




2013

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Stephen C. McCaffrey  
*Pacific McGeorge School of Law*

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## Recommended Citation

Stephen C. McCaffrey, *There's a Whole World Out There: Justice Kennedy's Use of International Sources*, 44 *McGeorge L. Rev.* 201 (2013).

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## There's a Whole World Out There: Justice Kennedy's Use of International Sources

Stephen C. McCaffrey\*

### I. INTRODUCTION

Justice Anthony M. Kennedy, a pivotal member of the Supreme Court, has shown a tendency in a number of his opinions for the Court to draw upon international sources—that is, legal materials from countries and systems outside of the United States. This is particularly true in three cases<sup>1</sup>: *Lawrence v. Texas*,<sup>2</sup> *Roper v. Simmons*,<sup>3</sup> and *Graham v. Florida*.<sup>4</sup> This Article will briefly survey Justice Kennedy's use of international materials in these cases and note reactions to this practice by other members of the Court.

#### A. *New Legal Isolationism in America?*

It takes no more than a glance at the earliest volumes of *U.S. Reports* to confirm that the practice of drawing upon international sources is nothing new to the Supreme Court. Beginning with its earliest opinions in the 1790s, the Court has often referred to international law and non-American materials.<sup>5</sup> Chief Justice John Jay explained in the Court's 1793 decision in *Chisholm v. Georgia*, “the United States had, by taking a place among the nations of the earth, become amenable to the laws of nations; and it was their interest as well as their duty to

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\* Professor of Law, University of the Pacific, McGeorge School of Law.

1. Another opinion for the Court by Justice Kennedy, *Abbott v. Abbott*, 130 S. Ct. 1983 (2010), could also be cited in this connection, but will not be discussed here because case law of other countries was used in relation to the interpretation of a treaty, the Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 102 Stat. 437, 1343 U.N.T.S. 89, T.I.A.S. No. 11670, S. Treaty Doc. No. 99–11, not in the interpretation of the Constitution. *Abbott*, 130 S. Ct. at 1987. The issue in *Abbott* produced a rather odd constellation of votes on the Court, with Justices Scalia, Ginsburg, Alito, and Sotomayor joining Justice Kennedy in the majority, and Justice Stevens filing a dissenting opinion in which Justices Thomas and Breyer joined. *Id.* But Justice Stevens' dissent was more critical of the majority's conclusion that the views of “sister signatories” reflected the “broad acceptance” of the interpretation adopted by the majority claimed by Justice Kennedy than of the use of foreign sources itself. *Id.* at 2008–09 (Stevens, J., dissenting).

2. 539 U.S. 558 (2003).

3. 543 U.S. 551 (2005).

4. 130 S. Ct. 2011 (2010).

5. See David L. Sloss, Michael D. Ramsey & William S. Dodge, *International Law in the Supreme Court to 1860*, in *INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE* 7 (D. Sloss, M. Ramsey & W. Dodge eds., 2011).

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provide, that those laws should be respected and obeyed . . . .”<sup>6</sup> The Court has even relied on international law as the rule of decision in some cases.<sup>7</sup>

What is new is the strident criticism of this practice in the first decade of the twenty-first century,<sup>8</sup> by both dissenting members of the Court<sup>9</sup> and commentators in academia,<sup>10</sup> politics,<sup>11</sup> and the media.<sup>12</sup> This criticism appears to reflect an unfortunate, isolationist, and almost xenophobic tendency—enacted into law in Oklahoma<sup>13</sup> and several other states<sup>14</sup>—toward barring courts from relying on international or foreign laws.

But Justice Kennedy, continuing the long tradition of the Supreme Court, has not refrained from mentioning international sources, despite blistering dissents by some of his colleagues on this point. To read these dissenting opinions, and some of the reactions by commentators in the media, one would think that Justice Kennedy, writing for the Court, relied entirely upon international authority as the basis of his decisions.

We can perhaps forgive media commentators for not actually having read the opinions in question; if they had, they would know that international authority was referred to merely to confirm a decision at which the Court had already arrived. The Court was not blazing a new trail, but was rather joining other Western nations and the rest of the international community.

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6. 2 U.S. 419, 474 (1793); *see also, e.g.*, *Ware v. Hylton*, 3 U.S. 199, 281 (1796).

7. *See, e.g.*, *Paquete Habana*, 175 U.S. 677 (1900) (relying on a rule of customary international law).

8. *See* Mark Tushnet, *International Law and Constitutional Interpretation in the Twenty-First Century: Change and Continuity*, in *INTERNATIONAL LAW IN THE U.S. SUPREME COURT*, *supra* note 5, at 507–17.

9. *See infra* notes 23, 33–40, and accompanying text.

10. *See, e.g.*, *H.R. Res. on the Appropriate Role of Foreign Judgments in the Interpretation of the Constitution of the U.S.: Hearing on H.R. Res. 97 Before the H. Comm. on the Judiciary*, 109th Cong. 109–40 (2005) (statement of Prof. Nicholas Quinn Rosenkranz) (describing and endorsing a proposed constitutional amendment barring references to the laws of other states in construing the Constitution) *referred to in* Tushnet, *supra* note 8, at n.3. The amendment proposed by Professor Rosenkranz would read: “This Constitution was ordained and established by the People of the United States, and so it shall not be construed by reference to the contemporary laws of other nations.” Nicholas Quinn Rosenkranz, *An American Amendment*, 32 *HARV. J. L. & PUB. POL’Y* 475, 482 (2009). *See generally* Mark Tushnet, *When Is Knowing Less Better than Knowing More?: Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law*, 90 *MINN. L. REV.* 1275 (2006), for the critical analysis of the objections to referring to foreign law.

11. *See* the examples cited by Tushnet, *supra* note 8, at 507 n.3.

12. *See, e.g.*, C. Levy, *Sotomayor and International Law*, *WALL ST. J.*, July 14, 2009, at A13; Editorial, *Kagan: Foreign Law Trumps Constitutional Law*, *WASH. TIMES*, May 25, 2010, at 2; Editorial, *Sharia in America’s Courts*; *Koranic Law: Coming to a City Near You*, *WASH. TIMES*, Jan. 12, 2012, at 2; and Op-Editorial, *Legal Eagle: Foreign Laws Don’t Apply to U.S. Cases*, *OKLAHOMAN*, Apr. 17, 2009, at 8A.

13. *Awad v. Zirriax*, 670 F.3d 1111 (10th Cir. 2012).

14. *See, e.g.*, *LA. REV. STAT. ANN.* § 9:6001 (Supp. 2012); *ARIZ. REV. STAT. ANN.* § 12-3101 to -3103 (2011); *TENN. CODE ANN.* § 20-15-102 (2010); *see generally* Martha F. Davis & Johanna Kalb, *Oklahoma and Beyond: Understanding the Wave of State Anti-Transnational Law Initiatives*, 87 *IND. L.J. SUPP.* 1, 3 (2011) (citing laws, initiatives, and constitutional amendments of a number of states).

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This is evident from the following discussion of the main cases in question.

*B. Justice Kennedy's Use of International Sources*

We can begin with *Lawrence v. Texas*, decided by the Court in 2003.<sup>15</sup> *Lawrence*, as is now well known, involved a conviction under a Texas statute that criminalized certain intimate sexual conduct between two persons of the same sex.<sup>16</sup> Overruling a prior case, the Court held, in an opinion by Justice Kennedy, that the Texas statute violated the Due Process Clause.<sup>17</sup>

Although it does not involve international sources, I cannot resist quoting the opening paragraph of the opinion, not only because it sets the stage, but because it is a shining example of the eloquence and inspirational language of which Anthony Kennedy is capable. Justice Kennedy wrote:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.<sup>18</sup>

By framing the case in this way, Justice Kennedy won the rhetorical battle in the first paragraph of the opinion.

But, of course, Justice Kennedy went on to marshal evidence, both historical and contemporary, concerning the treatment of same-sex relations in British and U.S. law. He concluded that “the historical grounds relied upon in *Bowers* [the earlier decision of the Court that *Lawrence* overruled] are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.”<sup>19</sup>

Justice Kennedy reserved particular attention for Chief Justice Burger’s remark in his opinion in *Bowers* that “[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards.”<sup>20</sup>

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15. 539 U.S. 558 (2003).

16. *Id.* at 562.

17. *Id.* at 578–79.

18. *Id.* at 562.

19. *Id.* at 571.

20. *Id.* (quoting *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986)).

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Justice Kennedy responded in a way that well illustrates his thinking:

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 laws punishing homosexual conduct. Parliament enacted the substance of those recommendations 10 years later.

Of even more importance, almost five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today's case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. 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.<sup>21</sup>

After demonstrating that the Supreme Court had rejected the foundations of *Bowers* in other decisions, Justice Kennedy returned to the broader picture. He observed:

To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in [the case referred to earlier]. Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.<sup>22</sup>

These references did not escape Justice Scalia's attention. In his dissenting opinion, joined by Chief Justice Rehnquist and Justice Thomas, Justice Scalia responded: "The Court's discussion of . . . foreign views . . . is . . . meaningless

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21. *Id.* at 572–73 (citations omitted).

22. *Id.* at 576–77 (citations omitted).

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dicta. Dangerous dicta, however, since ‘this Court . . . should not impose foreign moods, fads, or fashions on Americans.’”<sup>23</sup> Here, Justice Scalia was quoting from Justice Thomas’s concurrence in denying certiorari in another case,<sup>24</sup> evidently unable to find any actual precedent to use as support for his views.

I can be more brief with respect to the other two cases, because the dynamics within the Court in *Lawrence* set the tone for the cases to follow. In *Roper v. Simmons*, a Missouri court sentenced Mr. Simmons to death for a murder he committed when he was seventeen years old.<sup>25</sup> Justice Kennedy authored the Court’s opinion, joined by Justices Stevens, Souter, Ginsburg, and Breyer, affirming the Missouri Supreme Court’s grant of the defendant’s petition for a writ of habeas corpus. The Court held that execution of individuals who were under eighteen at the time of their capital crimes is prohibited by the Eighth and Fourteenth Amendments.<sup>26</sup>

After deciding on the basis of U.S. authority that the death penalty cannot be imposed on juvenile offenders, Justice Kennedy devoted the entirety of Part IV of his opinion to the practice in other countries.<sup>27</sup> The following portions of this analysis indicate the flavor of his thinking:

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. Yet at least from the time of the Court’s decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of “cruel and unusual punishments.”<sup>28</sup>

Justice Kennedy was here referring to *Trop v. Dulles*, a 1958 plurality opinion in which the Court found it necessary to take into account “the evolving standards of decency that mark the progress of a maturing society” to determine which punishments are so disproportionate as to be cruel and unusual.<sup>29</sup>

Justice Kennedy also noted that “Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition

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23. *Id.* at 598 (Scalia, J., dissenting) (quoting *Foster v. Florida*, 537 U.S. 990 (2002) (Thomas, J., concurring in denial of certiorari)).

24. *Id.*

25. 543 U.S. 551, 556 (2005).

26. *Id.* at 554, 559–60.

27. *Id.* at 575–78.

28. *Id.* at 575.

29. 356 U.S. 86, 100–01 (1958) (plurality opinion).

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on capital punishment for crimes committed by juveniles under 18.”<sup>30</sup> This chastening statement is laudable,<sup>31</sup> but thus far has not succeeded in moving the government to become a party to that treaty.

Justice Kennedy concluded:

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. The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.<sup>32</sup>

Justices O'Connor and Scalia filed dissenting opinions.<sup>33</sup> Justice Scalia devoted an entire section of his opinion, Part III, to the majority's use of, what he called, “the views of other countries and the so-called international community.”<sup>34</sup> He charged that while the majority examined the record of application of the juvenile death penalty in the twenty U.S. states that permit it, “the Court is quite willing to believe that every foreign nation—of whatever tyrannical political makeup and with however subservient or incompetent a court system—in fact *adheres* to a rule of no death penalty for offenders under 18.”<sup>35</sup> Then Justice Scalia contended that “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.”<sup>36</sup> This was not, of course, a premise of the Court's reasoning.<sup>37</sup> It is rather a straw man that Justice Scalia set up so he can easily knock it down.<sup>38</sup>

Justice Scalia concluded his discussion of foreign law with an attack on the final paragraph of Justice Kennedy's opinion for the Court, which reads: “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.”<sup>39</sup>

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30. *Roper*, 542 U.S. at 576.

31. *See id.*

32. *Id.* at 578 (citation omitted).

33. *Id.* at 587 (O'Connor, J., dissenting); *id.* at 607 (Scalia, J., dissenting).

34. *Id.* at 622–28 (Scalia, J., dissenting).

35. *Id.* at 623.

36. *Id.* at 624.

37. *See id.* at 575–78.

38. *See id.* at 624 (Scalia, J., dissenting).

39. *Id.* at 628 (quoting *id.* at 578).

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Justice Scalia, obviously unsettled by this eloquent explanation, fired back:

The Court's parting attempt to downplay the significance of its extensive discussion of foreign law is unconvincing. "Acknowledgment" of foreign approval has no place in the legal opinion of this Court *unless it is part of the basis for the Court's judgment*—which is surely what it parades as today.<sup>40</sup>

Justice Scalia disdains the idea that the United States should conform with the rest of the world. This might be a defensible doctrine if it dealt with economic or other matters not fitting within the field of international human-rights law. But the United States, whether Justice Scalia likes it or not, is bound by international law, including the branch of international law dealing with human rights. If we are an outlier in this area, the clear implication is that we are in breach of relevant treaties or, if the United States is not a party to those treaties, customary international law. If this is what Justice Scalia wishes for us, it is something that runs entirely counter to the tenets of the Framers of our Constitution that Justice Scalia holds so dear.<sup>41</sup>

Justice O'Connor also dissented from the Court's judgment.<sup>42</sup> On the use of what she called "foreign and international law,"<sup>43</sup> Justice O'Connor had the following to say:

Without question, there has been a global trend in recent years toward abolishing capital punishment for under-18 offenders. Very few, if any, countries other than the United States now permit this practice in law or in fact. While acknowledging that the actions and views of other countries do not dictate the outcome of our Eighth Amendment inquiry, the Court asserts that "the overwhelming weight of international opinion against the juvenile death penalty . . . does provide respected and significant confirmation for [its] own conclusions." Because I do not believe that a genuine *national* consensus against the juvenile death penalty has yet developed, and because I do not believe the Court's moral proportionality argument justifies a categorical, age-based constitutional rule, I can assign no such *confirmatory* role to the international consensus described by the Court. . . .

Nevertheless, I disagree with JUSTICE SCALIA's contention . . . that foreign and international law have no place in our Eighth Amendment

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40. *Id.*

41. *See supra* notes 5–7 and accompanying text (providing early instances of the Court's respect for international law).

42. *Id.* at 587–607 (O'Connor, J., dissenting).

43. *Id.* at 604.



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jurisprudence. Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency. This inquiry reflects the special character of the Eighth Amendment, which, as the Court has long held, draws its meaning directly from the maturing values of civilized society.<sup>44</sup>

These passages are interesting for several reasons. First, Justice O'Connor does not take issue with Justice Kennedy's use of international authority to confirm conclusions the Court has arrived at independently.<sup>45</sup> Second, Justice O'Connor seems to go even further than Justice Kennedy, suggesting that "foreign and international law is relevant to [the Court's] *assessment* of evolving standards of decency"<sup>46</sup>—that is, that such sources are relevant to the initial assessment, not just as confirmation of a conclusion at which the Court has already arrived. Finally, one cannot help but see in these lines a reflection of the close intellectual relationship Justices O'Connor and Kennedy had forged over the years and, in contrast, the rather antagonistic one that Justice Scalia had precipitated with Justice O'Connor.<sup>47</sup>

The final case I would like to touch upon is *Graham v. Florida*, a 2010 decision of the Court.<sup>48</sup> *Graham* involved the question of whether imposing a sentence of life without the possibility of parole on a juvenile offender violates the Eighth Amendment's prohibition of cruel and unusual punishment.<sup>49</sup> *Graham* was sixteen when he committed armed burglary and another crime.<sup>50</sup> After he violated the terms of his probation by committing other crimes, he was sentenced to life in prison.<sup>51</sup> Florida had abolished its parole system, leaving executive clemency as *Graham*'s only possibility for release.<sup>52</sup>

The Court held that imposing a sentence of life without the possibility of parole on a juvenile offender violates the Eighth Amendment's prohibition of cruel and unusual punishment.<sup>53</sup> In an opinion by Justice Kennedy, the Court again found support for its conclusion in the practices of other nations and the

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44. *Id.* at 604–05 (alterations in original) (citation omitted).

45. *See id.*

46. *Id.* at 604 (emphasis added).

47. *See, e.g.,* David M. O'Brien, *High-Court Power Play: Thomas, Scalia vs. O'Connor*, ORLANDO SENTINEL (Mar. 15, 1992), [http://articles.orlandosentinel.com/1992-03-15/news/9203130247\\_1\\_scalia-joined-justice-antonin-scalia-thomas](http://articles.orlandosentinel.com/1992-03-15/news/9203130247_1_scalia-joined-justice-antonin-scalia-thomas) (on file with the *McGeorge Law Review*) ("Tensions between Scalia and O'Connor went public in the 1989 decision *Webster vs. Reproductive Health Services*.").

48. 130 S. Ct. 2011 (2010).

49. *Id.* at 2017–18.

50. *Id.* at 2018–20.

51. *Id.*

52. *Id.* at 2020.

53. *Id.* at 2034.

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international community.<sup>54</sup> Justice Kennedy observed that the United States, “in continuing to impose life without parole sentences on juveniles who did not commit homicide, . . . adheres to a sentencing practice rejected the world over.”<sup>55</sup> He then wrote that while “[t]his observation does not control our decision[ and t]he judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment,”<sup>56</sup> “[t]he climate of international opinion concerning the acceptability of a particular punishment is also not irrelevant.”<sup>57</sup>

The *amici* of the State of Florida had argued “that no international legal agreement that is binding on the United States prohibits life without parole for juvenile offenders and [urged the Court] to ignore the international consensus.”<sup>58</sup> Justice Kennedy’s response was firm:

These arguments miss the mark. The question before us is not whether international law prohibits the United States from imposing the sentence at issue in this case. The question is whether that punishment is cruel and unusual. In that inquiry, “the overwhelming weight of international opinion against” life without parole for nonhomicide offenses committed by juveniles “provide[s] respected and significant confirmation for our own conclusions.”<sup>59</sup>

Justice Kennedy further explained:

The Court has treated the laws and practices of other nations and international agreements as relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world’s nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court’s rationale has respected reasoning to support it.<sup>60</sup>

Rather remarkably, there was no dissent from this section of the opinion.

The foregoing opinions of Justice Kennedy show that he has continued a longstanding practice of the Court of referring to international materials in decisions on matters of fundamental constitutional moment.<sup>61</sup> These opinions, when read together, raise the tantalizing question of whether Justice Kennedy may be laying the groundwork for a larger role for international materials in

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54. *Id.* at 2033–34.

55. *Id.* at 2033.

56. *Id.* (citations omitted).

57. *Id.* (first alteration in original) (internal quotations omitted).

58. *Id.* at 2034 (citing the Solidarity Center for Law and Justice).

59. *Id.* (alteration in original) (quoting *Roper v. Simmons*, 543 U.S. 551 (2005)).

60. *Id.*

61. *See supra* note 5 and accompanying text.

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future cases—one that would use such materials not only to support or confirm a constitutional interpretation on which the Court had already decided, but would play a role in the determination of the proper interpretation itself.

### III. CONCLUSION

It is interesting to speculate on what motivates Justice Kennedy to give a special place to international sources in some of his opinions. It is not improbable that one factor that is at least partly responsible for Justice Kennedy's awareness of the way in which other countries and systems handle some of the difficult issues that come before the Supreme Court is his having taught for nearly a quarter of a century in University of the Pacific McGeorge School of Law's summer program at the University of Salzburg in Austria.<sup>62</sup> Justice Kennedy taught a course in this program called Fundamental Rights, with Professor Sionaidh Douglas-Scott, now of Oxford University. Professor Douglas-Scott focused on the European human rights system while Justice Kennedy examined some of the difficult issues the United States Supreme Court has had to deal with in the context of our Bill of Rights. Thus, this amounted to a course in comparative human rights law. I suspect that just as the fortunate students learned much from these two professors, the professors learned from each other, as well. It does not seem far-fetched to imagine that regular exposure to developments in Europe's advanced human rights system may have strengthened Justice Kennedy's resolve to draw upon that experience in appropriate cases and to defend doing so against assaults from some of his colleagues on the Court.

But whatever his motivation for referring to international sources, I believe Justice Kennedy's opinions are richer and more compelling for this practice, and that the jurisprudence of the Supreme Court is strengthened significantly by it. For these reasons, it is to be hoped that Justice Kennedy will continue to take international materials into account as appropriate in future opinions.

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62. For more information about the summer program, see UNIVERSITY OF THE PACIFIC, MCGEORGE SCHOOL OF LAW, SUMMER IN SALZBURG, AUSTRIA, [http://mcgeorge.edu/Future\\_Students/JD\\_Program/Global\\_Impact/Study\\_Abroad/Summer\\_in\\_Salzburg.htm](http://mcgeorge.edu/Future_Students/JD_Program/Global_Impact/Study_Abroad/Summer_in_Salzburg.htm) (last visited Sept. 28, 2012) (on file with the *McGeorge Law Review*).