US Judges and the Increased Use of International Law:

- In an October 28, 2003 speech, Supreme Court Justice O'Connor stated "I suspect that over time [the U.S. Supreme Court] will rely increasingly ... on international and foreign courts in examining domestic issues."[1] According to the *Atlanta Journal-Constitution*, Justice O'Connor also stated that the U.S. judiciary should pay even more attention to international court decisions than it already does.[2] O'Connor continued, that doing so, "may not only enrich our own country's decisions, I think it will create that all important good impression."[3] Justice Scalia has stated, "foreign law is totally irrelevant" on most issues

- Can you imagine a judge in France, Denmark or Ireland taking US court decisions into account while deliberation or capital punishment?

- Eric Hargan has written, the "use of international sources in cases involving purely domestic concerns is alien to the American legal system, historically, and, if unchecked, will produce a further erosion of American sovereignty, in addition to the mischief already done by these cases."[4]

- Article VI of the Constitution clearly provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. The Senators and Representatives ... and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution."

- In *Lawrence v. Texas*, the recent decision striking down a Texas statute prohibiting same-sex sodomy, Justice Kennedy, writing for a majority, cites for support a decision by the European Court of Human Rights allowing

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[1] Bill Rankin, "U.S. Justice is Honored," *The Atlanta Journal-Constitution* (October 29, 2003) at A3.

[2] *Ibid.* ("The U.S. judiciary should pay more attention to international court decisions to help enrich our nation's standing abroad, U.S. Supreme Court Justice Sandra Day O'Connor said Tuesday."). Justice Breyer has also, on a morning talk show, stated that "Our Constitution and how it fits into the governing documents of other nations, I think, will be a challenge for the next generation." Editorial, "Courting Foreign Ideas Set a Troubling Precedent in Considering Other Nation's Rulings," *The Omaha World-Herald* (July 11, 2003) at B8. Such a statement implies that the U.S. Constitution should somehow be changed to "fit" into a milieu of untold numbers of foreign documents.

[3] Mark Steyn, "Trying to Impose western values on America," Irish Times (December 1, 2003)

[4] Eric D. Hargan, "The Sovereignty Implications of Two Recent Supreme Court Decisions," The Federalist Society for Law and Public Policy, at 1.

homosexual conduct as evidence of a lack of world consensus on the illegality of such conduct.[5] Whatever one's views on that issue, it should be evident that the relevant consensus behind American law is not a world consensus, but rather the consensus of those in the United States on the meaning of the words used in the Constitution and state laws when originally enacted.

- As Justice Scalia stated in his dissent in *Lawrence*, "The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is ... meaningless dicta. Dangerous dicta, however, since this Court ... should not impose foreign moods, fads, or fashions on Americans."[6]

- Last year, in *Atkins v. Virginia*, Justice Stevens, in the majority opinion, struck down laws allowing the mentally retarded to be sentenced to death, on the grounds that "[t]he practice ... has become truly unusual, and it is fair to say that a national consensus has developed against it."[7] Strikingly, the footnote following that sentence, presumably to support the proposition of a "national consensus," cites to the views expressed in the brief filed in the case by the European Union.[8] Not only does the European Union operate wholly outside the jurisdiction of the United States, but several of its leaders have stated that its goals are to counter the influence of the United States.[9]

- Several years earlier, Justice Stevens in an opinion joined by Justices Brennan, Marshall, and Blackmun,[10] stated that "The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by ... the leading members of the Western European community."[11] He then cited the laws of West Germany, France, the Soviet Unions, Canada, the Scandinavian countries, and Switzerland, among others, many of which

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[5] *Lawrence v. Texas*, 123 S.Ct. 2472, 2474 (2003).

[6] *Lawrence v. Texas*, 123 S.Ct. 2472, 2494 (Scalia, J., dissenting) (2003).

[7] *Atkins v. Virginia*, 536 U.S. 304, 316 (2002).

[8] *Id.* at 316, n.21.

[9] *See* Charles A. Kupchan, "The End of the West," *The Atlantic Monthly* (November 2002) (quoting the Swedish prime minister and then-president of the European Union, Goran Persson, as noting that the European Union is "one of the few institutions [Europe] can develop as a balance to US world domination," and Romano Prodi, the President of the European Commission, as stating one of the chief goals of the European Union is to create "a superpower on the European continent that stands equal to the United States.").

[10] In that case, Justice O'Connor filed a separate opinion concurring in the judgement.

[11] *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988).

prohibit capital punishment entirely,[12] despite the fact that the U.S. Constitution explicitly provides for capital punishment in multiple constitutional provisions.[13]

- And in a concurring opinion in *Nixon v. Shrink Missouri Government PAC*, Justice Breyer cited opinions by the European Commission of Human Rights and a Canadian court for the proposition that campaign finance laws should be judged according to various balancing tests.[14]

- Justice Ginsburg said in a recent speech to the American Constitution Society, "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. Partisans of that view sometimes carry the day in our courts. I anticipate, however, that they will speak increasingly in dissent.

[12] *Id.* at 831.

[13] The opening sentence of the Fifth Amendment is a guarantee that "No person shall be held to answer for a capital ... crime, unless on a presentment or indictment of a Grand Jury ..." Further, the Double Jeopardy Clause of the Fifth Amendment is a prohibition against being "twice put in jeopardy of life" for the same offense, and the Due Process Clause requires "due process of law" before an accused can be "deprived of life ..."

[14] *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 403 (2000) (Breyer, J., concurring).

Supreme Court's Use of International Law

1. Knight v. Florida, 528 U.S. 990 (1999); Justice Breyer- Dissent

> "A growing number of courts outside the United States-- courts that accept or assume the lawfulness of the death penalty-- have held that lengthy delay in administering a lawful death penalty renders ultimate execution inhuman, degrading, or unusually cruel. In Pratt v. Attorney General for Jamaica, supra, for example, the Privy Council considered whether Jamaica lawfully could execute two prisoners held for 14 years after sentencing. The Council noted that Jamaican law authorized the death penalty and the United Nations Committee on Human Rights has written that 'capital punishment is not per se unlawful under the [Human Rights] Covenant.'"
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> "The Supreme Court of India has held that an appellate court, which itself has authority to sentence, must take account of delay when deciding whether to impose a death penalty."
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> "The Supreme Court of Zimbabwe, after surveying holdings of many foreign courts, concluded that delays of five and six years were "inordinate" and constituted" 'torture or... inhuman or degrading punishment or other such treatment.'"
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> "And the European Court of Human Rights, interpreting the European Convention on Human Rights, noted the convention did not forbid capital punishment. But, in the court's view, the convention nonetheless prohibited the United Kingdom from extraditing a potential defendant to the Commonwealth of Virginia-- in large part because the 6 to 8 year delay that typically accompanied a death sentence amounts to 'cruel, inhuman, [or] degrading treatment or punishment' forbidden by the convention."

2. Nixon v. Shrink Missouri Government PAC; Justice Souter delivered the opinion with Rehnquist, Steven, O'Connor, Ginsburg, and Breyer joined.

And his concurring opinion in *Nixon*, Justice Breyer cited opinions by the European Commission of Human Rights and a Canadian court for the proposition that campaign finance laws should be judged according to various balancing tests.[1] The Court found that limitations on campaign contributions were sufficiently tailored to serve its purposes, as required to survive First Amendment scrutiny - a constitutional issue.

Breyer specifically stated,

[1] *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 403 (2000) (Breyer, J., concurring).

> "The approach taken by these cases is consistent with that of other constitutional courts facing similarly complex constitutional problems. See, *e.g. Bowman v. United Kingdom*, 26 Eur. Ct. H.R. 1 (European Comm'n of Human Rights 1998 (demanding proportionality in the campaign finance context); *Libman v. Quebec (Attorney General)*, 151 D.L. R. (4th) 385 (Canada 1997) (same). "

3. Lawrence v. TX, 123 S. Ct. 2472 (2003); Justice Kennedy: Majority Opinion

In *Lawrence v. Texas*, the Supreme Court struck down a Texas statute prohibiting same-sex sodomy. Justice Kennedy, writing for a majority, cited for support a decision by the European Court of Human Rights allowing homosexual conduct as evidence of a lack of world consensus on the illegality of such conduct.[2]

> "The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction. A committee advising the British Parliament recommended in 1957 repeal of law forbidding homosexual conduct... Of even more importance, almost 5 years before Bowers and to today's case.....the court (the European Court of Human Rights) held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981) para. 52.[3] Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in Bowers that the claim put forward was insubstantial in our Western civilization."

4. Atkins v. Virginia, 536 U.S. 304 (2002); Justice Stevens delivered the opinion of the Court, in which O'Connor, Kennedy, Souter, Ginsburg, and Breyer joined.

In *Atkins v. Virginia*, the Supreme Court struck down laws allowing the mentally retarded to be sentenced to death

Stevens, writing for the majority, stated

> "[t]he practice ... has become truly unusual, and it is fair to say that a national consensus has developed against it."[4]

Strikingly, the footnote following that sentence, presumably to support the proposition of a "national consensus," cites to the views expressed in the brief filed in the case by the European Union.[5]

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[2] *Lawrence v. Texas*, 123 S.Ct. 2472, 2474 (2003).

[3] *Lawrence v. Texas*, 123 S.Ct. 2472, ____ (2003).

[4] *Atkins v. Virginia*, 536 U.S. 304, 316 (2002).

[5] *Id.* at 316, n.21.

> "Moreover, within the world community, the imposition of the death penalty for crimes committee by mentally retarded offenders is overwhelmingly disapproved. Brief for the European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T. 2001. Mp/ 00-8727, p.4."

This citation ignores the fact that the European Union operates wholly outside the jurisdiction of the United States and but several of its leaders have stated that its goals are to counter the influence of the United States.[6]

5. Thompson v. Oklahoma, 487 U.S. 815 (1987); Justice Stevens in writing the opinion and joined by Justices Brennan, Marshall, and Blackmun,[7] stated that "The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by ... the leading members of the Western European community."[8] Stevens also cited the laws of West Germany, France, the Soviet Unions, Canada, the Scandinavian countries, and Switzerland, among others, many of which prohibit capital punishment entirely,[9] despite the fact that the U.S. Constitution explicitly provides for capital punishment in multiple constitutional provisions.[10]

6. Roper v. Simmons, 543 U.S. ___ (2005); Justice Kennedy delivered the majority opinion.

In *Simmons*, the Supreme Court held that the practice of executing individuals for crimes they committed below the age of 18 is a violation of the Eighth Amendment. Kennedy's majority opinion included an extended discussion of the relevance of foreign and international practice to the interpretation of the Eighth Amendment.

In striking down the juvenile death penalty laws, Kennedy stated that "our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility."[11]

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[6] *See* Charles A. Kupchan, "The End of the West," *The Atlantic Monthly* (November 2002) (quoting the Swedish prime minister and then-president of the European Union, Goran Persson, as noting that the European Union is "one of the few institutions [Europe] can develop as a balance to US world domination," and Romano Prodi, the President of the European Commission, as stating one of the chief goals of the European Union is to create "a superpower on the European continent that stands equal to the United States.").

[7] In that case, Justice O'Connor filed a separate opinion concurring in the judgement.

[8] *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988).

[9] *Id.* at 831.

[10] The opening sentence of the Fifth Amendment is a guarantee that "No person shall be held to answer for a capital ... crime, unless on a presentment or indictment of a Grand Jury ..." Further, the Double Jeopardy Clause of the Fifth Amendment is a prohibition against being "twice put in jeopardy of life" for the same offense, and the Due Process Clause requires "due process of law" before an accused can be "deprived of life ..."

[11] *Roper v. Simmons, cite here to page....See*.

Justice Kennedy cited international opposition to the practice.

> "It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime." See *Brief for Human Rights Committee of the Bar of England and Wales et al.* as Amici Curiae 10.11.[12]

And lastly...

> "It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom."[13]

The Court cited to the following international agreements:

- International Covenant on Civil and Political Rights, Art. 6(5), 999 U. N. T. S., at 175;
- United Nations Convention on the Rights of the Child, Art. 37;
- American Convention on Human Rights: Pact of San José, Costa Rica, Art. 4(5) ;
- African Charter on the Rights and Welfare of the Child, Art. 5(3)

Note: The U.S. government has specifically reserved to the question of the execution of juveniles in signing and ratifying the ICCPR and in signing the Convention on the Rights of the Child.

> "The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions." - Justice Kennedy

7. Grutter v. Bollinger, 539 U.S. ___ (2003). O'Connor delivered the opinion of the Court, in which Stevens, Souter, Ginsburg, and Breyer, joined, and in which Scalia and Thomas, joined in part insofar as it is consistent with the views expressed in Part VII of the opinion of Thomas. Chief Justice Rehnquist, with whom Justice Scalia, Justice Kennedy, and Justice Thomas join, dissenting

In Grutter, the Supreme Court held that Michigan law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body is not prohibited by the Equal Protection Clause, Title VI, or §1981. Justice Ginsburg's support for looking to foreign sources of law was apparent in her concurring opinion in *Grutter v. Bollinger*, where she noted that "the Court's observation that race-conscious programs must have a logical end point accords with the international

[12] *Roper v. Simmons, cite*.

[13] *Roper v. Simmons, cite*.

understanding of the office of affirmative action." She also referred to numerous international covenants that provide for measures of affirmative action.

Ginsburg filed a concurring opinion, in which Breyer joined.

> The Court's observation that race-conscious programs "must have a logical end point," *ante, at 156 L Ed 2d, at 341,* accords with the international understanding of the office of affirmative action. The International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994, see State Dept., Treaties in Force 422-423 (June 1996), endorses "special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms." Annex to G. A. Res. 2106, 20 U. N. GAOR Res. Supp (No. 14) 47, U. N. Doc. A/6014, Art. 2(2) (1965). But such measures, the Convention instructs, "shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved." *Ibid*; see also Art. 1(4) (similarly providing for temporally limited affirmative action); Convention on the Elimination of All Forms of Discrimination against Women, Annex to G. A. Res. 34/180, 34 U. N. GAOR Res. Supp (No. 46) 194, U. N. Doc. A/34/46, Art. 4(1) (1979) (authorizing "temporary special measures aimed at accelerating *de facto* equality" that "shall be discontinued when the [***343] objectives of equality of opportunity and treatment have been achieved").[14]

8. Gratz v. Bollinger, 123 S.Ct. at ____. Rehnquist delivered the majority opinion of the Court, in which O'Connor, Scalia, Kennedy, and Thomas joined. Ginsburg filed a dissenting opinion, in which Souter joined, and in which Breyer, joined as to Part I.

The Supreme Court concluded that because the University's use of race in its current freshman admissions policy was not narrowly tailored to achieve the asserted compelling interest in diversity, the admissions policy violated the Equal Protection Clause of the Fourteenth Amendment and violates Title VI and 42 U. S. C. § 1981.

Ginsburg filed a dissenting opinion joined by Breyer and Souter as to Point I of her opinion in briefly citing to international conventions on racial and sexual discrimination relied upon in *Grutter*.

> "Contemporary human rights documents draw just this line; they distinguish between policies of oppression and measures designed to accelerate de facto equality. See Grutter, post, at 1 (Ginsburg J., concurring) (citing the United Nations- initiated Conventions on the Elimination of All Forms of Racial Discrimination and on the Elimination of All Forms of Discrimination against Women)."

[14] *Grutter, cite to page...*