

ARTICLES

“A DECENT RESPECT TO THE OPINIONS OF [HUMAN]KIND”: THE VALUE OF A COMPARATIVE PERSPECTIVE IN CONSTITUTIONAL ADJUDICATION

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IN any season, it would be an honour to speak as a Sir David Williams Lecturer. But no season could be better for me than this one. For my daughter, Jane Ginsburg, is here at Cambridge, thriving in her year in the Arthur Goodhart Visiting Chair, thoroughly enjoying her affiliation with the law faculty and Emmanuel College, Sir David’s College (and, from 1627 to 1631, John Harvard’s too).

I did not know it at the time, but Sir David and I attended Harvard Law School the same school year, 1957–1958. He came East from graduate studies at the University of California in Berkeley to complete his Harkness Fellowship at Cambridge cross the sea. He was in a graduate programme, I was a lowly 2L. Sir David has done so much good in his various occupations—as leading scholar and author in the fields of administrative and constitutional law, guest lecturer around the world, true public citizen serving on many important commissions and councils, Vice Chancellor at this great University for seven years. Several of my colleagues have benefited from their association with him. Charles Wright, Frank Wozencraft, and Malcolm Wilkey had fellowships at Wolfson when Sir David was President of that College. Justices Sandra Day O’Connor and Anthony Kennedy participated with him in the Anglo-American Legal Exchange. A few more shared connections: Both Sir David and I are members of the American Law Institute, also the American Academy of Arts and Sciences, and honorary members of Lincoln’s Inn.

When Sir David spoke at the American Law Institute’s annual dinner fifteen years ago, the then-President of the Institute, Rod

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Perkins, did considerable homework to prepare his introduction. Rod told us that Sir David grew up in West Wales, in a pre-Roman town that is not only his birthplace, it is also believed to be the birthplace of Merlin, renowned magician at King Arthur's Court. As an attendee at that 1990 event, I can tell you that, even after a convivial cocktail hour, and wine of acceptable quality flowing freely at dinner, Sir David's talk captivated the audience. I selected the subject of this evening's remarks with his parting words at the ALI gathering in mind. Sir David celebrated our joint Anglo-American heritage and said he was convinced jurists in Europe, and especially in the United Kingdom, must take account of the experience of the United States over the two centuries (and now more) since our separation from the mother country. I will turn the table round and speak of the growing appreciation among US jurists that we must take account of experience, good thinking, and judicial opinions beyond our borders.

The Old Testament Book of Deuteronomy famously instructs: "Justice, justice shall you pursue, that you may thrive."¹ My remarks centre on one aspect of that pursuit in the system in which I work: judicial review for constitutionality as it is practised in the United States. What impact, if any, international and foreign opinions should have on decision making in US courts has proved controversial. Recognising the controversy, I will endeavour to explain my view, which is simply this: If US experience and decisions can be instructive to systems that have more recently instituted or invigorated judicial review for constitutionality, so we can learn from others now engaged in measuring ordinary laws and executive actions against charters securing basic rights.

Exposing laws to judicial review for constitutionality was once uncommon outside the United States. In the United Kingdom, not distant from France, Spain, Germany and other civil law countries in this regard, court review of legislation for compatibility with a fundamental charter was considered off limits, irreconcilable with the doctrine of parliamentary supremacy. But particularly in the years following World War II, many nations installed constitutional review by courts as one safeguard against oppressive government and stirred-up majorities. National, multinational and international human rights charters and courts today play a prominent part in our world. The US 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.

¹ Deuteronomy 16:20 ("Zedek, zedek tirdof, l'maan tichyeh").

Very much the same opinion was several times expressed by the Chief Justice of the United States, William H. Rehnquist, who put it this way in a 1999 foreword to a collection of essays on comparative constitutional law:

[F]or nearly a century and a half, courts of the United States exercising the power of judicial review [for constitutionality] had no precedents to turn to except their own, because our Court alone exercised this sort of authority. When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly grounded in so many countries . . . it [is] time the US courts began looking to the decisions of other constitutional courts to aid in their own deliberative process.²

More recently I must acknowledge, Chief Justice Rehnquist expressed scepticism, if not downright disagreement, on the relevance of foreign law, both on human rights issues and on federalism questions—issues implicating the allocation of regulatory and decision making authority between States and Nation in the United States. I will later refer to 21st-century dissenting opinions he joined criticising comparative sideglances by the Court's majority. I note here, in contrast to recent misgivings, the view Justice Felix Frankfurter expressed half a century ago. Even on questions of federalism, he thought, an “island” or “lone ranger” mentality ought not prevail. Justice Frankfurter wrote:

While the distribution of powers between each national government and its parts varies, leading at times to different legal results, the problems faced by the United States Supreme Court under the Commerce Clause are not different in kind . . . from those which come before the Supreme Court of Canada and the High Court of Australia.³

Were he with us today, Justice Frankfurter might have included the European Court of Justice.

Returning to my own perspective, while US jurisprudence has evolved over the course of two centuries of constitutional adjudication, we are not so wise that we have nothing to learn from other democratic legal systems newer to judicial review for constitutionality. The point was well made by Judge Guido Calabresi, a former Dean of Yale Law School and now a judge on

² William H. Rehnquist, Foreword to Vicki C. Jackson and Mark Tushnet (eds.), *Defining the Field of Comparative Constitutional Law* (Westport 2002), at p. vii (The foreword is based on an edited transcript of introductory comments delivered at the conference “Comparative Constitutional Law: Defining the Field,” held at Georgetown University Law Center on 17 September 1999).

³ Felix Frankfurter, *Of Law and Men* (New York 1956), 39.

the Court of Appeals for the Second Circuit (one of thirteen appellate courts in the US federal court system). “Wise parents,” Judge Calabresi said in a 1995 concurring opinion, “do not hesitate to learn from their children.”⁴

In the value I place on comparative dialogue—on sharing with and learning from others—I am inspired by counsel from the founders of the United States. The drafters and signers of the Declaration of Independence cared about the opinions of other peoples; they placed before the world the reasons why the States, joining together to become the United States of America, were impelled to separate from Great Britain. The Declarants stated their reasons out of “a decent Respect to the Opinions of Mankind.”⁵ I should add, even in this audience, that the US Declaration then endeavoured, through a long list of grievances, to submit the “Facts”—the “long Train of [the British Crown’s] Abuses”—to the scrutiny of “a candid World.”⁶

The US Supreme Court, early on, expressed a complementary view: the judicial power of the United States, the Court said in 1816, was intended to include cases “in the correct adjudication of which foreign nations are deeply interested ... [and] in which the principles of the law and comity of nations often form an essential inquiry.”⁷ “Far from [exhibiting hostility] to foreign countries’ views and laws,” Professor Vicki Jackson of the Georgetown University law faculty wrote last year, “the founding generation showed concern for how adjudication in our courts would affect other countries’ regard for the United States.”⁸ Even more so today, the United States is subject to the scrutiny of “a candid World.” What the United States does, for good or for ill, continues to be watched by the international community, in particular, by organisations concerned with the advancement of the “rule of law” and respect for human dignity.

The new turn-of-the-nineteenth-century United States looked outward not only to earn the respect of other nations. In writing the Constitution, the Framers were inspired by jurists and philosophers from other lands, and they understood that the new nation would be bound by “the Law of Nations,” today called

⁴ *United States v. Then* 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi J., concurring) (citing approach taken by German and Italian constitutional courts to interpretation of vague statutory language in light of changed circumstances).

⁵ *The Declaration of Independence*, para. 1 (US 1776).

⁶ *Ibid.*, at para. 2.

⁷ *Martin v. Hunter’s Lessee* 14 US (1 Wheat.) 304, 335 (1816).

⁸ Vicki Jackson, “Yes Please, I’d Love to Talk with You”, *Legal Affairs*, July/Aug. 2004, at p. 44. See also *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing on H.R. Res. 568 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 108th Cong., 2d Sess. 16 (2004) (statement of Professor Vicki C. Jackson) [hereinafter Jackson Statement].

international law. Among powers granted the US Congress, the Framers enumerated in Article I the power “[t]o define and punish . . . Offences against the Law of Nations.”⁹

John Jay, one of the authors of *The Federalist Papers* promoting ratification of the US Constitution, and George Washington’s appointee as first Chief Justice of the United States, wrote in 1793 that the United States, “by taking a place among the nations of the earth, [had] become amenable to the laws of nations.”¹⁰ Eleven years later, the great Chief Justice John Marshall (who no doubt had read Blackstone on this matter) cautioned that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”¹¹ And in 1900, the Court famously reaffirmed in *The Paquete Habana* that

[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.¹²

There are generations-old and still persistent discordant views, I acknowledge, on recourse to the “Opinions of Mankind.” A mid-19th century US Chief Justice expressed opposition to such recourse in an extreme statement. He wrote:

No one, we presume, supposes that any change in public opinion or feeling . . . in the civilized nations of Europe or in this country, should induce the [US Supreme Court] to give to the words of the Constitution a more liberal construction . . . than they were intended to bear when the instrument was framed and adopted.¹³

Those words were penned in 1857. They appear in Chief Justice Roger Taney’s opinion for a divided Court in *Dred Scott v. Sandford*, an opinion that invoked the majestic Due Process Clause to uphold one human’s right to hold another in bondage. The *Dred Scott* decision declared that no “descendan[t] of Africans [imported into the United States], and sold as [a] slav[e]” could ever become a citizen of the United States.¹⁴

While the Civil War and the Thirteenth, Fourteenth, and Fifteenth Amendments reversed that judgment, US jurists and political actors today are hardly of one mind on the propriety of looking beyond our nation’s borders, particularly on matters

⁹ *US Constitution*, art. I, §8, cl. 10.

¹⁰ *Chisholm v. Georgia* 2 US (2 Dall.) 419, 474 (1793).

¹¹ *Murray v. Schooner Charming Betsy* 6 US (2 Cranch) 64, 118 (1804).

¹² *The Paquete Habana* 175 US 677, 700 (1900).

¹³ *Dred Scott v. Sandford* 60 US (19 How.) 393, 426 (1857).

¹⁴ *Ibid.*, at p. 403.

touching fundamental human rights. Some have expressed spirited opposition. Justice Scalia wrote this year, in a dissenting opinion joined by Chief Justice Rehnquist and Justice Thomas: the Court “should cease putting forth foreigners’ views as part of the reasoned basis of its decisions. To invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decision making, but sophistry.”¹⁵

Another trenchant critic, Seventh Circuit Judge Richard Posner, commented last year: “To cite foreign law as authority is to flirt with the discredited ... idea of a universal natural law; or to suppose fantastically that the world’s judges constitute a single, elite community of wisdom and conscience.”¹⁶ Judge Posner’s view rests, in part, on the concern that US judges do not comprehend the social, historical, political, and institutional background from which foreign opinions emerge. Nor do we even understand the language in which laws and judgments, outside the common law realm, are written.

Judge Posner is right, of course, to this extent: foreign opinions are not authoritative; they set no binding precedent for the US judge. But they can add to the store of knowledge relevant to the solution of trying questions. As to our ignorance of foreign legal systems, just as lawyers can learn from each other in multinational transactions and bar associations, judges, too, can profit from exchanges and associations with jurists elsewhere. Yes, we should approach foreign legal materials with sensitivity to our differences, deficiencies, and imperfect understanding, but imperfection, I believe, should not lead us to abandon the effort to learn what we can from the experience and good thinking foreign sources may convey.¹⁷

Somewhat more accommodating, Ninth Circuit US Court of Appeals Judge Diarmuid O’Scannlain stated in remarks made last fall at the Institute of Advanced Legal Studies in London: “[L]imited references to foreign legal authorities may play a beneficial role in contemporary American jurisprudence.” But, he continued, “courts in the United States should restrict the use of foreign legal authorities to certain well-defined categories of cases”: when treaties or international conventions are relevant, first and foremost, and also when “Congress has expressed a desire to bring

¹⁵ *Roper v. Simmons* 125 S.Ct. 1183, 1228 (2005) (Scalia, J., dissenting) (emphasis in original removed).

¹⁶ Richard Posner, “No Thanks, We Already Have Our Own Laws”, *Legal Affairs*, July/Aug. 2004, at p. 42.

¹⁷ Judge Posner acknowledged that decisions elsewhere might have informational value; they might be useful, he thought, if they contain persuasive reasoning.

the United States into alignment with the international community.”¹⁸

Judge O’Scannlain gave as examples of proper regard for foreign decisions and laws two opinions I wrote for the Court. The first, *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, relied on a House of Lords’ decision interpreting the Warsaw Convention’s limitations on airline liability for injury to a passenger;¹⁹ the second, *Eldred v. Ashcroft*, upheld against constitutional challenge a statute conforming the US copyright term to the European Union’s “life plus seventy years.”²⁰ But overall, Judge O’Scannlain’s presentation placed him in accord with Fourth Circuit Judge J. Harvie Wilkinson, III, who cautioned against looking abroad when resolving “contentious social issues.”²¹

More representative of the perspective I share with five of my current colleagues, Patricia M. Wald, former Chief Judge of the US Court of Appeals for the D.C. Circuit, last year said with characteristic wisdom: “It’s hard for me to see that the use of foreign decisional law is an up-or-down proposition. I see it rather as a pool of potential and useful information and thought that must be mined with caution and restraint.”²²

Many current members of the US Congress would terminate all debate over whether federal courts should refer to foreign or international legal materials. For the most part, they would respond to the question with a resounding “No.” Two identical Resolutions introduced this year, one in the US House of Representatives and the other in the Senate, declare that “judicial interpretations regarding the meaning of the Constitution of the United States should not be based . . . on judgments, laws, or pronouncements of foreign institutions unless such [materials] inform an understanding of the original meaning of the Constitution.”²³ The House Resolution has so far garnered support from 54 co-sponsors. Two 2005-proposed Acts would do more than “resolve.” They would positively prohibit federal courts, when interpreting the US Constitution, from relying upon any law, policy, or other action of a foreign state or international organisation, other than English constitutional and common law “up to the time of the adoption of

¹⁸ Diarmuid F. O’Scannlain, “What Role Should Foreign Practice and Precedent Play in the Interpretation of Domestic Law?”, Lecture at the Institute of Advanced Legal Studies (Oct. 11 2004).

¹⁹ 525 US 155, 173–174 (1999) (citing *Sidhu v. British Airways plc* [1997] 1 All E. R. 193).

²⁰ 537 US 186 (2003).

²¹ J. Harvie Wilkinson, “The Use of International Law in Judicial Decisions” (2004) 27 Harv. J. Law & Pub. Pol. 423, 425.

²² Patricia M. Wald, “The Use of International Law in the American Adjudicative Process” (2004) 27 Harv. J. Law & Pub. Pol. 431, 439.

²³ H.R. Res. 97, 109th Cong. (2005); S. Res. 92, 109th Cong. (2005).

the [US] Constitution.”²⁴ (Even reference to a Scottish verdict, it seems, would be out of order.) The Acts further provide that any judge who refers to the prescribed materials shall be deemed to have committed an impeachable offence.

These measures recycle similar resolutions and bills proposed before the 2004 elections in the United States, but never put to a vote. Although I doubt the current measures will garner sufficient votes to pass, it is disquieting that they have attracted sizeable support. And one not-so-small concern—they fuel the irrational fringe. A recent example. The US Supreme Court’s Marshal alerted Justice O’Connor and me to a 28 February 2005, web posting on a “chat” site. It opened:

Okay commandoes, here is your first patriotic assignment ... an easy one. Supreme Court Justices Ginsburg and O’Connor have publicly stated that they use European laws and rulings to decide how to rule on American cases.

This is a huge threat to our Republic and Constitutional freedom. It is as much an assault on our liberty as anything ever has been ... If you are what you say you are, and NOT armchair patriots, then those two justices will not live another week.

More than two months have passed. Justice O’Connor, I am happy to report, remains alive and well. As for me, you can judge for yourself.

To a large extent, I believe, the critics in Congress and in the media misperceive how and why US courts refer to foreign and international court decisions. *The Washington Post*, for example, worried in a March 25 editorial “about the implications for liberty and the democratic rights of the American people if the courts outsource America’s constitutional tradition.”²⁵ We refer to decisions rendered abroad, it bears repetition, 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.”²⁶

Two decisions announced 26 April 2005, confounded those fearful about the US Supreme Court’s use of foreign court judgments to inform US adjudication. One case involved a man convicted under a federal gun-control law. Once convicted of a serious crime “in any court,” the law prescribed, the former offender could not possess a firearm.²⁷ The defendant had been

²⁴ Constitution Restoration Act of 2005, §201, H.R. 1070, 109th Cong. (2005); Constitution Restoration Act of 2005, §201, S. 520, 109th Cong. (2005).

²⁵ “Outsourcing Rights”, *Washington Post* 25 March 2005, at p. A18.

²⁶ Wald, “Use of International law”, at p. 442.

²⁷ *Small v. United States* 544 US ; 125 S.Ct. (2005).

convicted in Japan for gun smuggling. Did “any court” mean any court in the world? Or should “any court” be read to mean any state or federal court in the United States? For good and sufficient reasons, Justice Breyer, writing for a majority that included Justice O’Connor and me, confined “any court” to those within our borders. Justice Scalia was among the dissenters. He would have counted the Japanese conviction. Justice Breyer has been billed as “perhaps the court’s leading advocate of the idea that the Supreme Court needs to take greater notice of . . . legal opinions abroad.”²⁸ Justice Scalia, as I earlier noted, takes strong issue with that view.

A similar division attended the Court’s response to the question whether persons involved in a scheme to smuggle cheap liquor from Maryland into Canada, thereby evading Canada’s hefty taxes on alcohol, could be prosecuted in the United States for wire fraud—using interstate telephone wires to accomplish the scheme.²⁹ Joined by three of my colleagues including Justice Breyer, I expressed the dissenting view that enforcement of Canada’s customs and tax laws was that country’s prerogative, not ours. Both cases concerned the territorial range of US laws. Recognizing that the legislature ordinarily thinks domestically is entirely compatible with the view that all involved in writing and interpreting laws would profit from knowledge of other systems’ approaches and solutions to similar problems.

Professor Vicki Jackson noted a point critics of comparative sideglances perhaps overlook: the “negative authority” foreign experience may sometimes have.³⁰ She referred in this regard to the “Steel Seizure Case.”³¹ There, Justice Jackson, in his separate opinion, pointed to features of the Weimar Constitution in Germany that allowed Adolf Hitler to assume dictatorial powers. He contrasted Germany’s situation with that of France and Great Britain, countries in which legislative authorisation was required for the exercise of emergency powers. Justice Jackson drew from that comparison support for the conclusion that, without more specific congressional authorisation, the US President could not seize private property even in aid of a war effort.

The US Constitution, Justice Scalia has noted, does not contain any instruction resembling South Africa’s prescription. That nation’s Constitution provides that courts, when interpreting the Bill of Rights, must consider international law, and may consider

²⁸ “The Court is Open for Discussion”, Washington Post, 14 January 2005, at p. A12.

²⁹ *Pasquantino v. United States* 544 US ; 125 S.Ct. (2005).

³⁰ Jackson Statement, at p. 15.

³¹ *Youngstown Sheet & Tube Co. v. Sawyer* 343 US 579 (1952).

foreign law. Other post-World War II Constitutions, India's and Spain's for example, have similar prescriptions.

I would demur to Justice Scalia's observation. Judges in the United States are free to consult all manner of commentary—Restatements, Treatises, what law professors or even law students write copiously in law reviews, for example. If we can consult those writings, why not the analysis of a question similar to the one we confront contained in an opinion of the Supreme Court of Canada, the Constitutional Court of South Africa, the German Constitutional Court, or the European Court of Human Rights? Israel's Chief Justice, Aharon Barak, had it right, I think, when he listed among questions on which comparative law inquiry could prove enlightening or valuable in a positive or negative sense: hate speech, privacy, abortion, the death penalty, and now the fight against terrorism.

A case in point well-known to this audience. On 16 December 2004, in a controversy precipitated by the fight against terrorism, the Lords of Appeal issued a waypaving decision, one that looks beyond the United Kingdom's borders.³² The case was brought by aliens held in custody in Belmarsh prison. A nine-member panel ruled, 8-to-1, that the British government's indefinite detention of foreigners suspected of terrorism, without charging or trying them, is incompatible with the European Convention on Human Rights, incorporated into domestic law by the UK Human Rights Act. Lord Bingham's lead opinion draws not only on domestic decisions and decisions of the European Court of Human Rights. It also refers to opinions of the Supreme Court of Canada and US federal court opinions. Finding the differential treatment of nationals and non-nationals impermissible under the Human Rights Act, Lord Bingham also referred to several UN instruments, commencing with the 1948 Universal Declaration of Human Rights and including the 1965 International Convention on the Elimination of All Forms of Racial Discrimination.³³

Other opinions too, in that noteworthy decision, contain comparative references. One example: Baroness Hale, after noting that "Belmarsh is not the British Guantanamo Bay," quoted a passage on the protection of minority rights from Thomas Jefferson's first inaugural address.³⁴ Lord Bingham did make the observation, gently, that contemporary "US authority does not provide evidence of general international practice."³⁵ That comment

³² *A (FC) v. Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 A.C. 68.

³³ *Ibid.*, at paras. [58]–[62].

³⁴ *Ibid.*, at paras. [223], [237].

³⁵ *Ibid.*, at para. [69].

may have figured in the *New York Times*' characterization of the Lords' ruling as "a strong example of the increasing interdependence of domestic and international law, at least outside of the United States."³⁶ US District Judge Louis H. Pollak, formerly dean of Yale Law School and, later, of the University of Pennsylvania School of Law, in a February 2005 address at the Inner Temple, called the *Belmarsh* decision "masterful". The Law Lords, he said, "spoke in a firmer voice" than the US Supreme Court has up to now on the detention of alleged terrorists without charges or trial.³⁷

The notion that it is improper to look beyond the borders of the United States in grappling with hard questions, I earlier suggested, has a close kinship to the view of the US Constitution as a document essentially frozen in time as of the date of its ratification. I am not a partisan of that view. US jurists honour the Framers' intent "to create a more perfect Union," I believe, if they read the Constitution as belonging to a global 21st century, not as fixed forever by 18th-century understandings.

Justice Oliver Wendell Holmes, Jr., made the point felicitously in a case decided in 1920, *Missouri v. Holland*, involving the treaty-making power.³⁸ "[W]hen we are dealing with words ... [in] the Constitution of the United States," Holmes wrote, "we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters ... The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."³⁹

A key 1958 plurality opinion, *Trop v. Dulles*, sounds the same theme.⁴⁰ At issue in that case was whether stripping a wartime deserter of citizenship violated the Eighth Amendment's ban on "cruel and unusual punishments." "The basic concept underlying the ... Amendment," the opinion observed, "is nothing less than the dignity of man."⁴¹ Therefore the constitutional text "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."⁴² In that regard, the plurality reported: "The civilized nations of the world are in virtual

³⁶ Lizette Alvarez, "British Court Says Detentions Violate Rights" *New York Times* 17 December 2004, at p. A1.

³⁷ Louis H. Pollak, "Our New Supreme Court: Any Lessons from the US?", Seminar Jointly Sponsored by the Constitutional and Administrative Law Bar Association and University College London (23 February 2005).

³⁸ 252 US 416 (1920).

³⁹ *Ibid.*, at p. 433.

⁴⁰ 356 US 86 (1958) (plurality opinion).

⁴¹ *Ibid.*, at p. 100.

⁴² *Ibid.*, at p. 101.

unanimity that statelessness is not to be imposed as punishment for crime.”⁴³

A fairly recent example of frozen-in-time interpretation is *Grupo Mexicano de Desarrollo, S. A. v. Alliance Bond Fund, Inc.*, a 1999 decision involving no grand constitutional question, simply equity between parties with no ideological score to settle.⁴⁴ The basic scenario: A Mexican company defaulted on payments due to a US creditor and was sued in a Federal District Court, which had personal jurisdiction over the debtor. Sliding into insolvency, the Mexican company was busily distributing what remained of its assets to its Mexican creditors. It did so in clear violation of a contractual promise to treat the US creditor on par with all other unsecured, unsubordinated creditors. Continuation of that activity would leave nothing in the till for the US creditor. Since 1975, British courts have been providing a remedy in similar circumstances. To assure that there will be assets against which a final judgment for the plaintiff creditor can be executed, courts in this country issued *Mareva* injunctions, named after a decision of the Court of Appeal by Lord Denning, M.R., approving the practice.⁴⁵ A *Mareva* injunction temporarily restrains a foreign debtor from transferring assets pending adjudication of the domestic creditor’s claim. A US District Court, ruling over two decades after the leading UK decisions, looked to the *Mareva* injunction, which other common-law nations had by then adopted, and found it altogether fitting for the US creditor’s case against the Mexican debtor. The Court of Appeals agreed. But a 5–4 majority of the US Supreme Court concluded that *Mareva* injunctions were not “traditionally accorded by courts of equity” at the time the Constitution was adopted.⁴⁶ A power that English courts of equity “did not actually exercise . . . until 1975,” the Court concluded, was not one US courts could assume without congressional authorisation.⁴⁷

Joined by Justices Stevens, Souter, and Breyer, I dissented from the Court’s static conception of equitable remedial authority. Earlier decisions described that authority as supple, adaptable to changing conditions. I noted, among other things, that federal

⁴³ *Ibid.*, at p. 102.

⁴⁴ 527 US 308 (1999).

⁴⁵ *Mareva Compania Naviera S.A. v. Int’l Bulkcarriers S.A.* [1975] 2 Lloyd’s Rep. 509, 510–11 (CA). In the first case presenting the issue, *Nippon Yusen Kaisha v. Karageorgis*, [1975] 2 Lloyd’s Rep. 137 (CA), Lord Denning M.R. acknowledged that “[i]t ha[d] never been the practice of the English Courts to seize assets of a defendant in advance of judgment or to restrain the disposal of them.” Noting “that the practice on the Continent of Europe is different,” he concluded “that the time has come when we should revise our practice.” (*Ibid.*, at p. 138).

⁴⁶ *Grupo Mexicano* 527 US at p. 319.

⁴⁷ *Ibid.*, at p. 329.

courts, in their sometimes heroic efforts to implement the public school desegregation mandated by *Brown v. Board of Education*, did not embrace a frozen-in-time view of their equitable authority. Issuing decrees “beyond the contemplation of the 18th-century Chancellor,”⁴⁸ they applied the enduring principles of equity to the changing needs of a society still in the process of achieving “a more perfect Union.”

In *Brown*, I might note, apropos the respect due opinions of humankind, the Attorney General of the United States filed an *amicus* brief stressing the international importance of the case. The brief included a letter from then-Secretary of State Dean Acheson. Acheson observed:

[T]he continuance of racial discrimination in the United States remains a source of constant embarrassment to this Government in the day-to-day conduct of its foreign relations; and it jeopardizes the effective maintenance of our moral leadership of the free and democratic nations of the world.⁴⁹

Turning from frozen-in-time interpretation, I will take up another shortfall or insularity in current US jurisprudence, at least as I see it. The Bill of Rights, few would disagree, is the hallmark and pride of the United States. One might therefore assume that it guides and controls US officialdom wherever in the world they carry the flag of the United States or their credentials. But that is not the currently prevailing view. For example, absent an express ban by treaty, a US officer may abduct a foreigner and forcibly transport him to the United States to stand trial. The Court so held, 6-to-3, in 1992.⁵⁰ Just a year earlier, South Africa’s Supreme Court of Appeal had ruled the other way. It determined that under South Africa’s common law, a trial court has no jurisdiction to hear a case against a defendant when the State had acted lawlessly in apprehending him by participating in an abduction across international borders.⁵¹

Another example, one in which I was a participant, involving civil litigation: Interpreting US Supreme Court precedent, a divided US Court of Appeals for the D.C. Circuit held in 1989, during my tenure on that court, that foreign plaintiffs acting abroad—plaintiffs were Indian family planning organisations—had no First Amendment rights, and therefore no standing to assert a violation of such rights by US officials.⁵² In particular, the Indian

⁴⁸ *Ibid.*, at p. 337.

⁴⁹ Brief for the United States as *Amicus Curiae* at 8, *Brown v. Bd. of Educ.* 347 US 483 (1954) (No. 1).

⁵⁰ *United States v. Alvarez-Machain* 504 US 655, 670 (1992).

⁵¹ *State v. Ebrahim* 1991 (2) S.A.L.R. 553, 568 (A).

⁵² *DKT Mem’l Fund Ltd. v. Agency for Int’l Dev.* 887 F.2d 275, 284–85 (D.C. Cir. 1989).

organisations complained of a condition on US grant money: the recipients could not engage in any abortion counselling, even in a separate entity and with funds from other sources. In dissent, I resisted the notion that in an encounter between the United States and nonresident aliens, “the amendment we prize as ‘first’ has no force in court.”⁵³ I expressed the expectation that the position taken in the Restatement (Third) of Foreign Relations would one day accurately describe our law. “[W]herever the United States acts,” the Restatement projects, “it can only act in accordance with the limitations imposed by the Constitution.”⁵⁴

That point was well stated by Columbia University Professor Louis Henkin, a principal drafter of the current Foreign Relations Restatement, former president of the American Society of International Law, and Editor of the Society’s journal. Henkin wrote:

[I]n a world of states, the United States is not in a position to secure the rights of all individuals everywhere, [but] it is always in a position to respect them. Our federal government must not invade the individual rights of any human being. The choice in the Bill of Rights of the word “person” rather than “citizen” was not fortuitous; nor was the absence of a geographical limitation. Both reflect a commitment to respect the individual rights of all human beings.⁵⁵

Returning to my main theme, I will recount chronologically the Supreme Court’s most recent decisions involving foreign or international legal sources as an aid to the resolution of constitutional questions. In a headline 2002 decision, *Atkins v. Virginia*, a six-member majority (all save Chief Justice Rehnquist and Justices Scalia and Thomas) held unconstitutional the execution of a mentally retarded offender.⁵⁶ The Court noted that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”⁵⁷ The following 2002–2003 Term was appraised as pathmarking. *New York Times* reporter Linda Greenhouse observed in July 2003, in her annual roundup of the Supreme Court’s decisions: The Court has “displayed a [steadily growing] attentiveness to legal developments in the rest of the world and to the [C]ourt’s role in keeping the United States in step with them.”⁵⁸

⁵³ *Ibid.*, at p. 308 (R.B. Ginsburg J., concurring in part and dissenting in part).

⁵⁴ *Ibid.* (quoting *Restatement (Third) of Foreign Relations Law of the United States* § 721 note 1 (1987) (quoting from *Reid v. Covert* 354 US 1, 6 (1957) (plurality opinion of Black J.))).

⁵⁵ Louis Henkin, “The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates” (1985) 27 *Wm. & Mary L. Rev.* 11, 32.

⁵⁶ 536 US 304 (2002).

⁵⁷ *Ibid.*, at p. 317, n. 21.

⁵⁸ Linda Greenhouse, “The Supreme Court: Overview; In a Momentous Term, Justices Remake the Law, and the Court” *New York Times*, July 1th 2003, at p. A1.

Among examples, I would include the Michigan University affirmative action cases decided 23 June 2003.⁵⁹ In separate opinions, joined in one case by Justice Breyer, in the other in full by Justice Souter and in part by Justice Breyer, I looked to two United Nations Conventions: the 1965 International Convention on the Elimination of all Forms of Racial Discrimination, which the United States has ratified; and the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, which, sadly, the United States has not yet ratified. Both Conventions distinguish between impermissible policies of oppression or exclusion, and permissible policies of inclusion, “temporary special measures aimed at accelerating *de facto* equality.”⁶⁰ The Court’s decision in the Michigan Law School case, I observed, “accords with the international understanding of the [purpose and propriety] of affirmative action.”⁶¹

A better indicator from the same Term, because it attracted a majority, is Justice Kennedy’s opinion for the Court in *Lawrence v. Texas*, announced on 26 June 2003.⁶² Overruling the Court’s 1986 decision in *Bowers v. Hardwick*, *Lawrence* declared unconstitutional a Texas statute prohibiting two adult persons of the same sex from engaging, voluntarily, in intimate sexual conduct. On the question of dynamic versus static, frozen-in-time constitutional interpretation, the Court’s opinion instructs:

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.⁶³

On respect for “the Opinions of [Human]kind,” the *Lawrence* Court emphasised: “The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.”⁶⁴ In support, the Court cited the leading 1981 European Court of Human Rights decision, *Dudgeon v. United Kingdom*, and subsequent European Human Rights Court decisions affirming the

⁵⁹ *Gratz v. Bollinger* 539 US 244 (2003); *Grutter v. Bollinger* 539 US 306 (2003).

⁶⁰ Annex to G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at art. 4(1), U.N. Doc. A/34/46 (1979).

⁶¹ *Grutter*, 539 US at p. 344.

⁶² 539 US 558 (2003).

⁶³ *Ibid.*, at p. 579.

⁶⁴ *Ibid.*, at p. 577.

protected right of homosexual adults to engage in intimate, consensual conduct.

In the 2003–2004 term, foreign and international legal sources again figured in several decisions. These included, most notably, two June 2004 decisions. One, *Hamdi v. Rumsfeld*, concerned a US citizen, held incommunicado in a Navy brig in South Carolina pursuant to an executive decree declaring him an “enemy combatant”.⁶⁵ Ruling some six months before the Lords’ decision in the *Belmarsh* case, the Court held, 8-to-1, that the petitioner was entitled, at least, to a fair opportunity to contest the factual basis for his detention. Even in “our most challenging and uncertain moments” when “our Nation’s commitment to due process is most severely tested,” Justice O’Connor wrote for a four-Justice plurality, “we must preserve our commitment at home to the principles for which we fight abroad.”⁶⁶ “[H]istory and common sense,” she reminded, “teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse.”⁶⁷ That point received eloquent statement in Lord Hoffman’s opinion in the *Belmarsh* case.

The other “enemy combatant” case, *Rasul v. Bush*, held that US courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured in hostilities abroad, then transported to the US naval base in Guantanamo Bay, Cuba.⁶⁸ Lord Steyn, before this decision, called Guantanamo a “legal black hole.”⁶⁹ The Supreme Court has so far written only chapter one on the Guantanamo Bay incarcerations. Federal district court judges have split on chapter two. One judge held that foreigners detained at Guantanamo Bay, though they had access to court, could gain no judicial relief.^{69a} Another ruled that the detainees were entitled to a fair hearing on the question whether their incarceration meets due process demands.^{69b} Both cases are currently on appeal.

The Supreme Court’s March 2005 decision in *Roper v. Simmons* presents perhaps the fullest expressions to date on the propriety and utility of looking to “the opinions of [human]kind.”⁷⁰ Holding unconstitutional the execution of persons under the age of 18 when they committed capital crimes, the Court declared it fitting to acknowledge “the overwhelming weight of international opinion

⁶⁵ 124 S.Ct. 2633 (2004).

⁶⁶ *Ibid.*, at p. 2648.

⁶⁷ *Ibid.*, at p. 2647.

⁶⁸ 542 US ; 124 S. Ct. 2686 (2004).

⁶⁹ Johan Steyn, “Guantanamo Bay: The Legal Black Hole” (2004) 53 Int’l & Comp. L. Q. 1.

^{69a} *Khalid v. Bush* 355 F. Supp 2d 311 (D.D.C. 2005).

^{69b} *Re Guantanamo Detainees* 355 F Supp 2d 443 (D.D.C. 2005).

⁷⁰ 543 US ; 125 S.Ct. 1183 (2005).

against the juvenile death penalty.”⁷¹ Justice Kennedy wrote for the Court that the opinion of the world community provides “respected and significant confirmation of our own conclusions.”⁷² “It does not lessen our fidelity to the Constitution,” he explained, to recognise “the express affirmation of certain fundamental rights by other nations and peoples.”⁷³

The *Roper* opinion pointed, specifically, to the United Kingdom’s abolition of the juvenile death penalty over 50 years ago. The UK’s “experience bears particular relevance,” Justice Kennedy noted, “in light of the historic ties between our countries and in light of the Eighth Amendment’s own origins ... in the English Declaration of Rights of 1689.”⁷⁴

Justice O’Connor, although she dissented from the Court’s categorical ruling, agreed with the Court on the relevance of “foreign and international law to [an] assessment of evolving standards of decency.”⁷⁵ The other dissenters, for whom Justice Scalia spoke, vigorously contended that foreign and international law have no place in determining what punishments are “cruel and unusual” within the meaning of the US Constitution’s Eighth Amendment.⁷⁶

Recognizing that forecasts are risky, I nonetheless believe we will continue to accord “a decent Respect to the Opinions of [Human]kind” as a matter of comity and in a spirit of humility. Comity, because projects vital to our well being—combating international terrorism is a prime example—require trust and cooperation of nations the world over. And humility because, in Justice O’Connor’s words: “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.”⁷⁷

In this regard, I was impressed by an observation made in September 2003 by Israel’s Chief Justice Barak. September 11, he noted, confronts the United States with the dilemma of conducting a war on terrorism without sacrificing the nation’s most cherished values, including our respect for human dignity. “We in Israel,” Barak said, “have our September 11, and September 12 and so on.”⁷⁸ He spoke of his own Court’s efforts to balance the government’s no doubt compelling need to secure the safety of the

⁷¹ *Ibid.*, at p. 1200.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*, at p. 1199.

⁷⁵ *Ibid.*, at p. 1215 (O’Connor J., dissenting).

⁷⁶ *Ibid.*, at p. 1228–29 (Scalia J., dissenting).

⁷⁷ Sandra Day O’Connor, “Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law”, *Int’l Jud. Observer*, June 1997, at p. 2.

⁷⁸ Aharon Barak, “The Relationship of United States Constitutional Law and Foreign Constitutional Law”, Panel Discussion at Columbia Law School (Sept. 12th 2003).

State and of its citizens on the one hand, and the nation's high regard for "human dignity and freedom on the other hand." He referred, particularly, to a question presented to his Court: "Is it lawful to use violence (less euphemistically, torture) in interrogat[ing] [a] terrorist in a 'ticking bomb' situation." His Court's answer: No, "[n]ever use violence." He elaborated:

[It] is the fate of a democracy [that] not all means are acceptable to it, . . . not all methods employed by its enemies are open to it. Sometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of [a democracy's] understanding of security. At the end of the day, [those values buoy up] its spirit and strength [and its capacity to] overcome [the] difficulties.⁷⁹

Lord Hoffman spoke to the same effect in his 16 December 2004, opinion. He concluded:

The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as [section 23 of the 2001 Antiterrorism, Crime & Security Act, authorising indefinite imprisonment without charge or trial]. That is the true measure of what terrorism may achieve.⁸⁰

He hoped, after the Lords of Appeal ruling, Parliament would not "give the terrorists such a victory."⁸¹ Parliament, you no doubt know, reacted swiftly to the Lords' decision by enacting in March a measure allowing placement of terrorist suspects under a highly restrictive form of house arrest, in lieu of imprisonment, again without charging or trying them.

We live in an age in which the fundamental principles to which we subscribe—liberty, equality, and justice for all—are encountering extraordinary challenges. But it is also an age in which we can join hands with others who hold to those principles and face similar challenges. May we draw inspiration from Abigail Adams, who wrote to her son, the future President, of the era in which he was coming of age:

These are the times in which a genius would wish to live. It is not in the still calm of life, or the repose of a pacific station, that great characters are formed. The habits of a vigorous mind are formed in contending with difficulties.⁸²

⁷⁹ H.C. 5100/94, *Pub. Comm. Against Torture in Isr. v. Gov't of Israel*, 53 (4) P.D. 817, 845.

⁸⁰ *A v. Secretary of State for the Home Department*, [2004] UKHL 56, at para. [97].

⁸¹ *Ibid.*

⁸² Letter from Abigail Adams to John Quincy Adams, quoted in David McCullough, *John Adams* (London 2001), 226.