to support disenfranchising United States citizens for life or for a very long time on a conviction for relatively small offenses.⁵⁰ It wouldn't be a big burden on local lawyers to read the three cases I've mentioned on prisoners' voting rights.⁵¹ All of them are written in the English language. All of them refer to universal principles. At the very least, some of them might give the American lawyer interested in reviewing this issue a few ideas to kick start their thinking within the four walls of United States constitutional doctrine. They might present you with a thought, insidious and dangerous as that may be in the supposedly unique American constitutional culture, that you haven't always got the entire answer to everything. In fact, you may sometimes have the wrong answers to some aspects of human freedom.⁵²

PROFESSOR BLUMENSON: Just to add a little bit. I think it is a very good answer to many of these claims, what the two Justices just said, that judges select and cite only those foreign decisions that display a commonality over the issue that's being presented. So I'd like to ask Justice Kirby: one case where that wouldn't be true would be court decisions finding economic rights based on the International Covenant on Economic, Social, and Cultural Rights or domestic analogues—cases concerning economic guarantees to clean water, health care, and so on. This is alien to our Constitution, and our culture has little in common with the social welfare cultures in Europe. Just to see how far your position goes, are you saying that in interpreting the Constitution, the Justices should look at something like the International Covenant on Economic,

50. See Alec. C. Ewald, "Civil Death": *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1066-72 (2002).

51. See *Sauvé v. Canada* (Chief Electoral Commission), [2002] 3 S.C.R. 519 (Can.); *Hirst v. United Kingdom* [no. 2], 42 Eur. Ct. H.R. 41 (2005); *Roach v. Electoral Commissioner*, (2007) 233 C.L.R. 162.

52. Compare *Dennis v. United States*, 341 U.S. 494 (1951), with *Australian Communist Party v. Commonwealth* (1951) 83 C.L.R. 1 (Aust.) (elucidating differing outcomes regarding validity of federal legislation imposing civil limitations on communists).

Social, and Cultural Rights, or cases interpreting it?

JUSTICE KIRBY: The International Covenant on Economic, Social, and Cultural Rights is as alien to our constitution as it is to the United States Constitution. Even more so because we don't even have a general bill of civil rights, and therefore it is even more alien. But one can imagine a case arising, probably at common law or on a statutory level, rather than a constitutional level, where an issue akin to economic, social, and cultural rights could arise. If it did, in my opinion it would be relevant there to refer to any pertinent developing norm of the international community in deriving local legal ideas from it. But I can't myself see it being used in a constitutional dialogue in Australia. Justice Frankfurter's reference to the "English-speaking peoples" sounds a bit racist today—a bit old-fashioned. However, he was probably getting at something I do understand. For example, he may have been referring to judges who write judicial opinions in the same way as we do. Now, that is not true of the civil law countries. If you look at the civil law countries, their opinions are very brief and to our eyes opaque and unelaborated, even dogmatic: "whereas, whereas, whereas, whereas, therefore." In the English-speaking or common law judiciary, we write discursively. We are much more candid. We acknowledge the nuances. We reveal and discuss policy differences. We permit dissent. So this is a feature of the judiciary of English-speaking democracies. It's why going to those opinions is generally comfortable to us because they are written in the same style of reasoning, and on the basis of the same process of argumentation as we use ourselves. I think that's all that Justice Frankfurter was probably trying to get at. I'm sure he would not have been actually racist when referring to "English-speaking people." He would have been saying people who have courts which are similar to ours and who deal with issues and problems in the same discursive way. It is a more candid, honest, transparent way. Quite contrary to not referring to a useful idea or source of thinking from abroad in your judicial opinions.

QUESTION FROM AUDIENCE: With all due respect to the trickle-down effect of the U.S. Supreme Court, I was wondering if a better way to bring international law into decisions, at least as advisory, not binding, would be to come from the states up. Because the States have forty-seven million cases, that they have more opportunity to hear cases, different types of cases, different facts of cases, and therefore they would have more opportunity to sort of vet the international cases, or international statutes, and apply them to the state cases, and then that, I don't want to call it a habit, but sort of a process, at the state level, work its way up to the U.S. Supreme Court, if that would be a more effective way of getting international law into cases. I mean, another possibility, which I don't think would happen, would be a constitutional amendment, if there were a U.S. constitutional amendment that would have a provision like, I think it was Canada, the example, that says we'll consider international law. So, I wonder what you thought of that.

JUSTICE KIRBY: It is India that has that provision in its constitution. There are other like provisions in other countries, including South Africa and Papua-New Guinea, close to my home. However, I agree with you with trickle-up, if I can use that expression. But nothing would trickle at all until there was legal education that gets students knowledgeable about international and comparative law. Students who are interested in these subjects, seeing the value of them, seeing the relevance of them, not being myopic and purely introspective about them. Students who are thinking of themselves as human beings, citizens of the world, as well as proudly American citizens. The American story is part of the human story. In fact, it is a very important and influential part of the human story. But there are other stories intersecting with your own. So, legal education is absolutely critical. Yet even legal education won't work if there are people up in the top court who are saying "this is illicit," "this is irrelevant," "this is counterproductive," "this is inefficient," "this is decoration," "it's cherry-picking," "it's looking over the crowd for somebody with a like opinion to yourself." If those are the messages that are coming down from the highest court, nobody (or very few) are going to try to engage with the world. Only really bold spirits will do so. Similarly in academia, the teachers and theorists won't bother. Intellectual isolationism will score another victory. And that cannot be good for American law in the present age, or for the wider world.

JUSTICE GREANEY: Give me thirty seconds, Dean. I know the Dean wants to close and you all want to leave. It's a good idea, your trickle-up idea, but I don't think it'll work for a couple of reasons. One is the reason Justice Kirby just mentioned. The second is there's an awful lot of states that are never going to accept this. Alabama, Mississippi, states like that, I think would subscribe to the philosophy that you don't cite these things, that you don't, even as persuasive authority, so I don't think that's going to work. I think the debate is going to be around as long as the debate between originalism and non-originalism, and that's been going on for the past thirty years, or even longer. So I don't think this is ever going to be solved to the satisfaction of everybody.

DEAN AMAN: Well, please, join me in thanking this extraordinary panel, and also, thanking Justice Kirby for making this possible. Thank you all very much.