

*Judges Undermine
U.S. Sovereignty*

EVERY FEDERAL OFFICIAL, including judges, upon taking office, takes this oath: “I, _____, do solemnly swear (or affirm) . . . that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; . . . So help me God.” What, therefore, should we say about a judge who bypasses the U.S. Constitution and laws and instead applies a foreign court’s opinion? Is such a judge not faithless to his oath of office?

Yet such rulings have become more and more frequent. Six Supreme Court justices have cited foreign sources. Justice Stephen Breyer gleefully told George Stephanopoulos on ABC’s *World News Tonight* how the United States is changing “through commerce and through globalization . . . [and] through immigration,” and that this change is having an impact on the courts. He speculated on “the challenge”

of whether our U.S. Constitution “fits into the governing documents of other nations.”

Where did Justice Breyer get the idea that the U.S. Constitution should “fit” into the laws of other nations? If the United States can’t make its own laws, we cannot be a sovereign nation. Justice Breyer admitted his dalliance with foreign opinions at a meeting of top-level French lawyers in Washington in November 2004 (where he delivered a third of his speech in French), and again at the American Bar Association Convention in Chicago on August 9, 2005.

In a dissent in *Knight v. Florida* (1999), Justice Breyer suggested that it was “useful” to consider court decisions on allowable delays of execution in India, Jamaica, and Zimbabwe. Zimbabwe, indeed, has had a lot of experience with executions, but it’s hardly a country from which we should obtain guidance about due process.

Justice Kennedy couldn’t find any language in the U.S. Constitution to justify overturning the Texas sodomy law in *Lawrence v. Texas* (2003), so he invoked “other authorities” to rationalize his “emerging awareness” that “liberty” now means that the judiciary can grant more license in matters of sex. These non-American authorities included a committee advising the British Parliament, decisions of the European Court of Human Rights, the European Convention on Human Rights, a brief filed by former United Nations High Commissioner for Human Rights Mary Robinson, and “other nations, too.”

Kennedy overruled the Court’s anti-sodomy decision, *Bowers v. Hardwick* (1986), brushing off what he called “the sweeping references by Chief Justice Burger [in that case] to

the history of Western Civilization and to Judeo-Christian moral and ethical standards.” The judicial supremacists think it is their mission to dictate a new regime of sexual mores to replace our Judeo-Christian moral and ethical standards, which they believe are obsolete.

Justice Kennedy wrote in *Lawrence v. Texas* that “The right the petitioners seek [to engage in homosexual sodomy] has been accepted as an integral part of human freedom in many other countries.” Failing to mention the countries where sodomy is a serious crime, he emphasized the “values we share with a wider civilization.” In fact, most other countries do not share American values, and we certainly don’t want to share theirs.

Four other justices joined Kennedy’s majority decision without distancing themselves from his globalist reasoning or his inaccurate recitation of the history of sodomy laws in this country. Justice Scalia eloquently dissented: “Constitutional entitlements do not spring into existence . . . because foreign nations decriminalize conduct.” He called Kennedy’s words “dangerous dicta,” adding that the Supreme Court “should not impose foreign moods, fads or fashions on Americans.”

Looking to foreign countries for guidance about U.S. laws or court decisions not only is an interference with our sovereignty, but will diminish the precious constitutional rights that Americans enjoy. The proposed Constitution for the European Union (EU) is completely different from our great, long-lasting United States Constitution. Our Bill of Rights sets forth a list of individual *rights* against the government, whereas the EU constitution includes a long

list of *entitlements* to services to be provided by the government such as education, paid maternity leave, health care, housing, and environmental protection. The EU constitution purports to require “equality” between men and women, but sets up a program to give “specific advantages in favor of the underrepresented sex.”

Instead of condemning Kennedy’s use of foreign courts to change U.S. laws, the president of the American Bar Association opined that “the concept of fundamental law knows no national boundaries.” Harvard law professor Laurence Tribe chimed in to “applaud” the “important insights” of the “global legal community.”

This is deceptive. In fact, most other countries’ “concept of fundamental law” is far removed from ours. Most other countries flatly reject precious American rights, spelled out in our Bill of Rights, such as trial by jury. Other countries’ concepts of fundamental law may include such practices as same-sex marriages, polygamy, arranged marriages between cousins, so-called honor killings of women who reject the arrangements, cutting off hands as a punishment for theft, stoning to death as punishment for adultery, and prohibiting the private ownership of guns.

Justices Ruth Bader Ginsburg and Stephen Breyer, concurring in *Grutter v. Bollinger* (2003), cited a United Nations treaty to justify the University of Michigan Law School’s racial preferences: “The International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994 . . . endorses special and concrete measures to ensure the adequate development and protection of certain racial groups . . . for the purpose of

guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.”

The Senate ratified that treaty under pressure from the Clinton Administration thirty years after President Lyndon B. Johnson signed it. That is an example of how United Nations treaties come back to bite us by interfering with U.S. laws and customs.

In *Atkins v. Virginia* (2002), citing an amicus brief from the European Union, Justice John Paul Stevens rewrote the Eighth Amendment to outlaw capital punishment for those with low IQ scores. The EU warned us, Stevens wrote, that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.” Justice Scalia retorted, “The views of other nations cannot be imposed upon Americans.” But five justices did impose foreign views on us.

Justices Stevens, Souter, and Ginsburg again turned to a foreign authority in writing a 2004 opinion. Dissenting from a decision in favor of private property rights, they invoked the views of a foreign supreme court justice for the purpose of departing from the plain meaning of U.S. laws (*BedRoc Limited v. United States*).

Although the U.S. Constitution specifically endorses capital punishment and puts no restrictions on age, Justice Anthony Kennedy’s majority opinion in *Roper v. Simmons* (2005) cited foreign laws, “international opinion,” and even an unratified treaty to rationalize overturning more than two hundred years of American law and history. Five justices—Kennedy, Ginsburg, Breyer, Stevens, and

Souter—rewrote the Eighth Amendment and overturned the laws of Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Nevada, New Hampshire, North Carolina, Oklahoma, Pennsylvania, South Carolina, Texas, Utah and Virginia, all states that allowed the death penalty for a seventeen-year-old who commits a particularly shocking murder. The murder involved in this case was extremely brutal and premeditated.

Kennedy's main argument was that he saw a "trend" against juvenile capital punishment in foreign countries: since 1989, seven countries (Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, Congo, and China) have banned juvenile capital punishment. However, no such trend exists in the United States; since 1989, only four U.S. states have legislated against the juvenile death penalty (but none of them was executing juveniles anyway).

Kennedy claimed that most other countries don't execute seventeen-year-olds. But most other countries don't have due process-based capital punishment at all, so there is no distinction between criminals over and under age eighteen. Furthermore, most other countries don't allow jury trials or other guarantees found in the Bill of Rights, so who knows whether the accused ever gets what we would call a fair trial? More than 90 percent of jury trials are in the United States, and we certainly don't want to conform to non-jury-trial countries.

The five supremacist justices must think they can dictate the evolution of treaties as well as of the Constitution. They cited the United Nations Convention on the Rights

of the Child, which our Senate year after year has refused to ratify. They also cited the International Covenant on Civil and Political Rights, which the Senate ratified only with a reservation specifically excluding the matter of juvenile capital punishment.

As Justice Scalia pointed out in dissent, the Court's invocation of foreign law is both contrived and disingenuous. The big majority of countries reject U.S.-style abortion on demand, but the supremacist justices conveniently ignore that international opinion. Justice Scalia summed it up like this: "the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand."

Some state court judges are likewise infected with the itch to take guidance from foreign courts. The chief justice of the Massachusetts supreme judicial court (the court that issued the 2003 *Goodridge* decision demanding same-sex marriage licenses), Margaret Marshall, is "an advocate of mining the work of foreign courts," according to a writer for the journal *Legal Affairs*. That was the topic of Marshall's post-*Goodridge* lecture at New York University Law School. The reporter, who attended the lecture, received the clear impression that Marshall is strongly influenced by the high court of South Africa, which has promoted gay rights. Although Marshall (who is a South African native) did not cite a South African court in *Goodridge*, Harvard law professor Martha Minow, who has known Marshall for fifteen years, commented that *Goodridge* "is like a South Africa decision."

Justice Margaret Marshall did, however, cite the Canadian court that approved same-sex marriage. In one sentence, she managed to invoke foreign law, claim that judges can rewrite our country's laws, and slyly assert that the Constitution is evolving: "We concur with this [Canadian] remedy, which is entirely consonant with established principles of jurisprudence empowering a court to refine a common-law principle in light of evolving constitutional standards."

In March 2004, the European Court of Human Rights in Strasbourg ruled that laws preventing convicted prisoners from voting in elections are a breach of their human rights. The court ruled that it cannot accept "an absolute bar on voting by any serving prisoner"

Nearly all of America's fifty states deny the franchise to prisoners and also impose some kind of restriction on voting by convicted felons who have been released from prison. Will the Democrats now seek the votes of prisoners, citing the Strasbourg decision to persuade activist liberal judges to open up this new constituency?

THE GINSBURG-O'CONNOR TWO-STEP

Justices Ruth Bader Ginsburg and Sandra Day O'Connor apparently can't resist displaying their fascination with foreign opinion.

In August 2003, Ginsburg joined Hillary Clinton, Janet Reno, anti-Pledge-of-Allegiance judge Stephen Reinhardt, and other legal elites from Democratic administrations to

launch a new organization called the American Constitution Society. Its mission is to challenge the Federalist Society, which supports constitutionalist judges and America's unique system of federalism.

A Jimmy Carter appointee, Judge Reinhardt, who may hold the modern record for being overturned the most times by the Supreme Court, set the tone of the conference, saying that the words "liberal judge" are not "dirty words." He urged judges to return to the liberal philosophy of Earl Warren, William Brennan, and William O. Douglas.

Ginsburg's contribution was to tell the American Constitution Society that "your perspective on constitutional law should encompass the world." She urged her colleagues to look beyond our borders in handling death penalty and homosexual rights cases. She added, "Our island or lone ranger mentality is beginning to change."

Justice O'Connor told the Southern Center for International Studies in Atlanta on October 31, 2003, that "I suspect that over time we will rely increasingly, or take notice at least increasingly, on international and foreign courts in examining domestic issues."

At a speech dedicating Georgetown University's new international law center on October 26, 2004, O'Connor said that international law "is vital if judges are to faithfully discharge their duties." She continued, "International law is a help in our search for a more peaceful world." She failed to give any example of international law preventing a war.

The effort to import international law into the United States has nothing to do with promoting peace. The purpose is to give a veneer of respectability to liberals who want to

change our Constitution without obtaining approval of the American people through the amendment process.

Back on the public platform to address the American Society of International Law on April 1, 2005, Justice Ginsburg again endorsed the practice of consulting foreign and international law. She ridiculed the notion that “the U.S. Constitution is a document essentially frozen in time as of the date of its ratification”—forgetting that our Constitution has been successfully amended twenty-seven times since then.

INTERNATIONAL LAW IS POLITICS

In addition to the unacceptable citations of foreign laws, treaties, court opinions, and briefs to decide U.S. cases, we hear judges, lawyers, and politicians talking casually about “international law.” That is not law as we understand the term at all; it is just international politics.

The people who seek global governance are using supremacist judges to put Americans in the noose of fabricated law (i.e., not passed by any legislature) written (usually *ex post facto*) by foreign bureaucrats or United Nations functionaries, and administered by foreign bureaucrats pretending to be judges. The goal of these globalists is the worldwide rule of judges.

A tremendous effort was made to lock the United States into the International Criminal Court (icc) through a treaty negotiated during the Clinton Administration. Clinton signed the icc treaty on New Year’s Eve 2000, one of his last acts as president. Fortunately, President George W.

Bush *unsigned* the ICC treaty in 2002. If the U.S. Senate had ratified the ICC, U.S. troops and even government officials would be subject to prosecution by a court in the Hague, where Americans would not, of course, have U.S. Bill of Rights protections such as trial by a jury of their peers.

The impudence of these foreign courts knows no bounds. The ICC claims jurisdiction over Americans even though we are not a party to the ICC treaty. Our government should never acquiesce in such judicial arrogance.

Further evidence of judicial power-grabbing includes the tribunals of the North American Free Trade Agreement (NAFTA). On February 6, 2001, a NAFTA tribunal ordered the United States to ignore U.S. environmental law and forthwith admit tens of thousands of Mexican trucks that do not meet U.S. standards. The NAFTA tribunal claimed to derive its authority from the NAFTA “treaty,” but NAFTA was not (as it should have been) a treaty ratified by the Senate; it was an executive agreement implemented by an act of Congress passed by a simple majority vote. In *Department of Transportation v. Public Citizen* (2004), the Supreme Court voted 9 to 0 to allow the executive branch to implement the decision of the NAFTA tribunal ordering that U.S. roads be opened to Mexican trucks.

Another NAFTA tribunal, after hearing appeals from two U.S. state court decisions, upheld a Massachusetts court decision and overturned a Mississippi court decision. These judgments cannot be appealed. The American serving on this tribunal, Abner Mikva (a former activist federal judge and U.S. Representative) commented: “If Congress had known that there was anything like this in NAFTA, they

would never have voted for it.” The part of NAFTA that created this tribunal, chapter II, received scant attention when NAFTA was passed in 1993.

The NAFTA advocates are planning to expand NAFTA (a three-nation agreement: the U.S., Canada and Mexico) into FTAA (Free Trade Area of the Americas: a thirty-four-nation agreement). The European Union experience shows that economic integration leads to political integration, a loss of national sovereignty and self-government, and submission to the rule of unelected bureaucrats and judges.

The justices’ use of foreign sources has encouraged liberal politicians to appeal to foreign tribunals to change the U.S. Constitution. Eleanor Holmes Norton, the Washington, D.C., delegate to Congress, wants foreign authorities to overturn the clause in Article I, Section 8 that authorizes Congress to govern the District of Columbia. She has appealed to the Helsinki Commission to enforce a ruling of the Organization of American States (OAS), which previously ruled that this paragraph violates the American Declaration of the Rights and Duties of Man (the governing charter of the OAS).

When John G. Roberts was questioned during his confirmation hearings, he properly replied that reliance on foreign law is a “misuse of precedent” that wrongly “expands the discretion of the judge” and substitutes a judge’s “personal preferences” for the Constitution. It’s time for the American people and Congress to make it clear to all judges that it is their duty to base their decisions on the U.S. Constitution, and that it is a violation of their oath of office to base decisions on foreign decisions or practices.

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- Justice Breyer made his statement on ABC News on July 6, 2003.
- ABA president Alfred Carlton and Harvard Law School professor Laurence Tribe were quoted by CNSNews.com, July 11, 2003.
- Ginsburg is not known for her wit, but when she addressed the liberal lawyers of the American Constitution Society in August 2003, she managed to show her disdain for both President Bush and Chief Justice William Rehnquist with a triple entendre. Referring to Supreme Court decisions, she urged us to get rid of “the Lone Ranger mentality.” First, this was a personal slap at Bush because he is closely associated with the word ranger: his baseball club was the Texas Rangers, and his top fundraisers are affectionately called Rangers. Second, Ginsburg’s remark was a not-so-subtle sneer at Bush’s foreign policy, which has been impudently criticized by snooty Europeans for its cowboy approach. Third, Ginsburg’s comment sniped at Rehnquist, who had a small figurine of the Lone Ranger in his office, reminding him of the years when he was the lone conservative on the Supreme Court. Ginsburg’s Lone Ranger metaphor was characteristically feminist, as the feminists despise everything masculine, and Rangers are very masculine. Ginsburg’s speech to the American Constitution Society was reported by the As-

sociated Press, Aug. 3, 2003, and by MSNBC on Aug. 4, 2003.

- The comment about Margaret Marshall is from “A Bold Stroke” by Emily Bazelon, *Legal Affairs*, May-June 2004.
- The European Court of Human Rights decision granting voting rights to prisoners was *Hirst v. The United Kingdom* (No. 2) issued on March 30, 2004.
- For news of the NAFTA Chapter 11 decisions, see the *New York Times*, April 19, 2004.
- Robert H. Bork’s book, *Coercing Virtue: The Worldwide Rule of Judges* (AEI Press, 2003), is an excellent account of how judges worldwide are setting themselves up as the ruling class.

LESSON FOUR

JUDGES UNDERMINE U.S. SOVEREIGNTY

QUESTIONS FOR DISCUSSION:

- ★ Are you shocked that U.S. judges say they can use foreign law or cases to decide American law and cases? Do you think using foreign sources violates judges' oath of office to support the U.S. Constitution?
- ★ How did the Supreme Court use foreign law to throw out the Texas anti-sodomy law?
- ★ How did the Supreme Court use foreign law to overturn the laws of 20 states in regard to capital punishment for 17-year-olds?
- ★ Should United Nations treaties be used to decide questions of U.S. domestic law?
- ★ Was the Massachusetts court decision on same-sex marriage influenced by foreign law?
- ★ Why do you think liberal judges like to cite foreign law?
- ★ Discuss recent speeches made by Justices Ginsburg and O'Connor about the use of foreign law.
- ★ As an example of feminist pettiness, comment on Justice Ginsburg's sniping at "the Lone Ranger mentality."
- ★ Is there really such a thing as "international law"?