Notre Dame Law Review

Volume 80 | Issue 5 Article 5

5-1-2005

What Role Should Foreign Practice and Precedent Play in the Interpretation of Domestic Law

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SPEECH

WHAT ROLE SHOULD FOREIGN PRACTICE AND PRECEDENT PLAY IN THE INTERPRETATION OF DOMESTIC LAW?

*Diarmuid F. O'Scannlain**

Ladies and gentlemen, I am most honored to have the opportunity to speak here in London this evening. As you know from the introduction, I am a United States Circuit Judge sitting on the Ninth Circuit Court of Appeals, having been nominated in 1986 by President Ronald Reagan and confirmed by the United States Senate. My court, which is just one level below the Supreme Court, is our largest regional circuit, and it comprises roughly twenty percent of the country's population. The geographic reach of the Ninth Circuit is vast: it encompasses the nine Western states, including California, Oregon, and Hawaii, as well as the Pacific Territories. And while I will strive this evening to represent my circuit well, I must make explicit that I speak only for myself as an individual American judge and not for the court of which I am a member.

I.

It has been a distinct pleasure for me to spend the past few days in this historic city. For common-law jurists like myself, London is a place of special significance. It is here—in the courts of King's Bench, Chancery, and Exchequer—that the fundamental principles of the

* United States Circuit Judge, United States Court of Appeals for the Ninth Circuit. This lecture was delivered on October 11, 2004, at the Institute of Advanced Legal Studies of the University of London in London, England, while I was Visiting Scholar at the University of Notre Dame London Law Programme. I would like to acknowledge the hospitality of Geoffrey Bennett, Director of the London Law Programme, in making arrangements for this lecture. I would also like to acknowledge, with thanks, the assistance of Amir Cameron Tayrani, my law clerk, in preparing these remarks.

common law evolved centuries ago. This city's hallowed streets were once traversed by Lord Mansfield, Sir Edward Coke, and Sir William Blackstone—men whose contributions to the common law have been studied by generations of American lawyers. My time in London has thus forcefully reminded me that the United States and Great Britain will forever be linked by the unbreakable bonds of history and culture. Indeed, the United States shares a common legal heritage not only with Great Britain but also with all other countries that trace their jurisprudential roots to British origins. Truly, we are all part of the same common-law family.

A.

In light of the bonds that unite the common-law world, it is not surprising that courts in many such countries—including Australia, Canada, and New Zealand—frequently invoke the precedent and practice of other common-law jurisdictions as a source of persuasive legal authority. This transnational mode of jurisprudence, which Americans refer to as "comparative constitutionalism,"[1] is also relied upon by British courts. In the words of one member of the House of Lords, foreign law merits consideration in Britain because "[w]hatever differences there may be between the legal systems of South Africa, the United States, New Zealand and this country, many of the basic principles to which they seek to give effect stem from common roots."[2]

In preparing for this lecture, I attempted to gain an appreciation for the manner in which British courts utilize foreign legal authorities. In so doing, I came across a number of decisions in which the House of Lords sought guidance from foreign law when addressing a legal issue of first impression. In the 1993 case of *Airedale N.H.S. Trust v. Bland*, for example, the Law Lords looked to American, Canadian, New Zealand, and South African decisions to resolve whether it is lawful for a doctor to discontinue treating a person in a persistent vegetative state.[3] In *Regina v. Kearley*, a 1992 decision, the Lords were asked to define the contours of the rule against hearsay evidence, and they discussed at length a line of relevant cases from New Zealand and Aus-

1 *See generally* Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583 (1999).

2 Regina v. Horseferry Road Magistrates' Court, *Ex parte* Bennett, [1994] A.C. 42, 67 (H.L. 1994).

3 [1993] A.C. 789 (H.L. 1993).

tralia.[4] A similar mode of comparative analysis can be found in *Derbyshire County Council v. Times Newspapers Ltd.*[5] In that 1993 decision, the Lords addressed whether a local government could maintain a libel action against a newspaper, and, in so doing, engaged in an in-depth analysis of American and South African decisions.

Because comparativism is a well-established feature of British jurisprudence, it may come as something of a surprise to you that—in sharp contrast to judicial practices throughout much of the common-law world—it is exceedingly rare for American courts to reference foreign precedent. Indeed, between 1990 and 2003, the Supreme Court of the United States cited modern case law from Britain or Canada in only twenty-one decisions.[6] By way of comparison, the Canadian Supreme Court cited American decisions 230 times in the year 1990 alone![7] This reluctance to reference foreign legal authorities is not limited to the U.S. Supreme Court. It is equally rare for judges on my court to engage in comparativism. Between 1990 and 2003, a period during which all thirteen federal courts of appeals together published several thousand opinions, only forty-three decisions cited modern British precedent.[8]

Even when foreign courts have squarely addressed an issue that has yet to be resolved in the United States, American judges typically remain unwilling to expand their analysis beyond domestic sources of law. In the 1998 decision of *United States v. Balsys*, for example, the U.S. Supreme Court was tasked with determining whether a witness who fears prosecution by a foreign government can invoke the privilege against self-incrimination.[9] The Court made no mention of the fact that just two years earlier, the Privy Council, reviewing a decision of the New Zealand Court of Appeal, had addressed the very same issue in *Brannigan v. Davison*.[10] In concluding that fear of foreign prosecution is not a valid basis for invoking the privilege, the Privy Council did exactly what the U.S. Supreme Court chose *not* to do in

4 [1992] 2 A.C. 228 (H.L. 1992).

5 [1993] A.C. 534 (H.L. 1993).

6 Search of LEXIS, All U.S. Supreme Court Cases Database (Jan. 15, 2003). By "modern" case law, I am referring to decisions rendered after 1900, a classification that is necessary to distinguish the Court's infrequent attempts to seek guidance from contemporary foreign authorities from its abundant references to older common-law cases, which the Court uses, in the originalism context, to illuminate the Founders' intentions.

7 Peter McCormick, *The Supreme Court of Canada and American Citations 1945–1994: A Statistical Overview*, 8 SUP. CT. REV. 2d 527, 534 & fig.1 (1997).

8 Search of LEXIS, U.S. Court of Appeals Cases Database (May 2, 2003).

9 524 U.S. 666 (1998).

10 [1997] A.C. 238 (P.C. 1997).

Balsys: it surveyed case law from other common-law jurisdictions—including the United States—to inform its resolution of the issue.

It is interesting to note that while American courts are generally unwilling to invoke *modern* case law from foreign jurisdictions, they do rely heavily upon eighteenth- and nineteenth-century British decisions to elucidate the intentions of the men who drafted and ratified the United States Constitution in the 1780s. Indeed, there are a number of recent decisions in which the U.S. Supreme Court has undertaken a thorough analysis of historic common-law sources in an effort to divine the Constitution's original meaning—a practice that contrasts sharply with the Justices' reluctance to consider modern authorities from foreign courts.[11] This distinction is well illustrated by *INS v. St. Cyr*, a 2001 decision in which the Court addressed whether the writ of habeas corpus is available to compel a government official to exercise discretion that the official has refused to invoke.[12] The Court made no mention of whether other common-law jurisdictions consider the writ to be available under such circumstances. Instead, the Court engaged in a lengthy discussion of the right to habeas corpus as it existed in 1789. Indeed, Justice John Paul Stevens's majority opinion cited approximately a dozen English cases, the most recent of which was decided almost two centuries ago.[13]

B.

As I hope the foregoing overview has demonstrated, the limited utility that American courts derive from foreign precedent is significantly at odds with the practice prevalent throughout much of the common-law world. This fact has not gone unnoticed by legal commentators. A number of highly respected scholars and jurists have recently issued sharp criticisms of American courts' reluctance to participate in the global dialogue taking place among other nations' courts. These advocates of comparative constitutionalism contend that by ignoring the decisions of foreign jurisdictions, American courts are leaving untapped a valuable store of persuasive authority.

In the words of U.S. Supreme Court Justice Sandra Day O'Connor, "conclusions reached by other countries and by the inter-

11 State courts are likewise willing to consult eighteenth- and nineteenth-century English decisions when attempting to discern the origins of a common-law doctrine. *See, e.g.*, Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973) (referencing English cases dating back to the seventeenth century to elucidate the foundations of the contributory negligence doctrine).

12 533 U.S. 289 (2001).

13 *Id.* at 301–03.

national community should at times constitute persuasive authority in American courts" because "there is much to learn from other distinguished jurists who have given thought to the same difficult issues that we face here."[14] Justice Stephen Breyer expressed similar sentiments in a speech before the American Society of International Law.[15] Justice Breyer delineated five reasons why he believes American courts should take foreign precedent into consideration, including the growing number of domestic legal questions that implicate foreign law and the utility of foreign decisions as points of comparison for American courts.[16]

Patricia Wald, a highly respected former United States Circuit Judge on the District of Columbia Circuit who served for two years as a judge on the International Criminal Tribunal for the Former Yugoslavia, has also publicly argued that American courts should be more receptive to comparative constitutionalism. To quote Judge Wald:

> [C]itizens of most countries have common aspirations, a sense of dignity and worth, and intuitions and feelings about justice. Why then would we consciously shut the door to American judges on looking at the law of these countries as it affects the basic human needs and dilemmas of their people?[17]

And interest in this issue has not been limited to American jurists. Justice Michael Kirby of the High Court of Australia has gone so far as to warn that the United States is in danger "of becoming something of a legal backwater" if its courts continue to disregard foreign precedent.[18]

These commentaries encouraging American jurists to embrace comparative constitutionalism have borne fruit. In two recent, high-profile decisions, the Supreme Court of the United States has broken

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14 Justice Sandra Day O'Connor, *Keynote Address*, 96 AM. SOC'Y INT'L L. PROC. 348, 350 (2002).

15 Justice Stephen Breyer, *Keynote Address*, 97 AM. SOC'Y INT'L L. PROC. 265 (2003). Justice Ginsburg likewise defended the propriety of comparative constitutional analysis in a recent speech before the American Society of International Law, in which she made specific reference to this University of London lecture. *See* Anne E. Kornblut, *Justice Ginsburg Backs Value of Foreign Law*, N.Y. TIMES, Apr. 2, 2005, at A10.

Justice Scalia championed a decidedly different point of view when he addressed the Society in 2004. *See* Justice Antonin Scalia, *Keynote Address: Foreign Legal Authority in the Federal Courts*, 98 AM. SOC'Y INT'L L. PROC. 305, 310 (2004) ("If there was any thought absolutely foreign to the founders of our country, surely it was the notion that we Americans should be governed the way Europeans are.").

16 Breyer, *supra* note 15, at 265–67.

17 Hon. Patricia M. Wald, *The Use of International Law in the American Adjudicative Process*, 27 HARV. J.L. & PUB. POL'Y 431, 441–42 (2004).

18 Michael Kirby, *Think Globally*, 4 GREEN BAG 2D 287, 291 (2001).

sharply with tradition by invoking foreign practice and precedent to support a controversial holding. In 2002, the Court ruled in *Atkins v. Virginia* that it is unconstitutional to impose the death penalty upon mentally retarded persons.[19] To bolster the conclusion that such practice is impermissibly "excessive" under the Eighth Amendment to the U.S. Constitution, Justice Stevens made reference to the fact that the execution of the mentally retarded is overwhelmingly condemned by the world community.[20]

And a year later, in *Lawrence v. Texas*, the Court invalidated a state statute that made it illegal for persons of the same sex to engage in certain sexual conduct.[21] Justice Anthony Kennedy concluded that the statute was an unconstitutional deprivation of the "liberty" guaranteed to Americans by the Due Process Clause.[22] He supported this holding by asserting that the right to sexual freedom "has been accepted as an integral part of human freedom in many other countries"[23] and by citing to the decision of the European Court of Human Rights in *Dudgeon v. United Kingdom*.[24]

These recent examples of comparative constitutionalism in the Supreme Court's jurisprudence have drawn harsh responses from adherents to the traditional view that American courts should place exclusive reliance upon domestic sources of law. A resolution has been introduced in the United States House of Representatives condemning the *Atkins* and *Lawrence* decisions and, as its title states,

> [e]xpressing disapproval of the consideration by Justices of the Supreme Court of the United States of foreign laws and public opinion in their decisions, urging the end of this practice immediately to avoid setting a dangerous precedent, and urging all Justices to base their opinions solely on the merits under the Constitution of the United States.[25]

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19 536 U.S. 304 (2002); *see also Roper v. Simmons*, 125 S. Ct. 1183, 1198–200 (2005) (invoking international covenants and foreign practices to support the conclusion that it is unconstitutional to execute persons who were under the age of eighteen when they committed their crime).

20 *Atkins*, 536 U.S. at 316 n.21.

21 539 U.S. 558 (2003).

22 *Id.* at 578.

23 *Id.* at 577.

24 45 Eur. Ct. H.R. (ser. A) at 54 (1981). For further discussion of the use of comparative constitutional analysis in *Lawrence*, see Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference: A Postscript on* Lawrence v. Texas, 44 VA. J. INT'L L. 913, 915 (2004) ("For the first time in history, a majority of the Supreme Court has relied on an international tribunal decision to interpret individual liberties embodied in the U.S. Constitution.").

25 H.R. Res. 468, 108th Cong. (2003).

And seven United States Senators have introduced a bill known as the Constitution Restoration Act of 2004, which provides that

> [i]n interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional and common law.[26]

Although neither the proposed House resolution nor the Constitution Restoration Act has been enacted, the introduction of these legislative measures forcibly demonstrates the extent to which many Americans continue to harbor concerns about the use of foreign law in their courts. Several influential jurists have also strongly rebuked the comparativist jurisprudence of *Atkins* and *Lawrence.* Supreme Court Justice Antonin Scalia, who is one of the principal judicial opponents of comparative constitutionalism, labeled as "feeble" Justice Stevens's effort to use foreign practice to support the conclusion that execution of the mentally retarded is unconstitutional.[27] In his *Atkins* dissent, Justice Scalia argued that "the practices of the 'world community'" are "irrelevant" to American courts because their "notions of justice are (thankfully) not always those of our people."[28] He continued:

> "We must never forget that it is a Constitution for the United States of America that we are expounding . . . . 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."[29]

J. Harvie Wilkinson, a United States Circuit Judge on the Fourth Circuit Court of Appeals—a sister court to mine—has likewise stated that the "use of international law to resolve social issues of domestic import runs counter to the democratic accountability and federal

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26 S. 2323, 108th Cong.

27 Atkins v. Virginia, 536 U.S. 304, 347 (2002) (Scalia, J., dissenting).

28 *Id.* at 347–48 (Scalia, J., dissenting).

29 *Id.* at 348 (Scalia, J., dissenting) (quoting Thompson v. Oklahoma, 487 U.S. 815, 868–69 n.4 (1988) (Scalia, J., dissenting)). Justice Scalia and Justice Breyer recently debated the "Constitutional Relevance of Foreign Court Decisions" at an event hosted by the American University Washington College of Law. *See* Justice Antonin Scalia & Justice Stephen Breyer, A Conversation on the Relevance of Foreign Law for American Constitutional Adjudication at American University Washington College of Law (Jan. 13, 2005), *available at* http://www.wcl.american.edu/secle/founders/2005/050113.cfm.

structure envisioned by our Constitution."[30] In Judge Wilkinson's view, it is illegitimate for American jurists to rely upon foreign law to construe the Constitution because their authority to interpret that document derives exclusively from the *American* people.[31] Judge Wilkinson's concerns are shared by Professor Roger Alford of Pepperdine University, who has forcefully warned that "[u]sing global opinions as a means of constitutional interpretation dramatically undermines sovereignty."[32]

C.

As I detailed a few moments ago, I have the highest regard for the legal traditions of Great Britain and other common-law countries. We are indeed sprung from common roots, and our citizens hold dear many of the same rights and freedoms. Nevertheless, I speak to you this evening in an effort to explain why American courts may have a sound basis for treating foreign legal authorities with caution. That reason has absolutely nothing to do with the misguided notions of cultural superiority and ethnocentrism sometimes mistakenly ascribed to Americans. Rather, my argument is premised upon the manner in which the American legal system evolved from its English origins and upon the intentions of the Founders who framed and ratified the United States Constitution.

Indeed, the propensity of American courts to eschew foreign practice and precedent in favor of domestic sources of law is deeply rooted in my country's legal history. During the colonial and Founding eras—the period between the early 1600s and the early 1800s—there evolved a norm cautioning Americans not to rely upon foreign law because their country's political, cultural, and economic conditions were distinct from those prevalent in Europe. Many of the Constitution's Framers shared in this view and consciously sought to develop an indigenous American legal system tailored to the realities of American life. This norm continues to inform legal decisionmaking in my country today. And while, in an attempt to explicate this norm, I will focus for the next few minutes primarily upon the evolution of the American legal system, the lessons that can be gleaned from this historical survey may be equally applicable to other countries.

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30 Hon. J. Harvie Wilkinson III, *The Use of International Law in Judicial Decisions*, 27 HARV. J.L. & PUB. POL'Y 423, 429 (2004).

31 *Id.* at 426.

32 Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 58 (2004).

I hope to demonstrate the importance of acknowledging that, even in this age of globalization and integration, significant distinctions persist between different countries and different cultures. As the American Founders recognized, each country possesses unique cultural, political, and economic features. Indeed, I'm sure you will agree that even the United States and Great Britain, which are linked by deep bonds of history and culture, are distinct from each other in important ways. Because of these indelible differences, legal doctrines that evolved to meet the needs of one country may not be readily transplantable to other legal systems where social and political conditions—though superficially similar—in fact may be very different. It therefore may be prudent for judges both in the United States and in other countries to be cautious about engaging in comparative constitutional analysis.

II.

But let me focus for the moment on the United States, as that is the legal system with which I am the most familiar. To understand American jurists' reluctance to engage in comparative constitutionalism, it is necessary to trace the evolution of American law during the colonial and Revolutionary eras. The earliest settlers realized that the common law that they carried with them to the New World was tailored to the social and economic realities of English life. That legal system was therefore ill-suited in some respects to the needs of the sparsely populated and unsophisticated society in which they lived. The colonists accordingly made the quite conscious decision to abandon certain aspects of English law and to begin the process of fashioning a distinctly American jurisprudence. In the words of one scholar, there was among the early colonists "a very clear perception of their destiny to work out a new legal system, to establish rules dictated by their special polity or by the conditions of primitive and simple life in which they found themselves."[33]

Let me provide you with a few examples of how the early American settlers modified English law and crafted a legal system that was more conducive to life in the New World. The hallmark of the early jurisprudence of the Massachusetts Bay Colony, for example, was the Puritan settlers' infusion of religious elements into the law. Because the common law as it was conceived of in England did not comport with the Puritans' religious values, they promulgated in 1648 the *Book of the General Lawes and Libertyes*, a code that tailored the common law

33 PAUL SAMUEL REINSCH, ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES 57 (Leonard W. Levy ed., Da Capo Press 1970) (1899).

to fit the contours of their faith. The biblically inspired code provided scriptural citations as authority for many of its proclamations, and it instituted the death penalty for crimes such as adultery and blasphemy, which were only misdemeanors at common law.[34] Similarly, the leaders of the Massachusetts Bay Colony did away with many of the procedural formalities of English law, which were inappropriate in light of the simple social and economic conditions in the colony. The complex and formalistic pleading requirements of English courts were relaxed to fit the needs of a colony with few lawyers and little legal literature.[35]

Other changes to the common law were prompted by the fact that economic conditions in the colonies were much more primitive than in England. There was, for example, an acute shortage of labor in the New World. Notwithstanding the harshness of the Puritans' biblically inspired laws, the number of capital crimes throughout the colonies actually decreased because able bodies—even those of criminals—could not be spared to the gallows.[36] Similarly, while laborers who fled a job while under contract in England were subject to imprisonment, such a transgression was punished by an additional period of servitude in the colonies.[37] And because American women engaged in a wide range of businesses that in England were open only to men, colonial laws eased some gender-based legal restrictions. For example, women were permitted to bring suit in their own name—a necessity for doing business.[38]

Early American lawmakers also altered the common law of property so as better to coincide with the realities of colonial life. English property law had developed in a feudal setting where land was scarce, and it thus was ill-suited to a country with vast tracts of undeveloped land and a budding commercial market in real property. Accordingly, the colonists molded the common law to facilitate the ready alienation of land, as, for example, by developing a system for the recording of deeds.[39] Similarly, the colonists restricted the practice of entailing estates, which precluded the free alienation of inherited land outside of the family.[40]

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34 PETER CHARLES HOFFER, LAW AND PEOPLE IN COLONIAL AMERICA 22 (rev. ed. 1998).

35 STEPHEN BOTEIN, EARLY AMERICAN LAW AND SOCIETY 35 (1983).

36 KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 31 (1989).

37 HOFFER, *supra* note 34, at 17.

38 HALL, *supra* note 36, at 36.

39 HOFFER, *supra* note 34, at 101.

40 RICHARD B. MORRIS, STUDIES IN THE HISTORY OF AMERICAN LAW 86 (1930).

These historical developments are relevant to the current debate about comparative constitutionalism because they represent the origins of a legal norm suggesting that the unique social, economic, and political realities of American life require a distinctly American jurisprudence. Because foreign law may be ill-suited to American conditions, exclusive reliance upon domestic authorities is encouraged.

The evolution of this norm accelerated greatly during the American Revolution and its aftermath, as Americans strove to develop a jurisprudence that comported with the republican values upon which the newly independent United States was founded. Many members of the Founding generation were influenced by Montesquieu's theory, set forth in *The Spirit of the Laws*, that the content of a legal system ought to bear a close relation to the country's political, social, economic, religious, and geophysical environment. To quote Montesquieu, laws "should be adapted in such a manner to the people for whom they are made, as to render it very unlikely for those of one nation to be proper for another."[41] Montesquieu's work was widely circulated and highly influential during the Founding era, and the ideas formulated in *The Spirit of the Laws* therefore helped speed the development of a legal system that was tailored to the realities of American life and shorn of foreign elements.

Thomas Jefferson—author of the Declaration of Independence and third President of the United States—was a firm proponent of this movement. He read Montesquieu and shared his conception that the tenor of a legal system must coincide with a nation's social and cultural persuasion. At the time of the American Revolution, Jefferson helped to introduce over a hundred bills designed to bring Virginia's laws into alignment with the values of the Revolution.[42] In the words of one such bill, these reforms were necessary because many of Virginia's laws were "founded on principles heterogeneous to the republican spirit . . . and . . . having taken their origin while our ances-

41 CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 104–05 (David Wallace Carrithers ed., Thomas Nugent trans., Univ. of Cal. Press 1977) (1748).

42 *See* THOMAS JEFFERSON, AUTOBIOGRAPHY (1821), *reprinted in* 1 THE WRITINGS OF THOMAS JEFFERSON 1, 57–58 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1892).

> When I left Congress, in 76. [sic] it was in the persuasion that our whole code must be reviewed, adapted to our republican form of government, and, now that we had no negatives of Councils, Governors & Kings to restrain us from doing right, that it should be corrected, in all it's [sic] parts, with a single eye to reason, & the good of those for whose government it was framed.

Id.

tors remained in Britain, are not so well adapted to our present circumstances of time and place."[43] Notable reforms proposed by Jefferson included the abolition of primogeniture.[44] This practice of awarding an intestate parent's estate exclusively to the eldest son was disfavored by Americans because it perpetuated an aristocratic class with vast land holdings. Other reforms proposed by Jefferson included the establishment of religious freedom and the institution of a system of humane criminal sanctions, wherein capital punishment was to be reserved for murder and treason only.

James Madison—the man often credited with being the "Father of the United States Constitution"—was instrumental in securing the enactment of many of Jefferson's proposals. Madison's sympathy for the notion that the fledgling American republic needed to develop a legal system that was not unduly reliant upon foreign law is evident in *The Federalist.* This highly influential series of essays was a collaboration among Madison, Alexander Hamilton, and John Jay, and was produced in an effort to convince the American people to ratify the Constitution. The work is still frequently cited by the U.S. Supreme Court to inform its constitutional interpretations. In *The Federalist,* Madison wrote that "neither the common nor the statute law of [England], or of any other nation, ought to be a standard for the proceedings of this, unless previously made its own by legislative adoption."[45] Madison went on to assert that English law "would be . . . [an] illegitimate guide" for the United States to follow.[46]

A different approach to mitigating the influence of foreign law was adopted by the states of New Jersey,[47] Kentucky,[48] and Pennsylvania,[49] which enacted statutes forbidding the citation of English precedent in their courts; New Hampshire had a court rule to similar effect.[50] The spirit of these nineteenth-century provisions was very

43 Bill for the Revision of the Laws (Oct. 15, 1776), *reprinted in* 1 THE PAPERS OF THOMAS JEFFERSON 562 (Julian P. Boyd ed., 1950).

44 Bill Directing the Course of Descents (1785), *reprinted in* 2 THE PAPERS OF THOMAS JEFFERSON 391 (Julian P. Boyd ed., 1950).

45 THE FEDERALIST NO. 42, at 268 (James Madison) (Robert Scigliano ed., 2000).

46 *Id.*

47 Act Relative to Statutes, N.J. Acts 23d Gen. Assembly (1799), *reprinted in* ELIZABETH GASPAR BROWN, BRITISH STATUTES IN AMERICAN LAW 1776–1836, at 132 n.52 (1964).

48 Act Prohibiting the Reading of Certain Reports in This Commonwealth, 1807–1808 Ky. Acts 23 (1808), *reprinted in* ELIZABETH GASPAR BROWN, BRITISH STATUTES IN AMERICAN LAW 1776–1836, at 132 n.52 (1964).

49 1812 Pa. Laws 125 (1810).

50 Ford W. Hall, *The Common Law: An Account of Its Reception in the United States,* 4 VAND. L. REV. 791, 806 (1951).

similar to that of the Constitution Restoration Act currently pending before Congress, which, as I mentioned earlier, would preclude federal courts from relying upon foreign law when interpreting the Constitution.

The New Jersey noncitation statute remained on the books for two decades, and was finally repealed in 1819,[51] while its Pennsylvania counterpart remained in force until 1836.[52] As a result of these statutes, lawyers in the young republic found it necessary to seek guidance from the country's own nascent collection of case law, rather than from the vast store of more readily available English decisions.

Indeed, the developing norm against the citation of foreign precedent injected a degree of urgency into the task of producing published American case reports. When Justice Jesse Root of the Connecticut Superior Court compiled a collection of the court's decisions in 1798, he wrote in the introduction that a "work of this nature is doubly important at this time; when we are forming a system of jurisprudence congenial to the spirit and principles of our government."[53] Echoing the sentiments of Jefferson and Madison, Root urged judges to resort to the decisions of domestic courts so as "to lay a foundation, to establish a character upon, and to rear a system of jurisprudence purely American, without any marks of servility to foreign powers or states."[54]

III.

I hope that this brief historical overview has succeeded in demonstrating the manner in which colonial- and Founding-era Americans consciously strove to develop a legal system that was tailored to the unique conditions of our country at the time. These efforts fostered a norm cautioning American jurists not to place reliance upon foreign legal authorities because they may be inapposite to American conditions.

Of course, the world today is a very different place than it was in the eighteenth century, and one might wonder whether a norm that developed at the time of my country's Founding retains relevance today. After all, while the United States may have been a unique experi-

51 ELIZABETH GASPAR BROWN, BRITISH STATUTES IN AMERICAN LAW 1776–1836, at 83 (1964).

52 CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 233 (Howard Fertig, Inc. 1966) (1911).

53 JESSE ROOT, REPORTS OF CASES ADJUDGED IN THE SUPERIOR COURT AND SUPREME COURT OF ERRORS FROM JULY A.D. 1789 TO JUNE A.D. 1793, at xliv (Hartford, Hudson and Goodwin 1798).

54 *Id.* at xiv.

ment in democratic governance in 1776, today democracy is embraced by an ever-growing number of countries. Why shouldn't American courts attempt to benefit from the legal insights of those foreign jurisdictions that champion many of the same values held dear by Americans? I submit that there are two reasons why United States courts continue to adhere to the Founding-era norm cautioning against the citation of foreign legal authorities.

First, the intentions of the Constitution's Framers hold a privileged position in American jurisprudence. Although there is certainly no consensus among American judges as to the appropriate manner in which to treat the Framers' intentions, there are many jurists who believe that the original intentions of the Founding generation are entitled to a significant degree of deference. Because men such as Madison and Jefferson believed that the United States should develop a legal system that was tailored to American conditions and that did not place significant reliance upon foreign sources of law, proponents of originalism are wary of according weight to foreign precedent. To do so would contravene the intentions of the Founders.

Beyond the question of original intent, however, there are practical considerations that militate against the use of comparative constitutionalism, and these considerations are applicable not only to American courts, but also to those throughout the rest of the world. As I mentioned earlier, we must not lose sight of the fact that certain indelible differences—whether cultural, political, or economic—distinguish the countries of the globe from each other. I, for one, am thankful that the world is not comprised of homogenous cultures and peoples, for I believe that our differences should be celebrated. Indeed, there are many respects in which Great Britain is socially, culturally, and economically distinct from the rest of the European Union, and I imagine that many people in this country are today grappling with how best to preserve these uniquely British qualities as the EU continues its steady integration—a process, incidentally, that is very similar to the one by which the thirteen American states formed a single union more than 200 years ago. The authority of the European Court of Human Rights, for example, to issue rulings that are binding upon member nations is analogous in many respects to the role of the U.S. Supreme Court in the American constitutional scheme.[55]

55 *See, e.g.*, Lustig-Prean v. United Kingdom, App. Nos. 3147/96, 32377/96, 29 Eur. H.R. Rep 548 (2000), *available at* http://www.worldlii.org/eu/cases/ECHR/2000/381.html (invalidating Great Britain's ban on homosexuals serving in the military).

The United States also remains unique from the rest of the world in several important respects. For example, belief in the so-called "American Creed" of liberty, equality, individualism, democracy, and the rule of law largely defines what it means to be an "American." While other societies certainly share these values, in no other country are these ideas so central to the national identity. As Samuel Huntington has written, "in the United States, as in no other society, ideology and nationality are fused and the disappearance of the former would mean the end of the latter."[56] This value system binds together Americans of different religious, ethnic, and racial backgrounds and, in many respects, serves as the cornerstone of our national identity. For this reason, I question the propriety of Justice Kennedy's reference to foreign precedent to support *Lawrence*'s holding that it is unconstitutional to proscribe sexual conduct between persons of the same sex. Such fundamental principles as the sexual mores of the American people are best expressed by American legislative bodies, and such cultural questions should therefore be resolved without regard to the values held by persons in other parts of the world.

The United States is unique in several regrettable respects as well: for example, the nation has one of the highest violent crime and drug use rates in the developed world. Because the United States must grapple with a nearly unparalleled crime problem, the criminal jurisprudence of other nations may be inapposite to American conditions and thus an inappropriate guide for American jurists to follow. I therefore wonder whether it was appropriate for the Supreme Court to rely upon foreign practice to support its holding in *Atkins v. Virginia* that execution of the mentally retarded is unconstitutional.

While I have reservations about the widespread use of comparative constitutional analysis, I acknowledge that limited references to foreign legal authorities may play a beneficial role in contemporary American jurisprudence. Indeed, judges may be able to glean valuable insights from the practice and precedent of foreign jurisdictions where American conditions are consistent with those prevalent in the rest of the world or where Congress has expressed a desire to bring the United States into alignment with the international community.

Let me provide you with a recent example of such a case. In *Eldred v. Ashcroft*, a 2003 decision, the U.S. Supreme Court upheld a statute that retroactively extended the duration of copyrights for twenty years.[57] In order to establish that the law rested upon an ac-

56 SAMUEL P. HUNTINGTON, AMERICAN POLITICS: THE PROMISE OF DISHARMONY 27 (1981).

57 537 U.S. 186 (2003).

ceptable rational basis, the Court emphasized that the statute brought U.S. copyright law into alignment with that of the European Union, which—like the statute in question—also provides for a term of life plus seventy years.[58] Comparative constitutional analysis was appropriate in *Eldred* because copyright law is not an area where distinct American cultural or social conditions require a unique response from U.S. lawmakers. Moreover, Congress had explicitly evidenced a desire to harmonize American copyright law with that of the European Union.

It is also sensible for American courts to look to foreign sources of law when exercising admiralty jurisdiction[59] and when construing treaties and multinational conventions because there is, presumably, an interest in achieving a uniform interpretation of maritime contracts and international agreements. In *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, for example, the Supreme Court addressed whether a passenger could pursue a state law tort claim against an airline for alleged psychological harm occasioned by an intrusive search.[60] The Court held that such a claim was barred by the Warsaw Convention, and in reaching that result, Justice Ruth Bader Ginsburg afforded "considerable weight" to a decision of the British House of Lords that interpreted the same document.[61] She also offered citations to decisions from courts in Canada, New Zealand, and Singapore that had reached a similar result.[62]

Likewise, in *Sosa v. Alvarez-Machain*, a 2004 decision, a Mexican citizen brought a tort claim alleging that his rights under international law had been violated when he was detained within Mexico by persons hired by the U.S. Drug Enforcement Agency and then transferred to American officials to stand trial in the United States.[63] The Supreme Court quite properly made reference to international conventions and treaties as a step in the determination of whether the plaintiff's detention contravened a norm of customary international law.

IV.

In conclusion, may I suggest that a cautious approach to comparative constitutionalism may well be the most appropriate methodology

58 *Id.* at 205–06.

59 *See, e.g.*, Nemeth v. Gen. S.S. Corp., 694 F.2d 609, 612–13 (9th Cir. 1982) (consulting, and ultimately adopting, the House of Lords' position on an issue of admiralty law).

60 525 U.S. 155 (1999).

61 *Id.* at 175.

62 *Id.* at 176 n.16.

63 124 S. Ct. 2739 (2004).

to adopt. Despite the seemingly irresistible forces of globalization currently at work, our respective countries and legal systems remain distinct in several important aspects. Judges who disregard these differences run the risk not only of making bad law, but also of profoundly altering their legal system by incorporating incompatible foreign values. As one recent commentator has explained, the "American Constitution . . . was framed and amended in light of specific American history, culture, and aspirations."[64] For the foregoing reasons, I find myself aligned with those who believe that courts in the United States should restrict the use of foreign legal authorities to certain well-defined categories of cases. Of course, each country must ultimately determine for itself the appropriate role that foreign practice and precedent should play in its domestic law, which no doubt means that we will be discussing this subject for a long time to come.

I am grateful for the opportunity to share my perspectives on this issue with you, and I welcome any questions that you may have.

64 ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 137 (2003).