

# Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication<sup>†</sup>

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In the good job I have had now for some ten years, I try to follow Justice Brandeis' sage counsel: Resist even the irresistible invitation, conserve time for the Court's heavy work. But when Caroline Brown and Peter Rubin asked me to speak at this first national gathering of the American Constitution Society, I just had to accept the invitation because the Society's mission is important to the health and welfare of our Nation. The jurists and students assembled here seek to advance the highest ideals of the Union our Fundamental Instrument of Government establishes: You cherish liberty, and would make equal opportunity and nondiscrimination genuinely this country's law and practice; and you will pursue justice, so that you may thrive.<sup>1</sup>

While you are the *American Constitution Society*, your perspective on constitutional law should encompass the world. The United States was once virtually alone in exposing laws and official acts to judicial review for constitutionality. 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>2</sup> National, multinational, and international human rights charters and tribunals today play a key part in a world with increasingly porous borders. My message tonight is simply this: We are the losers if we do not both share our experience with, and learn from others.

That message is hardly original. A prominent jurist put it this way 14 years ago:

For nearly a century and a half, courts in the United States exercising the power of judicial review [for constitutionality] had no precedents to look to save their own, because our courts alone exercised this sort of authority. When many new constitutional courts were created after the Second World War, these courts naturally

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1. See *Deuteronomy* 16:20 ("Zedek, zedek tirdof, l'maan tichyeh." ["Justice, Justice shall you pursue, that you may thrive.])."

2. See generally Louis Favoreu, *Constitutional Review in Europe*, in *CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* 38, 40-42, 46, 51-54, 56 (Louis Henkin & Albert J. Rosenthal eds., 1990).

looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.<sup>3</sup>

The speaker was Chief Justice William H. Rehnquist. More recently, Justice O'Connor said: "While ultimately we must bear responsibility for interpreting our own laws, there is much to learn from . . . distinguished jurists [in other places] who have given thought to the same difficult issues that we face here."<sup>4</sup>

In the value I place on comparative dialogue—on sharing with and learning from others—I count myself an originalist in this sense. The 1776 Declaration of Independence, you will recall, expressed concern about the opinions of other peoples; it placed before the world the reasons why the United States of America (the new nation was called that in the Declaration) was impelled to separate from Great Britain. The Declaration did so out of "a decent Respect to the Opinions of Mankind."<sup>5</sup> It submitted the "Facts"—the "long Train of [the British Crown's] Abuses and Usurpations"—to the scrutiny of "a candid World."<sup>6</sup>

In writing the Constitution, the Framers looked to other systems and to thinkers from other lands for enlightenment, and they understood that the new nation would be bound by "the Law of Nations,"<sup>7</sup> today called international law.<sup>8</sup> Among powers granted Congress, the Framers enumerated the power "[t]o define and punish . . . Offences against the Law of Nations."<sup>9</sup>

John Jay, one of the authors of *The Federalist Papers* and our first Chief Justice, wrote in 1793 that the United States, "by taking a place among the nations of the earth, [had] become amenable to the laws of nations."<sup>10</sup> Eleven years later, Chief Justice John Marshall cautioned that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . ."<sup>11</sup> And in 1900, the Court famously reaffirmed in *The Paquete Habana*:

International law is part of our law, and must be ascertained and administered by

3. William H. Rehnquist, *Constitutional Courts — Comparative Remarks* (1989), in *GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE — A GERMAN-AMERICAN SYMPOSIUM* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993); see *Washington v. Glucksberg*, 521 U.S. 702, 710 & n.8, 718 n.16 (1997) (Rehnquist, C.J.) (referring to decision of the Supreme Court of Canada, which upheld a ban on assisted suicide, and observing that "in almost every western democracy[,] it is a crime to assist a suicide").

4. Sandra Day O'Connor, Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law (Mar. 16, 2002), in 96 *AM. SOC'Y INT'L L. PROC.* 348, 350 (2002).

5. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

6. *Id.* at para. 2.

7. U.S. CONST. art. I, § 8, cl. 10.

8. See Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 *U.C. DAVIS L. REV.* 1085, 1087-90 (2002) (on Framers' understanding of term "Law of Nations").

9. U.S. CONST. art. I, § 8, cl. 10.

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

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

## Comparative Constitutional Perspective

the courts of justice . . . For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.<sup>12</sup>

To discern the rule of law among nations, the Court said in *The Paquete Habana*, judges were to look “to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.”<sup>13</sup>

Today, tools are readily at hand to pursue international and comparative law inquiries. The Internet affords access to foreign judicial decisions, law journals contain all manner of commentary, course materials are well packaged. In 1999 and 2003, leading U.S. law book publishers produced two excellent sets of Cases and Materials on Comparative Constitutional Law.<sup>14</sup> These works should attract more teachers and students to the field. My colleague, Justice Stephen Breyer, speaks enthusiastically of his hopes for the wired world. Audio and visual technology in new classrooms, he notes, already permit U.S., Canadian, European, or Indian professors to “team teach” classes held simultaneously in different nations.<sup>15</sup> Technological developments, he predicts, will inevitably open vistas in courtrooms as well as classrooms.

True, there is a discordant view on recourse to the “Opinions of Mankind.” A mid-19th century Chief Justice expressed that view concisely:

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 court to give the words of the Constitution a more liberal construction . . . than they were intended to bear when the instrument was framed and adopted.<sup>16</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 opinion that invoked the majestic Due Process Clause to uphold one individual’s right to hold another in bondage.<sup>17</sup>

Jurists identified as today’s originalists adhere to the view that a comparative perspective, though useful in the framing of our Constitution, is inappropriate to its interpretation.<sup>18</sup> Partisans of that view sometimes carry the day in our courts. I anticipate, however, that they will speak increasingly in dissent. Two cases in point. In 1989, in *Stanford v. Kentucky*,<sup>19</sup> the Court held it was not “cruel and unusual punishment[t]” under the Eighth Amendment to sentence

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

13. *Id.*

14. NORMAN DORSEN ET AL., *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* (2003); VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (1999).

15. See, e.g., Stephen Breyer, *Mensaje del Juez Stephen Breyer en la Rededicación del Edificio de la Escuela de Derecho de la Universidad de Puerto Rico*, 70 REV. JUR. U.P.R. 1015, 1017 (2001).

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

17. *Id.* at 450-52.

18. See *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997).

19. 492 U.S. 361 (1989).

an individual to death for a crime committed at age 16 or 17. Rejecting the relevance of “the sentencing practices of other countries,” the Court “emphasize[d] that it is *American* conceptions of decency that are dispositive.”<sup>20</sup> Thirteen years later, in *Atkins v. Virginia*,<sup>21</sup> the Court held that executions of mentally retarded criminals are “cruel and unusual punishments” prohibited by the Eighth Amendment.<sup>22</sup> The six-member majority noted that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”<sup>23</sup>

In a 1996 address at American University, Chief Justice Rehnquist said: “The framers of the United States Constitution came up with two quite original ideas.”<sup>24</sup> The first was “a chief executive who [is] not responsible to the legislature, as a Chief Executive is under the parliamentary system.”<sup>25</sup> The separation of legislative and executive authority established under Articles I and II of the U.S. Constitution, the Chief Justice noted, has not been embraced by many other nations.<sup>26</sup> But the second idea—“an independent judiciary with the authority to declare laws passed by Congress unconstitutional”—“has caught on [abroad], particularly since the end of the Second World War.”<sup>27</sup> Of that idea, the Chief Justice said: Constitutional review by independent tribunals of justice “is one of the crown jewels of our system of government today.”<sup>28</sup>

I agree, but the just pride we take in our system of constitutional review, also in our judicially enforceable Bill of Rights, hardly means we should rest content with our current jurisprudence and have little to learn from others. May I suggest two areas in which, as I see it, we could do better. One concerns the dynamism with which we interpret our Constitution, and similarly, our common law. The other involves the extraterritorial application of fundamental rights.

Chief Justice Taney, in the passage I earlier quoted,<sup>29</sup> described a constitutional text frozen in time. Contrast the view stated in *Trop v. Dulles*,<sup>30</sup> a path-marking 1958 plurality opinion. That case concerned the proper reading of the Eighth Amendment’s ban on “cruel and unusual punishments.” Those words, the opinion said, “must draw [their] meaning from the evolving standards of

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20. *Id.* at 369 n.1.

21. 536 U.S. 304 (2002).

22. *Id.* at 307, 321.

23. *Id.* at 316 n.21.

24. William H. Rehnquist, Keynote Address at the Symposium on The Future of the Federal Courts (Apr. 9, 1996), in 46 AM. U. L. REV. 263, 273 (1996).

25. *Id.* at 273-74.

26. *Id.* at 274.

27. *Id.*

28. *Id.*

29. See *supra* note 16 and accompanying text.

30. 356 U.S. 86 (1958) (plurality opinion).

## Comparative Constitutional Perspective

decency that mark the progress of a maturing society.”<sup>31</sup> As the 2002 decision banning execution of the mentally retarded (*Atkins v. Virginia*) expressly reaffirmed,<sup>32</sup> a majority of the U.S. Supreme Court Justices generally adhere to that understanding. But the “frozen-in-time” position occasionally holds sway.

A recent example, involving no grand constitutional question, simply equity between parties with no ideological score to settle: A Mexican company defaulted on payments due a U.S. creditor and was sued in a Federal District Court, which had personal jurisdiction over the debtor.<sup>33</sup> Sliding into insolvency, the Mexican company was busily distributing what remained of its assets to its Mexican creditors. It did so in clear violation of a contractual promise to treat the U.S. creditor on a par with all other unsecured, unsubordinated creditors. If that activity continued, nothing would be left in the till for the U.S. creditor.<sup>34</sup>

Since 1975, English courts had been providing a remedy in similar circumstances.<sup>35</sup> To assure that there would be assets against which a final judgment for the creditor could be executed, they would order a temporary injunction restraining the foreign debtor from transferring assets pending adjudication of the creditor’s claim.<sup>36</sup> The U.S. District Court, ruling over two decades later, looked to the English practice, which other common law nations had by then adopted, and found it altogether fitting for the U.S. creditor’s case against the Mexican debtor. At the hearing on the preliminary injunction, the District Judge asked: “We have got a case where . . . no [plausible] defense [is] presented, why shouldn’t I be able to provide [the creditor] with [injunctive] relief?”<sup>37</sup> Why should the debtor be allowed “to use the process of the court to delay entry of a judgment as to which there is no defense? Why is that equitable?”<sup>38</sup>

Overturing a Second Circuit decision that affirmed the preliminary asset-freeze order,<sup>39</sup> a 5-4 majority of the Supreme Court, in 1999, answered the District Judge’s questions this way: Injunctions of the kind at issue (called *Mareva* injunctions, the short name of the 1975 English case that first approved the practice) were not “traditionally accorded by courts of equity” at the time the

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31. *Id.* at 101.

32. 536 U.S. 304, 311-12 (2002).

33. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 311-12 (1999).

34. *Id.* at 310, 312.

35. *See id.* at 327; *id.* at 339 (Ginsburg, J., concurring in part and dissenting in part).

36. *See Mareva Compania Naviera S.A. v. Int’l Bulkcarriers S.A.*, 2 Lloyd’s Rep. 509, 510-11 (C.A. 1975).

37. App. to Pet. for Cert. at 34a, *quoted in Grupo Mexicano*, 527 U.S. at 341-42 (Ginsburg, J., concurring in part and dissenting in part).

38. App. to Pet. for Cert. at 36a, *quoted in Grupo Mexicano*, 527 U.S. at 342 (Ginsburg, J., concurring in part and dissenting in part).

39. *See Alliance Bond Fund, Inc. v. Grupo Mexicano de Desarrollo, S.A.*, 143 F.3d 688 (2d Cir. 1998).

Constitution was adopted.<sup>40</sup> “[A]ny substantial expansion of [1789] practice,” the Court said, was the prerogative of Congress.<sup>41</sup> A power that English courts of equity “did not actually *exercise* . . . until 1975,” the Court concluded, was not one U.S. courts could assume.<sup>42</sup>

Joined by Justices Stevens, Souter, and Breyer, I dissented from the Court’s static conception of equitable remedial authority.<sup>43</sup> Earlier decisions described that authority as supple, adaptable to changing conditions. I noted, among other things, that federal courts, in their sometimes heroic efforts to implement the public school desegregation mandated by *Brown v. Board of Education*,<sup>44</sup> did not embrace a frozen-in-time view of their equitable authority.<sup>45</sup> Issuing decrees “beyond the contemplation of the 18th-century Chancellor,”<sup>46</sup> they applied the enduring *principles* of equity to the changing needs of a society still in the process of achieving “a more perfect Union.”<sup>47</sup>

Turning from frozen-in-time interpretation to another shortfall, the Bill of Rights, few would disagree, is our nation’s hallmark and pride. One might assume, therefore, that it guides and controls U.S. officialdom wherever in the world they carry our flag or their credentials. But that is not our current jurisprudence. 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 here. The Court so held, 6-3, in 1992.<sup>48</sup> Just a year earlier, South Africa’s highest court had ruled the other way, determining that “abduction [violates] the applicable rules of international law.”<sup>49</sup>

Another example, this one involving civil litigation: Interpreting Supreme Court precedent, the D.C. Circuit held in 1989, during my time on that court and over my dissent, 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>50</sup> In dissent, I resisted the notion that in an encounter between the United States and non-resident aliens, “the amendment we prize as ‘first’ has no force in court.”<sup>51</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

40. *Grupo Mexicano*, 527 U.S. at 319; see *id.* at 327, 333.

41. *Id.* at 329.

42. *Id.*

43. *Id.* at 336-37 (Ginsburg, J., concurring in part and dissenting in part).

44. 347 U.S. 483 (1954).

45. *Grupo Mexicano*, 527 U.S. at 337 n.4 (Ginsburg, J., concurring in part and dissenting in part).

46. *Id.* at 337.

47. U.S. CONST. pmb1.

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

49. *State v. Ebrahim*, 1991 (2) SALR 553, 568 (A), quoted in *Alvarez-Machain*, 504 U.S. at 687 n.36 (Stevens, J., dissenting).

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

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

## Comparative Constitutional Perspective

United States acts,” the Restatement projects, “it can only act in accordance with the limitations imposed by the Constitution.”<sup>52</sup>

With human rights increasingly prominent on the world’s agenda, that day may come sooner rather than later. The idea was well stated by distinguished Columbia University Professor Louis Henkin when he wrote:

[I]n a world of states, the United States is not in a position to secure the rights of all individuals everywhere, [but] it is always in a position to respect them. Our federal government must not invade the individual rights of any human being. The choice in the Bill of Rights of the word “person” rather than “citizen” was not fortuitous; nor was the absence of a geographical limitation. Both reflect a commitment to respect the individual rights of all human beings.<sup>53</sup>

In celebration of the Supreme Court of Canada’s 125th anniversary three years ago, I remarked on the impressive human rights decisions that court has made since the 1982 adoption of Canada’s Charter of Rights and Freedoms.<sup>54</sup> Interpreting the Charter, Canada’s Supreme Court, as of 1996, had referred in some 50 cases to international human rights instruments.<sup>55</sup> In contrast, since the United Nations’ 1948 adoption of the Universal Declaration of Human Rights, the U.S. Supreme Court has mentioned that basic international Declaration a spare six times—and only twice in a majority decision.<sup>56</sup>

But our “island” or “lone ranger” mentality is beginning to change. Our Justices, as I noted at the start of these remarks, are becoming more open to comparative and international law perspectives. The term just ended may prove a milestone in that regard. *New York Times* reporter Linda Greenhouse observed in her annual roundup of the Court’s decisions: The Court has “displayed a [steadily growing] attentiveness to legal developments in the rest of the world and to the [C]ourt’s role in keeping the United States in step with them.”<sup>57</sup>

In the Michigan affirmative action cases,<sup>58</sup> in separate opinions, joined in

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52. *Id.* (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 721 note 1 (1987) (quoting from *Reid v. Covert*, 354 U.S. 1, 6 (1957) (plurality opinion of Black, J.))).

53. Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 32 (1985).

54. Ruth Bader Ginsburg, Remarks for Celebration of the 125th Anniversary of the Supreme Court of Canada (Sept. 28, 2000) (on file with author).

55. See Louis LeBel & Gloria Chao, *The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law*, 16 SUP. CT. L. REV. 23, 45 (2002); Gérard V. La Forest, *The Expanding Role of the Supreme Court of Canada in International Law Issues*, 34 CAN. Y.B. INT’L L. 89, 90-91 (1996).

56. See *Knight v. Florida*, 528 U.S. 990, 996 (1999) (Breyer, J., dissenting from denial of certiorari); *Dandridge v. Williams*, 397 U.S. 471, 521 n.14 (1970) (Marshall, J., dissenting); *Zemel v. Rusk*, 381 U.S. 1, 4, 15 n.13 (1965) (majority opinion); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 161 n.16 (1963) (majority opinion); *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 776 (1960) (Douglas, J., concurring); *Am. Fed’n of Labor v. Am. Sash & Door Co.*, 335 U.S. 538, 549 n.5 (1948) (Frankfurter, J., concurring).

57. Linda Greenhouse, *The Supreme Court: Overview; In a Momentous Term, Justices Remake the Law, and the Court*, N.Y. TIMES, July 1, 2003, at A1.

58. *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003); *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003).

one case by Justice Breyer,<sup>59</sup> in the other in full by Justice Souter and in part by Justice Breyer,<sup>60</sup> I looked to two United Nations Conventions:<sup>61</sup> the 1965 International Convention on the Elimination of all Forms of Racial Discrimination, which the United States has ratified<sup>62</sup>; and the 1979 Convention on the Elimination of All Forms of Discrimination Against Women,<sup>63</sup> 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* equality.”<sup>65</sup> The Court’s decision in the Law School case, I observed, “accords with the international understanding of the office of affirmative action.”<sup>66</sup>

A better indicator, because it attracted a majority, is Justice Kennedy’s opinion for the Court in *Lawrence v. Texas*,<sup>67</sup> announced June 26, 2003. Overruling the Court’s 1986 decision in *Bowers v. Hardwick*,<sup>68</sup> *Lawrence* declared unconstitutional a Texas statute prohibiting two adult persons of the same sex from engaging, voluntarily, in certain intimate sexual conduct. On the question of dynamic versus static, frozen-in-time constitutional interpretation, the Court’s opinion instructs:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.<sup>69</sup>

And on respect for “the Opinions of [Human]kind,” the 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>70</sup> In support, the Court cited the leading 1981 European Court of Human Rights decision, *Dudgeon v. United Kingdom*,<sup>71</sup> and follow-on European Human Rights Court decisions affirming the protected right of homosexual adults to engage in intimate, consensual con-

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59. *Grutter*, 123 S. Ct. at 2347 (Ginsburg, J., concurring).

60. *Gratz*, 123 S. Ct. at 2442 (Ginsburg, J., dissenting).

61. *See id.* at 2445; *Grutter*, 123 S. Ct. at 2347.

62. Annex to G.A. Res. 2106, U.N. GAOR, 20th Sess., Supp. No. 14, at 47, U.N. Doc. A/6014 (1965); *see* DEPT. OF STATE, TREATIES IN FORCE 449-50 (2000).

63. Annex to G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 194, U.N. Doc. A/34/46 (1979) [hereinafter CEDAW].

64. *See* Malvina Halberstam, *United States Ratification of the Convention on the Elimination of all Forms of Discrimination Against Women*, 31 GEO. WASH. J. INT’L L. & ECON. 49, 50 (1997).

65. CEDAW, *supra* note 63, at art. 4(1).

66. *Grutter*, 123 S. Ct. at 2347 (Ginsburg, J., concurring).

67. 123 S. Ct. 2472 (2003).

68. 478 U.S. 186 (1986).

69. *Lawrence*, 123 S. Ct. at 2484.

70. *Id.* at 2483.

71. *Id.* at 2481, 2483 (citing *Dudgeon*, 45 Eur. Ct. H.R. (1981)).

## Comparative Constitutional Perspective

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Recognizing that forecasts are risky, I nonetheless believe we will continue to accord “a decent Respect to the Opinions of [Human]kind” as a matter of comity and in a spirit of humility. Comity, because projects vital to our well being—combating international terrorism is a prime example—require trust and cooperation of nations the world over. And humility because, in Justice O’Connor’s words: “Other legal systems continue to innovate, to experiment, and to find new solutions to the new legal problems that arise each day, from which we can learn and benefit.”<sup>73</sup>

In conclusion, my cheers as you undertake the challenging mission to support and nurture the Constitution, as it has evolved over the span of two centuries and more. The time is right for that mission. As Abigail Adams wrote to her son of the era in which he was coming of age, “These are the times in which a genius would wish to live. It is not in the still calm of life, or the repose of a pacific station, that great characters are formed. The habits of a vigorous mind are formed in contending with difficulties.”<sup>74</sup>

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72. *Lawrence*, 123 S. Ct. at 2483.

73. 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.

74. Letter from Abigail Adams to John Quincy Adams, *quoted in* DAVID MCCULLOUGH, JOHN ADAMS 226 (2001).

