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## “A Decent Respect to the Opinions of [Human] Kind”: The Value of a Comparative Perspective in Constitutional Adjudication

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## **INTRODUCTORY REMARKS**

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

INTERNATIONAL ACADEMY OF COMPARATIVE LAW  
AMERICAN UNIVERSITY  
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The invitation to greet members of this Congress was irresistible, for it revived memories of my own participation in earlier meetings of the International Academy of Comparative Law. In the 1960s, I attended Congresses in Hamburg, Uppsala, and — most delightfully — Pescara, in Abruzzi. The value of comparative studies was brought home to me at those gatherings, which — along with my affiliation with the Columbia Law School Project on International Procedure, my membership in the American Foreign Law Association, and my 1964–1972 service on the Board of Editors of the American Journal of Comparative Law — powerfully influenced my work as a lawyer, law teacher, and now judge.

As David Clark’s fine articles in 2006 and 2007 issues of the American Journal of Comparative Law relate, renowned jurists in the United States were leading participants in the formative years of the Academy. Among the bright minds engaged in the 1930s were Professors Roscoe Pound, John Henry Wigmore, Samuel Williston, and Supreme Court Justice Harlan Fiske Stone. And at the only other international congress of comparative law held in the United States,

in St. Louis in 1904, Supreme Court Justice David Brewer served as congress president.

From the birth of the United States as a nation, foreign and international law influenced legal reasoning and judicial decisionmaking. Founding fathers, most notably, Alexander Hamilton and John Adams, were familiar with leading international law treatises, the law merchant, and English constitutional law. And they used that learning as advocates in legal contests.

The U. S. Constitution, in Article I, authorized Congress to define and punish "Offences against the Law of Nations," and the very first Congress passed the Alien Tort Act, which empowers federal courts to entertain civil actions brought by an alien for a tort "committed in violation of the law of nations or a treaty of the United States."

Any doubt about the tradition of judicial reference to foreign and international law was (or should have been) laid to rest by a comprehensive article composed by Steven G. Calabresi and Stephanie Dotson Zimdahl, published in 2005 in the *William & Mary Law Review*. The survey, running over 160 pages, shows how very wrong it is to charge that citing foreign law is a recent heresy advanced by liberal activist judges in pursuit of their political preferences.

The law of nations, Chief Justice Marshall famously said in 1815, is part of the law of our land. Decisions of the courts of other countries, Marshall explained, show how the law of nations is understood elsewhere, and will be considered in determining the rule which is to prevail here. Those decisions, he clarified, while not binding authority for U. S. courts, merit respectful attention for their potential persuasive value.

Decades later, in 1900, the U. S. Supreme Court reaffirmed that

"[i]nternational law is part of our law and must be ascertained and administered by [our] courts of justice . . . . [W]here there is no treaty, no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subject of which they treat."

Those works today, include the writings of many in this audience.

Flash forward with me now to the hearings held earlier this month on the nomination of Elena Kagan for a seat on the U. S. Supreme Court. Queries about international and foreign law were several times posed by members of the Senate Committee on the Judiciary. One Senator expressed “dismay” that, during Kagan’s tenure as Dean of the Harvard Law School, “first year students [were required] to take a course in international law.” Another ventured that “[n]owhere did the founders say anything about using foreign law.” “[P]lease explain,” that Senator asked, “why it is OK sometimes to use foreign law to interpret our Constitution or statutes, our treaties.” Yet another asked “whether [judges should] ever look to foreign laws for good ideas” or “get inspiration for their decisions from foreign law.”

Nominee Kagan responded: “I’m in favor of good ideas . . . wherever you can get them.” “Having an awareness of what other nations are doing might be useful,” she explained, offering as an example a brief she filed as Solicitor General a few months ago in a case concerning the immunity of foreign officials. Of course, she observed, on a point of U. S. law, foreign decisions do not rank as precedent, but they could be informative in much the same way as one might gain knowledge or insight from reading a law review article. “I’m troubled,” a Senator told her, that she “believes we can turn to foreign law to get good ideas.”

Contrast with those exchanges, the view of the Constitution’s framers, expressed in *The Federalist*, on the “high importance” to the new nation of our adherence to “the laws of nations” in our commerce with other countries. The authors of *The Federalist*, schooled in history, looked abroad for both positive and negative examples to guide their course.

On judicial review for constitutionality, my own view is simply this: If U.S. experience and decisions may be instructive to systems that have more recently instituted or invigorated judicial review for constitutionality, so too can we learn from others now engaged in measuring ordinary laws and executive actions against fundamental instruments of government and charters securing basic rights.

Exposing laws to judicial review for constitutionality was once uncommon outside the United States. But particularly in the years following World War II, many nations installed constitutional review

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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 U.S. judicial system will be the poorer, I have urged, 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.

In the value I place on comparative dialogue — on sharing with and learning from others — as I earlier noted, I draw on counsel from the founders of the United States. The drafters and signers of the Declaration of Independence showed their concern 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.” They sought to expose those reasons to the scrutiny of “a candid world.”

The U.S. Supreme Court, early on, expressed a complementary view: The judicial power of the United States, the Court said in 1816, includes 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.” Just as the founding generation showed concern for how adjudication in our courts would affect other countries’ regard for the United States, so today, even more than when the United States was a new nation, judgments rendered in the USA are subject to the scrutiny of “a candid World.”

True, there are generations-old and still persistent discordant views on concern about, and recourse to, the “Opinions of Mankind.” As my quotations from the remarks of Senators at the Elena Kagan hearings indicate, U. S. jurists and political actors today divide sharply on the propriety of looking beyond our nation’s borders, particularly on matters touching fundamental human rights. Expressing spirited opposition, my dear colleague, Justice Antonin Scalia, for example, counsels: 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 decisionmaking, but sophistry.”

Another trenchant critic, Seventh Circuit U.S. Court of Appeals Judge Richard Posner, commented not long ago: “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.” Judge Posner’s view rests, in part, on the concern that U.S. judges do not comprehend the social, historical, political, and institutional background from which foreign opinions emerge. Nor do most of us 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, as Elena Kagan reiterated in her responses to Senators, are not authoritative; they set no binding precedent for the U.S. judge. But they can add to the store of knowledge relevant to the solution of trying questions. Yes, we should approach foreign legal materials with sensitivity to our differences and imperfect understanding, but imperfection, I believe, should not lead us to abandon the effort to learn what we can from the experience and wisdom foreign sources may convey.

Comparative sideglances can sometimes aid us in deciding not only what we should do, but what we should not do. A notable example: In the “Steel Seizure Case” decided by the U. S. Supreme Court in 1952, Justice Jackson, in his separate opinion, pointed to features of the Weimar Constitution in Germany that allowed Adolf Hitler to assume dictatorial powers. Even in wartime, Jackson concluded, the U.S. President could not seize private property (in that case, the steel mills). Such a measure, in good times and bad, the Court held, required congressional authorization.

At the time Justice Jackson cast a comparative sideglance at Weimar Germany, the United States itself was a source of “negative authority” abroad. The Attorney General pressed that point in an amicus brief for the United States filed in *Brown v. Board of Education*, the public schools desegregation case decided in 1954. Urging the Court to put an end to the “separate but equal doctrine,” the Attorney General wrote:

”The existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries. Racial discrimination . . . raises doubts even among

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friendly nations as to the intensity of our devotion to the democratic faith.”

Judges in the United States, after all, are free to consult all manner of commentary — Restatements, Treatises, what law professors or even law students write copiously in law reviews, and, in the internet age, any number of legal blogs. If we can consult those sources, why not the analysis of a question similar to the one we confront contained, for example, 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?

Henry Fielding wrote in one of his novels that examples work more forcibly on the mind than precepts. With that counsel in mind, I will endeavor, now, to recount briefly some recent Supreme Court 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 the Chief Justice and Justices Scalia and Thomas) held unconstitutional the execution of a mentally retarded offender. The Court noted that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”

The next year, the Court looked beyond our borders in a case titled *Lawrence v. Texas*. Overruling a 1986 decision, the judgment in *Lawrence* declared unconstitutional a Texas statute that prohibited two adult persons of the same sex from engaging, voluntarily, in intimate sexual conduct.

On respect for “the Opinions of [Human]kind,” the *Lawrence* Court emphasized: “The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.” In support, the Court cited a leading 1981 European Court of Human Rights decision, *Dudgeon v. United Kingdom*, and subsequent European Human Rights Court rulings affirming the protected right of homosexual adults to engage in intimate, consensual conduct.

The current U. S. Supreme Court has several times shown “a decent respect for the opinions of humankind” in cases arising out of the war on terror. In June 2008, for example, the Court held, in *Boumediene v. Bush*, that Congress acted unconstitutionally when it

eliminated federal court jurisdiction to hear petitions for habeas corpus filed by aliens detained at Guantanamo Bay. The Guantanamo prison, the Court's opinion made plain, may not be treated by the President or Congress as a legal black hole. Prisoners there have the right, protected by Article I of the Constitution, the Court ruled, to challenge the legality of their detention before the nation's courts.

The Court had established the groundwork for *Boumediene* in a 2006 decision, *Hamdan v. Rumsfeld*. There, the Court held that the President, acting without congressional authorization, could not order trial of Guantanamo Bay detainees by military commissions. 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 the four-Justice plurality in *Hamdan*, "we must preserve our commitment at home to the principles for which we fight abroad." "[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."

Two University of Chicago Law School professors (Eric A. Posner and Adrian Vermeule) promptly published their disagreement with Justice O'Connor's statement and a similar speech made by Lord Hoffman, acting as a Law Lord in the first Belmarsh Prison case; indeed, the professor called the O'Connor-Hoffman remarks "absurdities." People do not prefer liberty to death, they urged. A government that does not contract civil liberties in face of terrorist threats, they said, "is pathologically rigid, not enlightened." Yet what greater defeat could we suffer than to come to resemble the forces we oppose in their disrespect for human dignity?

I will conclude these illustrations with the Court's March 2005 decision in *Roper v. Simmons*. Holding unconstitutional the execution of persons under the age of 18 who committed capital crimes, the Court acknowledged "the overwhelming weight of international opinion against the juvenile death penalty." Justice Kennedy wrote for the Court that the opinion of the world community provides "respected and significant confirmation of our own conclusions." "It does not lessen our fidelity to the [U. S.] Constitution," he explained, to recognize "the express affirmation of certain fundamental rights by other nations and peoples."

Recognizing that forecasts are risky, I nonetheless believe the

U. S. Supreme Court 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 . . . solutions to the new legal problems that arise each day, [solutions] from which we can learn and benefit.”

My best wishes to all in this assemblage. May you continue to listen to, and learn from, each other.