

FOREWORD

“OUTSOURCING AUTHORITY?” CITATION TO FOREIGN COURT PRECEDENT IN DOMESTIC JURISPRUDENCE

&

REFINEMENT OR REINVENTION: THE STATE OF REFORM IN NEW YORK

*James W. Leary**

The 2005–2006 academic year was a novel one, as the *Albany Law Review* sought to challenge its own precedent by hosting two symposia—the first in the Fall of 2005, which considered the propriety, methodology and potential impact of citation by United States courts to foreign court opinions and transnational law, and the second in the Winter of 2006, which focused on reform issues facing the State of New York.¹ In the process of producing these two symposia, Providence smiled upon the *Albany Law Review* in two noteworthy ways. First, the names on the masthead of this volume compose an assembly of talented, dedicated and driven minds which, I am sure, would arouse the envy of any scholarly publication in any era. Additionally, the greater academic community at Albany Law School provided fertile and supportive ground for the dual symposia—as faculty, staff and students generously shared their insights, efforts and time in assisting the Law Review in conceptualizing, organizing and hosting the two events. Second, the *Albany Law Review* was fortunate as its two chosen topics—citation to foreign courts and reform in the State of New York—became front page issues of public debate, creating an exciting and energized atmosphere in which to hold the live

* Executive Editor for Symposia, *Albany Law Review*. B.A., State University of New York at Plattsburgh, 2003; J.D., Albany Law School, 2006.

¹ While limitations of time have made it impossible for us to print all of the remarks delivered at these symposia in this edition, audio and video recordings of all addresses are currently on reserve at the Schaeffer Law Library of Albany Law School, which is located at 80 New Scotland Avenue, Albany, New York 12208.

symposia events and producing an intellectually rich time for the release of this publication.

Great controversy has erupted recently over citation of foreign and transnational legal authority. Politicians and pundits have dramatically admonished the United States Supreme Court for outsourcing to foreign entities the duty of interpreting the United States Constitution. For instance, the Court came directly under fire over this issue in 2005 during appropriations hearings before Congress. Further, in confirmation hearings, now Chief Justice John Roberts firmly challenged the propriety of the practice. He described it as lacking accountability and allowing a judge to “cloak his own views” under the garb of legitimate precedent. Justice Samuel Alito also articulated his view of the practice during his confirmation hearings, stating, “I don’t think it’s appropriate or useful to look to foreign law in interpreting the provisions of our Constitution . . . the Framers would be stunned by the idea that the Bill of Rights is to be interpreted by taking a poll of the countries of the world.” Justice Alito elaborated:

The purpose of the Bill of Rights was to give Americans rights that were recognized practically nowhere else in the world at the time. The Framers did not want Americans to have the rights of people in France or the rights of people in Russia or any of the other countries on the continent of Europe at the time; they wanted them to have the rights of Americans.

The debate has unfurled even within the pages of the *U.S. Reports*. Justices Stevens, O’Connor, Scalia, Kennedy, Thomas, Ginsburg and Breyer have skirmished over the issue in several notable cases, including *Atkins v. Virginia* and *Roper v. Simmons*, in which the Court cited foreign authority in placing new constitutional limits on the use of capital punishment, and in *Lawrence v. Texas*, in which the Court also cited foreign authority in overruling *Bowers v. Hardwick* and invalidating criminal sodomy laws. Justice Scalia has described Court discussion of foreign views as “meaningless dicta” and has condemned the practice as “[d]angerous . . . since ‘this Court . . . should not impose foreign moods, fads, or fashions on Americans’”—a statement that Justice Thomas wholeheartedly agrees with. Perhaps these territorialist Justices—Scalia, Thomas, Roberts and Alito—would accuse those citing foreign authority of “combin[ing] with others to subject us to a jurisdiction foreign to our constitution and unacknowledged by our

laws.” Of course, that would not be an unfamiliar grievance; it was one leveled at King George III in the Declaration of Independence.

In his book *Ages of American Law*, Grant Gilmore notes that at the inception of our republic “the revolutionary trauma had instilled in . . . Americans [] a hatred of England and all its ways. The prevalent Anglophobia led to statutes which prohibited the use of English legal materials in court proceedings.” Gilmore observed, for instance, that a “New Jersey statute, enacted in 1799 and not repealed until 1819, forbade the citation not only of any English case decided later than July 4, 1776, but also . . . ‘any [English] compilation, commentary, digest, lecture, treatise, or other explanation or exposition of the common law.’ Even in states which did not go to the New Jersey extreme, it was . . . part of professional wisdom for both judges and counsel to avoid, in their opinions and arguments, anything that might look like undue deference” toward the laws of foreign lands.

While the New Jersey statute was unusual and this level of rigid autonomy was relatively short-lived, by 1820, a substantial body of American legal materials had emerged. The decisions of American courts, state and federal, were being published, and books on American law were beginning to appear. An indigenous base of American law which had not existed a generation earlier had developed; affording greater interpretive freedom to the American judiciary along with the ability to build an independent body of law.

In 2006, however, the United States is at a far different place politically and socially than it was in the late Eighteenth Century. Yet, we are witnessing a resurgence of the belief that string cites involving foreign law constitute a litany of sinful judicial abominations. In this symposium edition, we face the question whether the American judiciary may look abroad for perspectives and experiences that may shed light on constitutional questions and help resolve them. Further, may American courts incorporate those ideas, if sound, without sacrificing legitimacy, independence and individuality in the process?

The goal of the *Albany Law Review* in presenting this symposium is that it will generate as much light as heat, and do so in a manner benefiting the legal community. The process of debate on this topic is itself important, as it emphasizes the interplay between international law, comparative law and domestic law. The debate is crucial, however, in forcing the judiciary—and through the judiciary, the American polity in general—to consider questions

which strike at the heart of democratic and judicial theory, including: (1) whether there is a resolution to this debate that may coalesce the competing desires for intellectual honesty, democratic accountability, and a culturally sophisticated outlook; (2) whether a balance may be struck between the importance of the native development of law in society and the notion that a sound idea should be chained by political boundaries; and (3) whether the wish to maximize judicial distinctiveness through self-reliance can coexist with a belief that the proper evolution of law involves engaging differences and embracing diversity of thought in a global context.

This symposium edition showcases this topic as presenting a pivotal debate, the outcome of which may determine whether the United States judiciary will embrace an increasingly cosmopolitan character or select a more isolationist and self-reliant path. Either way, the outcome of the debate may create a new “Age” of American law—or perhaps, as Justice O’Connor so elegantly and acerbically put it, the whole thing is really just “much ado about nothing.”

The live symposium on this topic, which was held in October of 2005, featured three panels. The first panel was moderated by Professor Steven E. Gottlieb of Albany Law School, and provided a broad introduction to the issue, featuring presentations by (in order of appearance): Mark W. DeLaquil, Esq., of Baker & Hostetler LLP; Professor Roger P. Alford of Pepperdine University School of Law; Professor Ken I. Kersch of Princeton University; and Dr. Saby Ghoshray of the World Compliance Company. The second panel was devoted to the practice of citation to foreign court opinions in United States constitutional law and was moderated by Professor Stephen Clark of Albany Law School. This panel featured presentations from (in order of appearance): Dean Susan L. Karamanian of George Washington University School of Law; Professor John S. Baker, Jr., of Louisiana State University, Paul M. Hebert Law Center; Professor John Oldham McGinnis of Northwestern University School of Law; and Professor Mark V. Tushnet, then of Georgetown University Law Center, but currently, of Harvard Law School. The third panel of the symposium was directed toward the effect of citation to foreign court citation in private law, and was moderated by Professor James Thuo Gathii of Albany Law School. This panel featured addresses by (in order of appearance): Lawrence R. Walders, Esq., of Sidley Austin Brown & Wood; Scott McBride, Esq., Senior Attorney, Office of the Chief

Counsel for Import Administration, United States Department of Commerce; and Paul R. Bailey, Counsellor and Deputy Director of the Canadian Department of International Trade in Ottawa, Canada. Thanks to the excellent efforts of these speakers, the *Albany Law Review* Executive Board, the Senior Editors, Members, Faculty Advisor Professor Vincent Bonventre and Administrative Assistant Theresa Colbert, our first symposium of the academic year was a success—setting a positive tone as we looked toward our next symposium project, which was to be held in February of 2006 on the topic of New York State government reform.

The second symposium presented by the *Albany Law Review* was sponsored in conjunction with the Albany Law School Government Law Center, and was titled “Refinement or Reinvention: The State of Reform in New York.” This day-long symposium presented various visions of New York State government reform. At a time when New York State government was being widely criticized and characterized as “broken,” and on the eve of a State gubernatorial election in which “reform” is projected to be a major issue, we at the *Albany Law Review* were honored to host an open public symposium on the topic of reform and the future of New York State. I would go into more detail describing the import of this event, but I will leave that to Dean Patricia Salkin, Director of the Government Law Center at Albany Law School, whose insightful *Introduction* to the issue of New York State reform appears later in this edition.

Our live symposium on this topic, which took place in February of 2006, was presented in five parts and featured some of the most important voices in New York State government, law and civic activism. Opening, tone-setting remarks were delivered in prolific fashion by Evan Davis, Esq., former Counsel to New York State Governor Mario Cuomo. Mr. Davis’ remarks were followed by a panel on Legislative reform issues moderated by Professor Sandra Stevenson of Albany Law School and featuring: Professor Eric Lane of Hofstra School of Law; New York State Assemblywoman Sandy Galef; and Legislative Director Barbara Bartoletti of the New York State League of Women Voters. Following the Legislative panel, we were honored and privileged as Professor David Siegel of Albany Law School introduced Judith S. Kaye, Chief Judge of the State of New York, who delivered the symposium’s keynote address on the topic of judicial reform. Following Chief Judge Kaye’s keynote address, Professor Michael Hutter of Albany Law School hosted a series of “Perspectives” addresses, which featured: Dean Gerald

Benjamin of the State University of New York at New Paltz; John Faso, former New York State Assembly Minority Leader and a 2006 gubernatorial candidate; Karl Sleight, Executive Director of the New York State Ethics Commission; and Blair Horner, Legislative Director of the New York Public Interest Research Group (NYPIRG). The symposium concluded with remarks from Richard Platkin, Esq., Counsel to Governor George E. Pataki. Again, thanks to the excellent efforts of our distinguished speakers, the *Albany Law Review* Executive Board, the Senior Editors, Members, Faculty Advisor Professor Vincent Bonventre and Administrative Assistant Theresa Colbert, our second symposium of the academic year was also a success.

On behalf of the *Albany Law Review*, please enjoy this unique symposium edition.