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

RUTH BADER GINSBURG\*\*

South Africa’s 1996 Constitution famously provides in Section 39: “When interpreting the Bill of Rights, a court . . . must consider international law; and may consider foreign law.”<sup>1</sup> Other modern Constitutions have similar provisions, India’s and Spain’s, for example.<sup>2</sup> In the United States the question whether and when courts may seek enlightenment from the laws and decisions of other nations has provoked heated debate. I will speak of that controversy in these remarks. At the outset, I should disclose the view I have long held: If U.S. 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 including Canada, South Africa, and most recently the U. K. — 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, undemocratic, irreconcilable with the doctrine of parliamentary supremacy. That was once true of South Africa, is that not so? 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.<sup>3</sup> National, multinational, and international human rights charters and courts today play a prominent part in

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\* Address given to the Constitutional Court of South Africa, February 7, 2006. An Earlier version of this address is published in the Proceedings of the 99<sup>th</sup> Annual Meeting of the American Society of International Law, *Cambridge Law Journal*, and *Florida International University Law Review*.

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1. S. AFR. CONST. 1996, § 39.

2. INDIA CONST. art. 51; C.E. [Constitution] (Spain) art. 10.

3. See Louis Favoreu, *Constitutional Review in Europe*, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 38, 46 (Louis Henkin & Albert J. Rosenthal eds., Columbia Univ. Press 1990).

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 — I draw on 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.”<sup>4</sup> They set out in the Declaration a long list of grievances, in order to submit the “Facts” — the “long Train of [the British Crown’s] Abuses” — to the scrutiny of “a candid World.”<sup>5</sup>

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.”<sup>6</sup> “Far from [exhibiting hostility] to foreign countries’ views or laws,” Professor Vicki Jackson of the Georgetown University law faculty recently reminded us: “[T]he founding generation showed concern for how adjudication in our courts would affect other countries’ regard for the United States.”<sup>7</sup> A similar concern is evident today in the jurisprudence of the Constitutional Court of the Republic of South Africa. As Justice O’Regan put it, writing separately in *Kaunda v. President of the Republic of South Africa*: “[O]ur Constitution recognises and asserts that, after decades of isolation, South Africa is now a member of the community of nations, and a bearer of obligations and responsibilities in terms of international law.”<sup>8</sup> Even more so than when the United States was a new nation, the USA today, no less than South Africa, is subject to the scrutiny of “a candid World.”

John Jay, one of the authors of *The Federalist Papers* promoting ratification of the U. S. Constitution and George Washington’s appointee as first Chief Justice of the United States, wrote of the new nation in 1793 much as Justice O’Regan did in 2004 of the new Republic. The United States, Jay

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4. THE DECLARATION OF INDEPENDENCE ¶ 1 (U.S. 1776).

5. Favoreu, *supra* note 3, at ¶ 2.

6. *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 335 (1816).

7. Vicki C. Jackson, *Yes Please, I’d Love to Talk with You*, LEGAL AFF., July-Aug. 2004, 43, 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 H. Comm. on the Judiciary*, 108th Cong., 2d Sess. 14-15 (2004) (statement of Professor Vicki C. Jackson) [hereinafter Jackson Statement].

8. *Kaunda v. President of the Republic of S. Afr.*, 2004 (10) BCLR 1009 (CC) at ¶ 222 (S. Afr.).

observed, "by taking a place among the nations of the earth, bec[a]me amenable to the laws of nations," the core of what we today call international law.<sup>9</sup> Eleven years later, the great Chief Justice John Marshall cautioned: "[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."<sup>10</sup> South Africa installed just such a guide in its 1996 Constitution. Section 233 instructs: "When interpreting . . . legislation, every court must prefer any reasonable interpretation . . . consistent with international law over any alternative interpretation . . . inconsistent with international law."<sup>11</sup>

True, there are generations-old and still persistent discordant views on recourse to the "Opinions of Mankind." A mid-19th century U. S. 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 [U. S. 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.<sup>12</sup>

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 infamous 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 "descendants of Africans [imported into the United States], and sold as slaves" could ever become citizens of the United States.<sup>13</sup>

While the Civil War and the Thirteenth, Fourteenth, and Fifteenth Amendments to the U. S. Constitution reversed the *Dred Scott* judgment, 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. Some have expressed spirited opposition. Justice Scalia 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."<sup>14</sup>

Another trenchant critic, Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit, commented not long ago: "To cite foreign law

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9. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793).

10. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

11. S. AFR. CONST. 1996, § 233.

12. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 426 (1857).

13. *Id.* at 403.

14. *Roper v. Simmons*, 543 U.S. 551, 627 (2005) (Scalia, J., dissenting) (emphasis in original removed).

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."<sup>15</sup> 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 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 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, 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.<sup>16</sup>

Representative of the perspective I share with four of my current colleagues, Patricia M. Wald, once Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit and former Judge on the International Criminal Tribunal for the former Yugoslavia, 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."<sup>17</sup>

Many current members of the U.S. 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 reintroduced last year, one in the 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."<sup>18</sup> As of December 2005, the House Resolution had attracted support from eighty-three cosponsors. Two 2005-proposed Acts would do more than "resolve." They would positively prohibit federal courts, when interpreting the U.S. Constitution, from referring to "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 up to the time of the

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15. Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFF., Jul.-Aug. 2004, at 40, 42.

16. Judge Posner acknowledged that decisions elsewhere might have informational value; they might be useful, he thought, if they contain persuasive reasoning. *Id.* at 41.

17. Patricia M. Wald, *The Use of International Law in the American Adjudicative Process*, 27 HARV. J.L. & PUB. POL'Y 431, 439 (2004).

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

adoption of the [U.S. Constitution]."<sup>19</sup> [Even reference to a Scottish verdict, i.e., a verdict of not proved, it seems, would be out of order.]

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 sizable support. And one not-so-small concern — they fuel the irrational fringe. A personal example. The U. S. Supreme Court's Marshal alerted Justice O'Connor and me to a February 28, 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 [foreign] laws and rulings to decide how to rule on American cases.

This is a huge threat to our Republic and Constitutional freedom. . . . If you are what you say you are, and NOT armchair patriots, then those two justices will not live another week.

Nearly a year has passed since that posting. Justice O'Connor, though to my great sorrow retired just last week from the Court's bench, 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 U. S. courts refer to foreign and international court decisions. 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."<sup>20</sup>

In a November 2005 *Harvard Law Review* comment, Georgetown's Professor Jackson usefully identified three responses to transnational sources: resistance, convergence, and engagement.<sup>21</sup> South Africa's apartheid regime fit the "Resistance Model," an approach that "relishes resistance . . . to outside influence."<sup>22</sup> Professor Jackson suggested that South Africa's 1996 Constitution fits the "Convergence Model," in that it "explicitly incorporate[s] international law as a controlling legal norm."<sup>23</sup> But perhaps the Constitutional Court's emerging jurisprudence comes closer to the third approach, the "Engagement Model." That Model comprehends transnational sources "as interlocutors," a means to test "understanding of one's own

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

20. Wald, *supra* note 21, at 442.

21. Vicki C. Jackson, Comment, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 112-115 (2005).

22. *Id.*

23. *Id.* at 113.

traditions and possibilities by examining them in the [reflected light cast by other legal systems].”<sup>24</sup>

The jurisprudence of South Africa’s Constitutional Court offers many examples, among them, Justice Kriegler’s cautionary note in *Sanderson v. Attorney-General, Eastern Cape*.<sup>25</sup> The question in that case: Did a two-year delay in bringing a prosecution for alleged sexual offenses violate the defendant’s constitutional right to a speedy trial.<sup>26</sup> In determining that the defendant’s rights were not violated, Justice Kriegler canvassed foreign precedents, especially U. S. and Canadian decisions; he prefaced his examination, however, by warning that “the use of foreign precedent requires circumspection.”<sup>27</sup> In *State v. Makwanyane*, then Chief Justice Chaskalson earlier cautioned, in presenting his comparative survey decisions on capital punishment: “We can derive assistance from . . . foreign case law, but we are in no way bound to follow it.”<sup>28</sup> I agree. Some U. S. practices, I fully appreciate, are not suitably exported: the use of juries in civil cases is one example.

In testimony prepared for a congressional hearing, Professor Jackson made a point critics of comparative sideglances perhaps overlook: the “negative authority” foreign experience sometimes may have.<sup>29</sup> She referred in this regard to the “Steel Seizure Case” decided by the U. S. Supreme Court in 1952.<sup>30</sup> There, Justice Jackson, in his separate opinion, pointed to features of the Weimar Constitution in Germany that allowed Adolf Hitler to assume dictatorial powers.<sup>31</sup> He contrasted Germany’s situation with that of Great Britain, a country in which legislative authorization was required for the exercise of emergency powers.<sup>32</sup> Justice Jackson drew from that comparison support for the conclusion that, without more specific congressional authorization, the U. S. President could not seize private property (in that case, the steel mills) even in aid of a war effort.<sup>33</sup> The U. S. President’s wartime authority, you no doubt know, is today a hotly debated issue in U. S. political and legal circles.

At the time Justice Jackson cast a comparative sideglance at Weimar Germany, the United States itself was a source of “negative authority.” The Attorney General pressed that point in an amicus brief for the United States in

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24. *Id.* at 114.

25. 1997 (12) BCLR 1675 (CC) (S.Afr.).

26. *Id.* at ¶ 8.

27. *Id.* at ¶ 26.

28. 1995 (6) BCLR 665 (CC) at ¶ 39 (S. Afr.).

29. Jackson Statement, *supra* note 8, at 15.

30. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

31. *Id.* at 651 (Jackson, J., concurring).

32. *Id.* at 651-52.

33. *Id.* at 652-55.

*Brown v. Board of Education*.<sup>34</sup> 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 friendly nations as to the intensity of our devotion to the democratic faith.<sup>35</sup>

The U. S. Constitution, Justice Scalia has remarked, contains no instruction resembling South Africa's Section 39 prescription. So U.S. courts, he thinks, have no warrant from our fundamental instrument of government to consider foreign law. I would demur to that 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?

A case in point. On December 16, 2004, in a controversy precipitated by the fight against terrorism, the Lords of Appeal (the U.K. counterpart to the U. S. Supreme Court) issued a way paving decision, one that looks beyond the United Kingdom's borders.<sup>36</sup> 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 U. K. 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 U. S. Court of Appeals opinions (although not U. S. Supreme Court opinions). Finding the differential treatment of nationals and non-nationals impermissible under the Human Rights Act, Lord Bingham also referred to several U.N. 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.<sup>37</sup>

Lord Bingham did make the observation, gently, that contemporary "U. S. authority does not provide evidence of general international practice."<sup>38</sup> That comment may have figured in the *New York Times*' characterization of the Lords' ruling as "a strong example of the increasing interdependence of

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34. Brief for the United States as Amicus Curiae, *Brown v. Board of Education*, 347. U.S. 483 (1954) (Nos. 1, 2, 3, 4, 5).

35. *Id.* at 6.

36. *A(FC) v. Secretary of State for the Home Dept.* [2004] UKHL 56.

37. *Id.* at ¶¶ 35-40, 58-62 (opinion of Lord Bingham).

38. *Id.* at ¶ 69.

domestic and international law, at least outside of the United States.”<sup>39</sup> Parliament reacted swiftly to the Lord’s decision. In March 2005, it enacted 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.<sup>40</sup>

One year later, in December 2005, the Law Lords resolved another headline case involving the Belmarsh detainees.<sup>41</sup> A seven-member panel ruled unanimously that evidence obtained through torture was inadmissible in British courts to establish criminal liability or eligibility for deportation “irrespective of where, by whom or on whose authority the torture was inflicted.”<sup>42</sup> Lord Bingham’s lead opinion again surveyed U.N. instruments, including the Convention against Torture, as well as judicial decisions from other nations, including the United States, Germany, and Israel.<sup>43</sup> These sources afforded confirmation for his ringing declaration: “[T]he English common law has regarded torture and its fruits with abhorrence for over 500 years, and that abhorrence is now shared by over 140 countries which have acceded to the Torture Convention.”<sup>44</sup> Some of the Lords’ speeches cast a critical eye across the sea. Lord Hoffmann ventured that “many people in the United States, heirs to the common law tradition, have felt their country dishonoured by its use of torture outside the jurisdiction.”<sup>45</sup>

Later in December, recognizing the nation’s obligations under the Convention against Torture, the U. S. Congress banned cruel, inhuman, and degrading treatment of detainees in U. S. custody.<sup>46</sup> The legislation, however, stops short of explicitly banning evidence elicited by torture from consideration by a military tribunal charged with determining whether a detainee is an enemy combatant.

The notion that it is improper to look beyond the borders of the United States in grappling with hard questions, as my quotation from Chief Justice Taney suggested, is in line with the view of the U. S. Constitution as a document essentially frozen in time as of the date of its ratification. I am not a partisan of that view. U. S. jurists honor 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.

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39. Lizette Alvarez, *British Court Says Detentions Violate Rights*, N.Y. TIMES, Dec. 17, 2004, at A1.

40. Prevention of Terrorism Act, 2005, c. 2, § 1 (Eng.).

41. *A(FC) v. Secretary of State for the Home Dept.* [2005] UKHL 71.

42. *Id.* at ¶ 10 (opinion of Lord Bingham).

43. *Id.* at ¶¶ 30-33, 36-39.

44. *Id.* at ¶ 51.

45. *Id.* at ¶ 82 (opinion of Lord Hoffmann).

46. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003, 119 Stat. 2739 (2006) (codified at 42 U.S.C. § 2000dd (2006)).

A key 1958 plurality opinion, *Trop v. Dulles*, makes just that point.<sup>47</sup> At issue in that case, whether stripping a wartime deserter of citizenship violated the Eighth Amendment's ban on "cruel and unusual punishments."<sup>48</sup> "The basic concept underlying the . . . Amendment," the opinion observed, "is nothing less than the dignity of man."<sup>49</sup> Therefore the Constitution's text "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."<sup>50</sup> In that regard, the plurality reported: "The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime."<sup>51</sup> (The primacy of human dignity notably is not left to inference in South Africa's Constitution, for Section 10 prescribes: "Everyone has inherent dignity and the right to have their dignity respected and protected.")<sup>52</sup>

Turning from frozen-in-time interpretation, I will take up another shortfall or insularity in current U. S. 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 U. S. 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 U. S. officer may abduct a foreigner and forcibly transport him to the United States to stand trial. The U. S. Supreme Court so held, 6-to-3, in 1992.<sup>53</sup> Just a year earlier, South Africa's Supreme Court of Appeal had ruled the other way.<sup>54</sup> 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.

Another case in point, one in which I was a participant, involving civil litigation: interpreting U. S. Supreme Court precedent, a divided U.S. Court of Appeals for the District of Columbia Circuit held in 1989, during my tenure on that court, that foreign plaintiffs acting abroad — plaintiffs were Indian family planning organizations — had no First Amendment rights, and therefore no standing to assert a violation of such rights by U. S. officials.<sup>55</sup> In particular, the Indian organizations complained of a condition on U. S. grant money: the recipients could not engage in any abortion counseling, even in a separate

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47. 356 U.S. 86 (1958) (plurality opinion).

48. *Id.* at 87.

49. *Id.* at 100.

50. *Id.* at 101.

51. *Id.* at 102.

52. S. AFR. CONST. 1996, § 10.

53. *United States v. Alvarez-Machain*, 504 U.S. 655, 657, 670 (1992).

54. *State v. Ebahim*, 1991 (2) SALR 533 (A) at 568 (S. Afr.).

55. *DKT Mem'l Fund Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275, 285 (D.C. Cir. 1989).

entity funded by non-U. S. sources.<sup>56</sup> In dissent, I resisted the notion that in an encounter between the United States and the people of another land, “the amendment we prize as ‘first’ has no force in court.”<sup>57</sup> 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.”<sup>58</sup>

Returning to my main theme, I will recount briefly and 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 the Chief Justice and Justices Scalia and Thomas) held unconstitutional the execution of a mentally retarded offender.<sup>59</sup> The Court noted that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”<sup>60</sup> (South Africa, of course, figures prominently in the worldwide disapproval, the Constitutional Court having held a decade ago that capital punishment in any case is unconstitutional.)

*New York Times* reporter Linda Greenhouse wrote of the following, 2002–2003, Term: 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.”<sup>61</sup> Among examples from that Term, I would include the Michigan University affirmative action cases decided June 23, 2003.<sup>62</sup> Although the Court splintered, it upheld the Michigan Law School program.<sup>63</sup> In separate opinions, I looked to two United Nations Conventions: the 1965 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.<sup>64</sup> Both Conventions distinguish between impermissible policies of oppression or exclusion, and permissible policies of inclusion, “temporary special measures aimed at accelerating de facto

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56. *Id.* at 278.

57. *Id.* at 308 (R.B. Ginsburg, J., concurring in part and dissenting in part).

58. *Id.*; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 721 n.1 (1987) (quoting *Reid v. Covert*, 354 U.S. 1, 6 (1957) (plurality opinion)).

59. 536 U.S. 304 (2002).

60. *Id.* at 317 n.21.

61. Linda Greenhouse, *In a Momentous Term, Justices Remake the Law, and the Court*, N.Y. TIMES, July 1, 2003, at A1.

62. *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

63. *Grutter*, 539 U.S. at 343.

64. *Id.* at 344 (Ginsburg, J., concurring); *Gratz*, 539 U.S. at 302 (Ginsburg, J., dissenting).

equality.”<sup>65</sup> The U.S. Supreme Court’s decision in the Michigan Law School case, I observed, “accords with the international understanding of the [purpose and propriety] of affirmative action.”<sup>66</sup> (South Africa’s Constitution is clear on that matter; Section 9(2) provides: “To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”)<sup>67</sup>

A better indicator from the U.S. Supreme Court’s 2002–2003 Term, because it attracted a majority, is Justice Kennedy’s opinion for the Court in *Lawrence v. Texas*, announced June 26, 2003.<sup>68</sup> Overruling a 1986 decision, *Lawrence* declared unconstitutional a Texas statute prohibiting two adult persons of the same sex from engaging, voluntarily, in intimate sexual conduct. (I think it highly unlikely, however, that we will soon see a U. S. Supreme Court decision resembling the very recent decision of the Constitutional Court of South Africa in *Minister of Home Affairs v. Fourie*.)<sup>69</sup> On the question of dynamic versus static, frozen-in-time constitutional interpretation, the Court’s *Lawrence v. Texas* 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.<sup>70</sup>

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.”<sup>71</sup> 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 protected right of homosexual adults to engage in intimate, consensual conduct.<sup>72</sup>

In the 2003–2004 Term, foreign and international legal sources again figured in several decisions. These included, most notably, two June 2004

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65. Annex to G.A. Res. 34/180, ¶ 4(1), U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (1979); see Annex to G.A. Res. 2106, ¶ 2(2), U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6014 (1965).

66. *Grutter*, 539 U.S. at 344 (Ginsburg, J., concurring).

67. S. AFR. CONST. 1996, § 9(2).

68. 539 U.S. 558 (2003).

69. 2006 (3) BCLR 355 (CC) (S. Afr.).

70. *Lawrence*, 539 U.S. at 578-79.

71. *Id.* at 577.

72. *Id.* at 573, 576.

decisions in cases arising out of the war on terror. One, *Hamdi v. Rumsfeld*, concerned a U.S. citizen, held incommunicado in a Navy brig in South Carolina pursuant to an executive decree declaring him an “enemy combatant.”<sup>73</sup> Ruling some six months before the Law Lords’ decision in the 2004 *Belmarsh* case, the Court held, 8-to-1, that the petitioner was entitled to a “meaningful opportunity” to contest the factual basis for his detention before an impartial adjudicator.<sup>74</sup> 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.”<sup>75</sup> “[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.”<sup>76</sup> On that theme, the U.K.’s Lord Hoffmann wrote in his separate opinion in the 2004 *Belmarsh* case:

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 [or executive measures, such as the one at issue in *Belmarsh*, authorizing indefinite imprisonment without charge or trial]. That is the true measure of what terrorism may achieve.<sup>77</sup>

He hoped, after the Lords of Appeal ruling, that Parliament would not “give the terrorists such a victory.”<sup>78</sup> I should add that two University of Chicago Law School professors, Eric A. Posner and Adrian Vermeule, recently inveighed against Justice O’Connor’s and Lord Hoffmann’s statements as “absurdities.”<sup>79</sup> People do not prefer liberty to death, they urged. A government that does not contract civil liberties in the face of terrorist threats, they said, “is pathologically rigid, not enlightened.”<sup>80</sup> They queried whether the Lords would have come out the same way had the terrorist carnage in London’s underground preceded the *Belmarsh* decision.<sup>81</sup> The Law Lords, I note, have not relented. Their December 2005 decision excluding evidence obtained through torture post-dates the London underground bombing.

The other “enemy combatant” case decided by the U. S. Supreme Court in June 2004, *Rasul v. Bush*, held that U. S. courts have jurisdiction to consider

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73. 542 U.S. 507, 510-11 (2004) (plurality opinion).

74. *Id.* at 509.

75. *Id.* at 532.

76. *Id.* at 530.

77. *A(FC) v. Secretary of State for the Home Dept.* [2004] UKHL 56, ¶ 97 (opinion of Lord Hoffmann).

78. *Id.*

79. Eric A. Posner & Adrian Vermeule, *Judicial Clichés on Terrorism*, WASH. POST, Aug. 8, 2005, at A15.

80. *Id.*

81. *Id.*

challenges to the legality of the detention of foreign nationals captured in hostilities abroad, then transported to the U. S. naval base in Guantanamo Bay, Cuba.<sup>82</sup> The Court wrote narrowly; it said nothing about what claims, if any, would succeed once the detainees get to a federal court. [Britain's Lord Steyn, before this decision, called Guantanamo a "legal black hole."]<sup>83</sup> 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.<sup>84</sup> Another ruled that the detainees were entitled to a fair hearing on the question whether their incarceration meets due process demands.<sup>85</sup> Both cases are currently on appeal.

Just a few months ago, the Supreme Court agreed to hear a case, titled *Hamdan v. Rumsfeld*, posing these questions: (1) Does the President have authority to establish a military commission to try Guantanamo Bay detainees for alleged war crimes; and (2) Is the writ of habeas corpus in federal court an available means to determine Guantanamo Bay detainees' alleged rights under the 1949 Geneva Convention?<sup>86</sup> The December 2005 legislation I earlier mentioned severely narrows Guantanamo Bay detainees' access to courts. The impact of that legislation on Hamdan's petition, and on scores of filings in the federal district court in the District of Columbia, remains uncertain.

To conclude my account of recent decisions in which the U. S. Supreme Court cast comparative sideglances, the 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."<sup>87</sup> 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 against the juvenile death penalty."<sup>88</sup> Justice Kennedy wrote for the Court that the opinion of the world community provides "respected and significant confirmation of our own conclusions."<sup>89</sup> "It does not lessen our fidelity to the Constitution," he explained, to recognize "the express affirmation of certain fundamental rights by other nations and peoples."<sup>90</sup> (Among the dozens of amici curiae submissions in *Roper*, an impressive brief bears the names of several Nobel Peace Prize winners, including former U. S. President Jimmy Carter, South Africa's former

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82. 542 U.S. 466, 484 (2004).

83. Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT'L & COMP. L.Q. 1 (2004).

84. *See* *Khalid v. Bush*, 355 F. Supp. 2d 311, 330 (D.D.C. 2005).

85. *See In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 464 (D.D.C. 2005).

86. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

87. 543 U.S. 551 (2005).

88. *Id.* at 578.

89. *Id.*

90. *Id.*

President Willem de Klerk, and Archbishop Desmond Tutu. The Nobel laureates urged the Court to “consider the opinion of the international community, which has rejected the death penalty for child offenders worldwide.”<sup>91</sup>

[Justice O’Connor, although she dissented from the Court’s categorical ruling in *Roper*, agreed with the Court on the relevance of “foreign and international law [to an] assessment of evolving standards of decency.”<sup>92</sup> 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 U. S. Constitution’s Eighth Amendment.]<sup>93</sup>

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 new solutions to the new legal problems that arise each day, from which we can learn and benefit.”<sup>94</sup>

In this regard, I was impressed by an observation made in September 2003 by Israel’s Chief Justice Aharon Barak. September 11th, 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.”<sup>95</sup> He spoke of his own Court’s efforts to balance the government’s no doubt compelling need to secure the safety of the State and of its citizens on the one hand, and the nation’s high regard for “human dignity and freedom on the other hand.”<sup>96</sup> 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.”<sup>97</sup> His Court’s answer: No, “[n]ever use violence.” He elaborated:

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91. Brief for President James Earl Carter, Jr. et al. as Amici Curiae Supporting Respondent at 2, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633).

92. *Roper*, 543 U.S. at 604 (O’Connor, J., dissenting).

93. *Id.* at 622-28 (Scalia, J., dissenting).

94. Sandra Day O’Connor, *Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law*, INT’L JUD. OBSERVER, June 1997, at 2, available at <http://www.fjc.gov/public/home.nsf/pages/311> (last visited March 6, 2007).

95. Aharon Barak, *The Relationship of United States Constitutional Law and Foreign Constitutional Law*, Panel Discussion at Columbia Law School (Sept. 12, 2003).

96. *Id.*; see also Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 153 (2002).

97. Barak, *supra* note 106; see also Barak, *supra* note 107, at 162.

[It] is the fate of 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.<sup>98</sup>

In that opinion, I concur without reservation.

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98. H.C. 5100/94, Pub. Comm. Against Torture in Isr. V. Gov’t of Israel, 53 (4) P.D. 817, 845.

