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Why Not Costa Rica? Judging the United States by Foreign Law

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One of the most important controversies in constitutional law today arises out of the increasing tendency of some judges, and particularly justices of the Supreme Court, to use decisions of foreign tribunals as authority for interpreting the United States Constitution.

In judicial opinions, published articles, television interviews, and public speeches, Justices Stephen Breyer and Ruth Bader Ginsburg, along with former Justice Sandra Day O'Connor, have advocated the use of decisions of foreign courts to help U.S. judges ascertain the meaning of our nation's statutes and constitutional guarantees. Ginsburg was perhaps most specific when she asked why judges in the United States should not look to decisions of the supreme courts of Canada, South Africa, Israel, or Germany, or the European Court of Human Rights, in deciding questions of United States constitutional law.

Those justices, and others, have put their arguments into practice. In the 2003 Lawrence v. Texas decision, the United States Supreme Court overruled its own precedent and declared that the constitutional guarantee of due process protects homosexual conduct. Speaking for the Court, Justice Anthony Kennedy cited three decisions of the European Court of Human Rights in support of his conclusion. Two years later, in Roper v. Simmons, the Court held that the execution of individuals who were under 18 years of age when they committed their capital crimes constitutes "cruel and unusual punishment," in violation of the U.S. Constitution. The Court, again speaking through Kennedy, relied heavily on recent legal developments in the United Kingdom, Canada, India, and the European Union.

It is significant that those justices who today give weight to foreign judicial decisions and other foreign legal developments invariably do so in order to establish that something that was once clearly constitutional (e.g., the prohibition of homosexual sodomy, or the application of the death penalty to a youth who committed premeditated, wanton, and cruel murder) has now become unconstitutional.

Reliance on foreign decisions thus has not been a neutral practice, such as might likely produce "conservative" as well as "liberal" conclusions; rather, it is closely associated with the "living Constitution" school of interpretation, whose adherents argue that the meaning of the U.S. Constitution "changes with the times." In our day, that view is always associated with judicial activism and liberal politics.

The conclusive argument against relying on foreign cases in interpreting our Constitution is, of course, that those cases are simply irrelevant; that is, while they may tell us what some justices would like the U.S. Constitution to mean, they tell us absolutely nothing about what it does mean. But while its irrelevance should be the decisive argument against reliance on foreign decisions, it is not the only argument worth considering. Such practice is necessarily subjective; it leaves each judge free to invoke only those foreign decisions that he or she likes, while ignoring the rest. Nothing demonstrates this judicial arbitrariness more clearly than the failure of the devotees of foreign case law even to mention two of the most important pro-life judicial decisions of our day, rendered in 2000 and 2001, respectively, by the Constitutional Chamber of the Supreme Court of Justice of Costa Rica.

The first of these decisions came in a case in which a citizen named Hermes Navarro del Valle challenged the constitutionality of a presidential decree authorizing and regulating "in vitro fertilization and embryo transfer" in Costa Rica. The Constitutional Chamber held the decree in question unconstitutional. The chamber recognized that human life begins with fertilization and that the use of a process (in vitro fertilization and transfer) in which the vast majority of those conceived will—and are expected to—die and be discarded violates the right to life and dignity guaranteed by the Costa Rican Constitution and by various international conventions to which Costa Rica is a party.

In 2001, Kathia Cecilia Saborio Obando, four-and-a-half months pregnant, entered a government hospital with labor pains. A preliminary examination led the attending physician to conclude that the child was probably dead, and tests soon confirmed that conclusion. Saborio and her husband immediately requested their unborn child's remains so that they could arrange for a Catholic burial. The hospital denied the request, relying on its policy of subjecting miscarried fetuses to laboratory testing and subsequent disposal in a common hospital burial place. Saborio sued the hospital and its superintendent, seeking the remains of her child and basing her claim on the constitutional right of every person to be treated with dignity. In a unanimous opinion, the Constitutional Chamber ordered the hospital authorities to deliver the child's remains to the parents within two days.

In its opinion, the Constitutional Chamber acknowledged that at the time of the fertilization of the egg, all of the characteristics of a new and unique person are present. The chamber concluded that as soon as life begins the per-

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son is under the protection of the law, and any exception to that principle would destroy the essence of the right to life. Summarizing, the chamber said, "Once conceived, a person is a person, and we have before us a living being, with the right to be protected by the legal order."

In deciding the case, the Constitutional Chamber relied on the Costa Rican Constitution and several international conventions that have constitutional status in Costa Rica. Any U.S. judge could properly ignore Saborio Obando and Narrao Del Valle on the grounds that the documents the Costa Rican tribunal relied on have no bearing on the meaning of the U.S. Constitution. But those judges in the United States who say that their decisions should be informed by the case law of foreign tribunals should at least pay respectful attention to what the Costa Rican court has said—unless, of course, our judges’ proclaimed respect for foreign decisions is merely cover for their own policy preferences.

Perhaps Costa Rican jurisprudence became unattractive to internationally inclined U.S. jurists as early as 1992, when the Constitutional Chamber declared numerous government decrees regulating private education unconstitutional. The chamber said, in pertinent part:

By conceiving of private [including Catholic] education as "public service," that is to say, as an activity belonging fundamentally to the State, in which private entities collaborate by means of a sort of "concession," and which the State authorizes as a form of "official instruction," subject to regulation, direction, even hierarchy and discipline, by the Ministry of Public Education and the Superior Council on Education, [the decrees in question] gravely violate [various constitutional and international human rights guarantees]. . . . Freedom of instruction, in particular, and the Law of the Constitution, in general, impose the complete contrary: to be educated, and to educate, is a fundamental right of every human being, and a right precisely "of liberty," that is, of autonomy or self-determination, that a democratic State should stimulate and, at most, complement, and also always respect and guarantee "in liberty" . . . (emphasis theirs).

In May 2006, the chamber upheld Costa Rica’s law providing that "marriage is legally impossible between persons of the same sex," relying in large part on the long history, general and legal, secular and religious, of the heterosexual nature of marriage.

Costa Rica has a history of constitutionalism, judicial independence, and respect for the law that very few other countries can approach. Costa Rican courts were protecting human rights when many European courts were actively violating the same, when South African courts were virtually powerless, and when Israeli national courts did not yet exist.

I agree with Justices Antonin Scalia and Clarence Thomas, as well as the late Chief Justice William Rehnquist, in rejecting the notion that the Constitution and law of the United States should be remade by judges to conform to the laws of other countries. But to those justices, judges, and law professors who say that we should look elsewhere: Why not look to Costa Rica?

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