ANNALS OF LAW

SWING SHIFT

How Anthony Kennedy's passion for foreign law could change the Supreme Court.

BY JEFFREY TOOBIN

Few Justices in recent history have arrived at the Supreme Court from a more provincial background than Anthony Kennedy. Before he moved to Washington, seventeen years ago, his professional life had been spent almost entirely in Sacramento. He was born there in 1936, and when his father, a lawyer who had his own practice, died two years after Kennedy graduated from Harvard Law School, he returned home to take over the family business. When President Reagan nominated him to the Supreme Court, in 1987, Kennedy was fifty-one years old and still lived in the house where he grew up.

His inclinations were hardly those of an insular man, however. While Kennedy was a teen-ager, his uncle, an oil driller, hired him to work summers on rigs in Canada and Louisiana. Before he graduated from college, he spent several months studying at the London School of Economics, where he was struck by the range of student opinion and the vehemence of political debate. "At the political union, you had to sit in the room according to your place on the ideological spectrum, and, to give you an idea of what it was like, the Communists—the Communists!—were in the middle," Kennedy recalled recently. "It was a different world, and I loved it." As an attorney in private practice, he maintained his father's ties with California's Republican Party; in 1973, he volunteered to draft a tax-cutting referendum for Governor Reagan, which lost at the polls. At the same time, he obtained a license to practice law in Mexico and helped a client establish one of the first *maquiladoras*—American-owned factories—there. While serving as a judge on the United States Court of Appeals for the Ninth Circuit, in the late nineteen-seventies, he accepted an appointment from Chief Justice Warren Burger as supervisor of the territorial courts in the South Pacific, which entailed travelling to Guam, Palau, Saipan, American Samoa, Australia, New Zealand, and Japan.

In fact, Kennedy has a passion for foreign cultures and ideas, and, as a Justice, he has turned it into a principle of jurisprudence. Over the past two years, he has become a leading proponent of one of the most cosmopolitan, and controversial, trends in constitutional law: using foreign and international law as an aid to interpreting the United States Constitution. Kennedy's embrace of foreign law may be among the most significant developments on the Court in recent years—the single biggest factor behind his evolution from a reliable conservative into the likely successor to Sandra Day O'Connor as the Court's swing vote. Kennedy continues to oppose racial preferences and to argue for expansive Presidential powers. He was a principal author of the unsigned majority opinion in Bush v. Gore. But he also wrote the two most important pro-gay-rights decisions in the Court's history and has at least tentatively affirmed his support for Roe v. Wade. Conservatives regard these decisions as a betrayal. In 2003, James Dobson, the founder and director of the influential evangelical group Focus on the Family, called Kennedy "the most dangerous man in America."

PAT OLIPHANT

Kennedy's position on Roe v. Wade ultimately may surprise supporters of abortion rights..

The United States Supreme Court has made references to foreign law since the earliest days of the Republic. During the tenure of Chief Justice John Marshall, the Court was often called on to interpret treaties and weigh controversies involving ships on the high seas, and the Justices frequently cited the laws of other nations in their decisions. In 1829, for example, Marshall analyzed both Spanish and French law to settle a claim by an American who had bought a parcel of land once owned by Spain and later included in the Louisiana Purchase. Contemporary commercial disputes also cross borders, and the Justices rely on foreign and international law, as well as on American statutes, to adjudicate them. In the past two years, the Court has considered such questions as whether Mexican trucks must abide by American safety rules under NAFTA, whether the American family of a Holocaust victim could recover art seized by the Nazis in Austria, and whether a United States district court should compel the American computer-chip-makers AMD and Intel to provide documents to each other in a European antitrust dispute. "When it comes to interpreting

treaties or settling international business disputes, the Court has always looked to the laws of other countries, and the practice has not been particularly controversial," says Norman Dorsen, a professor at New York University Law School.

However, beginning in the late nineteen-nineties, the Court's more liberal members began citing foreign sources to help interpret the Constitution on basic questions of individual liberties—for which the laws of foreign democracies tend to be more progressive than those at home. In 1999, Justice Stephen Breyer protested the Court's refusal to hear the appeal of a prisoner who argued that spending more than two decades on death row amounted to cruel and unusual punishment, and thus violated the Eighth Amendment. Quoting legal opinions from Jamaica, India, Zimbabwe, and the European Court of Human Rights, Breyer observed in a dissenting opinion in Knight v. Florida that "a growing number of courts outside the United States . . . have held that lengthy delay in administering a *lawful* death penalty renders ultimate execution inhuman, degrading or unusually cruel." More recently, in an opinion concurring with the Court's decision to uphold the affirmative-action program at the University of Michigan Law School, Justice Ruth Bader Ginsburg relied on the United Nations' International Convention on the Elimination of All Forms of Racial Discrimination. (In speeches, O'Connor has endorsed the use of foreign sources, but she has rarely mentioned them in constitutional-law opinions.)

Had the practice of citing foreign sources been confined to liberal—and, in the current political arrangement of the Court, less influential—Justices, it would have remained a phenomenon primarily of academic interest. But, in 2003, Kennedy drew on several foreign sources in the context of a majority opinion in one of the Court's most important cases in recent years. In Lawrence v. Texas, the Court ruled, six to three, that states could not criminalize sodomy between consenting adult homosexuals, thus overturning a seventeen-year-old precedent on the subject, Bowers v. Hardwick. In his opinion, Kennedy noted that a committee advising the British Parliament in 1957 had recommended the repeal of laws punishing homosexual conduct, that Parliament had repealed them ten years later, and that in 1981 the European Court of Human Rights had ruled that laws against gay sexual activity violated the European Convention on Human Rights. "Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now)," Kennedy wrote, "the decision is at odds with the premise in Bowers that the claim put forward was insubstantial in our Western civilization." (In 1996, Kennedy had written the Court's opinion invalidating Colorado's statewide anti-gay-rights ordinance.)

Earlier this year, in his opinion for the Court declaring the death penalty unconstitutional for juvenile offenders, Kennedy invoked the United Nations' Convention on the Rights of the Child. Writing for the five-to-four majority in Roper v. Simmons, Kennedy observed that only seven other countries have executed juvenile offenders since 1990—Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, Congo, and China. "It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty," he wrote, adding, "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."

Kennedy's reliance on foreign sources has prompted a vigorous backlash, both on and off the Court. "When Kennedy, who's hardly a liberal, started citing these international sources, that's when the subject exploded in the broader political world," says Dorsen, who in 2003 founded the *International Journal of Constitutional Law* to compare the use of foreign precedents by courts around the world. In dissenting opinions in the sodomy and juvenile-death-penalty cases, Justice Antonin Scalia, who was joined on both occasions by Chief Justice William Rehnquist and Justice Clarence Thomas, condemned any reference to foreign authority by the Supreme Court. "The basic premise of the Court's argument—that American law should comport to the laws of the rest of the world—ought to be rejected out of hand," Scalia wrote in the

death-penalty case. "What these foreign sources 'affirm,'" he went on, "is the Justices' own notion of how the world ought to be, and their diktat that it shall be so henceforth in America." This spring, fifty-four conservatives in the House of Representatives sponsored a resolution criticizing the use of foreign sources by the Supreme Court, and, in August, Representative Steve King, a Republican from Iowa, completed an investigation of the Justices' foreign trips, based on the disclosure forms that they are required to file. "Between 1998 and 2003, the Justices took a total of ninety-three foreign trips," King told me. "And the implication is that there are at least a couple of Justices, chiefly Kennedy and Breyer, who are more enamored of the 'enlightenment' of the world than they are bound by our own Constitution."

The debate over foreign law and the Constitution thrusts the Supreme Court into the perennial struggle in American politics between internationalists and isolationists. More important, perhaps, Kennedy's unlikely transformation into a tribune of legal multiculturalism offers a striking lesson in the unpredictability of the Court. If O'Connor's replacement, presumably John G. Roberts, Jr., turns out to be a dependable conservative, Kennedy's influence on the Court is likely to grow. With John Paul Stevens, David Souter, Ginsburg, and Breyer to his left and Rehnquist, Scalia, Thomas, and (possibly) the new Justice to his right, Kennedy's vote may increasingly determine the Court's decisions.

Every summer for the past fifteen years, Kennedy and his wife, Mary, have rented an apartment in Salzburg. Kennedy speaks serviceable German, navigates the winding cobblestone streets with ease, and only this year acquired a coveted pass allowing him to park his car in the old part of town. On the evening I arrived in Salzburg, Kennedy, who is a devout Catholic, invited me to join him and Mary at a Mass that his friend Wolfgang Berger, a local lawyer, organizes every year. It took place in the Müllnerkirche, which, even with its spectacular gilt altarpieces, qualifies as only a modest parish church by Salzburg standards. ("Salt was the oil of the Middle Ages," Kennedy explained. "That's why the city is called Salzburg—city of salt—and that's where the money for all these churches came from.") Just before the service, which was in German, he leaned over and whispered, "You won't understand a word, but I find with sermons that's not always a bad thing."

Like many visitors to Salzburg, Kennedy is a classical-music fan, and Berger had arranged for a performance of Haydn's "Theresienmesse" by a local orchestra and choir, which were seated in the balcony. Kennedy told me that he rarely attends the famous Salzburg Festival, which coincides with his annual visit. "The tickets are way too expensive," he said. Kennedy, who is six feet three inches tall, with a high forehead and a crown of blondish-gray hair, looks patrician, but he is, according to financial-disclosure reports, the least wealthy member of the current Court, with cash, stock holdings, and life insurance worth between seventy-five thousand and a hundred and eighty thousand dollars.

Before Kennedy joined the Supreme Court, he moonlighted as a law professor, teaching mostly night classes at the McGeorge School of Law, a branch of the University of the Pacific, in Sacramento. "I competed with 'Monday Night Football' for years," he said. He first went to Salzburg in 1987, to teach for McGeorge as part of a summer program that the school hosts at the University of Salzburg. He returned in 1990 and has taught every summer since. He takes the job seriously. After Mass, as we stepped outside into an evening drizzle, Mary Kennedy said, "Tony likes it when it rains. It means his students study harder."

Kennedy's class met for the first time the following morning, and he began his lecture by saying, "Welcome to our class, with the modest title 'Fundamental Rights in Europe and the United States'—all in three weeks." A ripple of laughter passed through the room, in a renovated wing of an eighteenth-century building on campus. Kennedy is a natural teacher; in front of his students, as in his opinions from the bench, he expresses himself in plain English, rather than legalese. In Salzburg, he proudly told me that his class included twenty students from schools around the world, as well as ninety or so from McGeorge.

As Kennedy explained the structure of the U.S. Constitution to his class, he hinted at his own approach to interpreting the document. "Here you are in Europe," he said to his American students. "And you might think, Gee, look at this culture, look at these churches, look how

old everything is. But you have the oldest constitution in the world. We have a legal identity, and our self-definition as a nation is bound up with the Constitution." But the document itself was not the only constitution Kennedy had in mind. "There is also the constitution with a small 'c,' the sum total of customs and mores of the community," he said. "The closer the big 'C' and the small 'c,' the better off you are as a society."

Unbeknownst to most of the students, Kennedy was making an oblique reference to one of the most contentious issues in constitutional law. A little more than a year after he joined the Supreme Court, he made a fateful choice about the meaning of the phrase "due process of law." In a 1989 case about parental rights, Michael H. v. Gerald D., the majority opinion, written by Scalia, asserted, in effect, that the due-process clause protected only what the Framers of the Constitution intended it to protect, and nothing more. If the Framers did not regard, say, the right to have an abortion, or the right to engage in homosexual sodomy, as worthy of protection (as surely they did not), then the Supreme Court should not do so, either. Kennedy disagreed with Scalia's "imposition of a single mode of historical analysis," joining an opinion by O'Connor that endorsed a more flexible notion of due process. That brief opinion has turned out to be a reliable guide to Kennedy's jurisprudence. On the bench, his view has been that the Court is obligated to consider the evolving standards of society—the constitution with a small "c"—in addition to the words of the Constitution, which are what matter to Scalia.

As Kennedy worked his way through each constitutional provision, he compared it with other nations' views on the same subject. When he came to states' rights, he said, "Margaret Thatcher was very interested in this, because she wanted to know what the American experience taught about what would happen in the European Union." Kennedy noted that the existence of separate federal and state governments allowed losing political parties in national elections to gain power and experience at the local level. "Compare Japan," Kennedy said. "For close to thirty years, no leader of the opposition party has ever held an important office."

When Kennedy referred to another country, it was often to show how its system had been influenced by the United States. He said that he had told the judges at the European Court of Human Rights, in Strasbourg, that they should provide more than cursory opinions to go with their rulings. "If you're interpreting phrases like 'liberty,' you have to do it in a way that commands the allegiance of the people," he said. Near the end of his class, Kennedy mentioned a trip to Poland that he had made last September. He had been invited to meet with the law faculty of the University of Warsaw, but when he arrived he was told that it was orientation week for the students and they, too, wanted to meet with him. "So I went to the students, and I said I was Justice Kennedy, and I wondered if they had any questions for me. Well, they started asking the most sophisticated questions I could imagine, and I finally asked them what was going on. Was this some little strategy they had decided on in advance? And they said no, they had been studying our constitutional history for nine years. Later, the rector told me the students in Poland knew our constitutional history backwards and forwards."

The Berlin Wall fell a year after Kennedy joined the Court, and the political developments that followed from Communism's collapse had a profound effect on his approach to interpreting the Constitution. Kennedy's first sustained encounter with foreign law came when he began to advise emerging democracies—including Czechoslovakia and Russia—on their constitutions and the rule of law. "I never thought I'd live in an era when we had new constitutions being founded," Kennedy told me. "I never thought we'd be in demand, but suddenly we were." In the early nineties, dozens of projects were created to export American legal expertise and ideas. International organizations, universities, and private groups began arranging meetings between American judges and their foreign counterparts. New York University sponsors frequent international judges' conferences at its Villa La Pietra, in Florence, and every year Paul Gewirtz, a professor at the Yale Law School, brings senior judges from around the world to New Haven. Most of the Justices on the Supreme Court have participated in some of these exchanges. (The exceptions are Souter and Thomas, who generally avoid foreign travel.)

Kennedy happened to spend his summers in the city where the most important international judges' conference takes place. The Salzburg Seminar was founded in 1947, by three young Harvard graduates who thought that Europe needed a place for the study of American ideals. They raised a few thousand dollars and rented the Schloss Leopoldskron, an eighteenth-century palace that had fallen into disrepair after being

"Mom! Everybody at school says we're just a bunch of crazy Victorians."

seized by the Nazis. The seminar became known as the "Marshall Plan of the mind," and it remains a meeting place for scholars and judges. Since 1971, nine Supreme Court Justices have attended sessions at the Schloss, many of them several times. Kennedy has participated in four seminar events, and even during summers when he is not officially involved, he visits the Schloss frequently to meet with foreign colleagues.

Kennedy went to the Schloss after his class, to have lunch with Richard Goldstone, a former justice of the South African Constitutional Court, who was in Salzburg to deliver a lecture and, like Kennedy, was eager to meet his foreign counterparts. Goldstone is among the world's most widely admired judges; the former chief war-crimes prosecutor for the United Nations, he is now a member of an independent commission investigating the oil-for-food scandal at the U.N. The Schloss Leopoldskron has tight security by Salzburg's relaxed standards, but not because of the jurists who congregate there. The palace was the setting for several scenes in "The Sound of Music," the 1965 movie, and endures more or less constant traffic from fans. (A sign on the wall closest to the street reads, in English, "Trespassers Will Be Prosecuted—Including Tour Groups.") The two men dined on the second floor, in a room adorned with mirrored panels and gilt sconces, which had been reproduced on a soundstage to create the von Trapp ballroom.

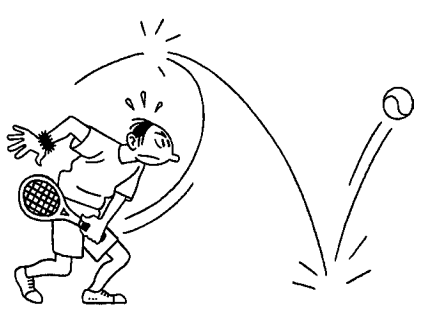
"Do you know any of the Russian judges?" Kennedy asked Goldstone. "They are so resilient."

"I've met good and bad," Goldstone replied. "Now the court belongs to the President"—Vladimir Putin.

Kennedy mentioned that he belonged to the board of an American Bar Association group that advises judges and lawyers in China, where he travels about once a year. "There was a dinner for one of their vice-premiers," he said. "I knew that I had to give a gift. We don't have a budget for these things, so I went down to the Supreme Court gift shop, and I found one of these calendars. It was in a nice leather case, and it had some anniversary from American constitutional law for every day of the year. So we're at this dinner, and I present the calendar to him, and he's so pleased, so I just say, 'When's your birthday? Why don't you look it up?' And he says whatever the date was and hands the calendar to the interpreter. So the interpreter just stands there. He looks at me. He looks around. There was this silence. Clearly, he doesn't know what to do. So I say, 'Read it, read it.' And the entry is for Dennis v. United States, affirming prison time for eleven American Communists. There was this silence again. My security guy headed to the door. Then the guest of honor just laughed and laughed." Kennedy laughed, too, adding, "I am not a world-class diplomat."

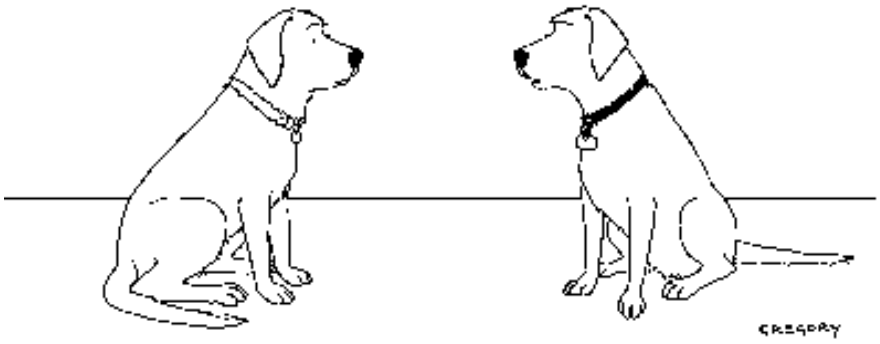
Later, he told me, "Judges check each other out. We're a guild, just like physicians or military people are guilds." Kennedy regards the use of foreign law by the Supreme Court as an inevitable effect of an increasingly interconnected world. "It really began with the Holocaust, when international law started to concern itself with how nations treated their own citizens," he told me. "Country A is concerned with how Country B treats its own citizens. So you had the beginnings of things like the European Court of Human Rights. They became the new kids on the block, but no one really knew what they did. Gradually, their work started to become known around the world. Then you started to have formal exchanges of judges." Beginning in the nineteen-seventies, as part of a program sponsored by the American College of Trial Lawyers, a rotating group of Supreme Court Justices has met every four or five years with their counterparts in England, Canada, and, on one occasion, India. "When it began, I don't think any of us had ever been inside the House of Lords," Kennedy said. "It was novel. Now it's routine. And then you have informal exchanges, like in Salzburg. You can't help but be influenced by what you see and what you hear."

Kennedy suggests that judges' use of foreign law today is a response to the availability of global sources of information, in the same way that lawyers during the progressive era began using "Brandeis briefs" in response to the advent of social-science research. At the beginning of the twentieth century, Louis Brandeis, then a Boston lawyer, began filing briefs with the Supreme Court which relied not only on judicial precedents but on empirical data, which was then beginning to be collected in a systematic way. His victory in the landmark 1908 case Muller v. Oregon, which upheld restrictions on the working hours of women—the Court's opinion noted Brandeis's references to "bureaus of statistics, commissioners of hygiene, inspectors of factories, both in this country and Europe"—changed the way lawyers and judges conceived of evidence.



The Bowers case, which Kennedy's Lawrence decision overturned, was rendered in 1986, the year before he was nominated to the Supreme Court. "When Bowers was being argued, the European Court of Human Rights had just decided Dudgeon v. United Kingdom, which went exactly the way the defendant wanted our court to go," Kennedy said. "Yet the lawyers didn't even cite it in their briefs. Now, maybe they didn't know about the case. People didn't look at those cases routinely in those days. Or maybe they thought our court would have been offended that they cited a foreign case to us. But that would never happen today. We know we have to be aware of what's going on in the world. Of course, it's not binding on us, but we can't pretend that it doesn't exist. Today, no lawyer would think of not telling us how courts around the world have approached the same question."

Clearly, it would require almost willful ignorance on the part of Supreme Court Justices not to be aware of judicial activity in other countries. The European Union translates and publishes opinions from nearly fifty nations, and the two most frequently consulted legal databases in the United States, Lexis and Westlaw, carry foreign opinions from dozens of countries. (The high courts of many countries now also routinely post their opinions on the Internet.) In many American courts, including the Supreme Court, foreign nations and international organizations regularly file briefs citing their own laws. Kennedy's opinion in the juvenile-death-



"I had my own blog for a while, but I decided to go back to just pointless, incessant barking."

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penalty case mentioned friend-of-the-court briefs submitted by the European Union and the Human Rights Committee of the Bar of England and Wales. "The way American and foreign courts are connected is not much different from the way corporations are connected," says Anne-Marie Slaughter, the dean of the Woodrow Wilson School of Public and International Affairs, at Princeton, who examined the effects of globalization on the American judiciary in her 2004 book, "A New World Order." "The opinions are out there, easy to get, and the briefs are being filed. If the Justices didn't cite them, it would be like pretending the rest of the world didn't exist."

On every subject for which the Court has so far cited foreign views, notably gay rights and the death penalty, the Justices in the majority have inclined in the liberal direction. "The United States is probably the most conservative democracy in the world," Goldstone said. "The death penalty, gender, welfare—you name it. I think it would be fair to say that the most conservative member of the South African Constitutional Court would be left of the most progressive member of the United States Supreme Court. So, in looking at what other democracies are doing, it would mean looking to the left, not to the right. I think conservatives in the United States are saying, 'Don't do it, because it gives us bad answers.'"

Yet it would be a mistake to regard the dispute over foreign law and the Supreme Court as simply another iteration of America's conservative-liberal split. Kennedy and Breyer, the two Justices most prominently associated with the controversy over foreign law, have considerable political differences. In January, Breyer conducted a public debate on the subject with Scalia, an unprecedented encounter between sitting Supreme Court Justices. At the law school of American University, in Washington, D.C., before a crowd of about four hundred, with hundreds more watching the event online, Scalia declared that foreign laws were irrelevant, because "we don't have the same moral and legal framework as the rest of the world, and never have." Breyer responded that, though foreign laws could never be binding on an American court, they were still worth examining. Foreign judges "have problems that often, more and more, are similar to our own," he said. "They're dealing with texts that more and more protect basic human rights. If here I have a human being called a judge in a different country dealing with a similar problem, why don't I read what he says, if it's similar enough? Maybe I'll learn something."

Kennedy offers a more tactical reason to cite foreign law. "Let me ask you this," he said to me from across a lacquered coffee table in a Chinese-themed sitting room at the Schloss. "Why should world opinion care that the American Administration wants to bring freedom to oppressed peoples? Is that not because there's some underlying common mutual interest, some underlying common shared idea, some underlying common shared aspiration, underlying unified concept of what human dignity means? I think that's what we're trying to tell the rest of the world, anyway." In other words, Kennedy believes that by invoking foreign law the United States Supreme Court sends an implicit message to the rest of the democratic world that our society shares its values. "The European courts, in particular the transnational courts, have been somewhat concerned, and some feel demeaned, that we did not cite their decisions with more regularity," he said. "They cite ours all the time. And, basically, they were saying, 'Why should we cite yours if you don't cite ours?'" He went on, "If we are asking the rest of the world to adopt our idea of freedom, it does seem to me that there may be some mutuality there, that other nations and other peoples can define and interpret freedom in a way that's at least instructive to us."

Kennedy's argument amounts to a corollary to President Bush's policy of exporting freedom. The difference is that Kennedy believes that American evangelism for freedom is more likely to succeed if it includes listening as well as lecturing. "Liberty isn't for export only," he said. This is what especially riles his critics: the notion that the shifting enthusiasms of foreign judges could affect the meaning of the U.S. Constitution. Cosmopolitanism on the Court is seen by many as élitist and un-American. Robert Bork, whose failed nomination to the Supreme Court in 1987 led to Kennedy's appointment, says, "The class that is commonly called the intelligentsia is composed of people who may not do very good intellectual work but who make their living with words and ideas. Judges belong to that class and respond to its values, which they impose as constitutional law. Our Justices are said to be engaged in a worldwide constitutional conversation. It more closely resembles a worldwide constitutional convention."

This view is echoed by conservatives in Congress, including Tom Feeney, a Florida Republican, who is the chief sponsor of the resolution condemning the Supreme Court's use of foreign law. "When judges intermingle with other élite jurists, there is a tendency to want to be part of the club," Feeney said. "And it's a very élite club. It's perfectly defensible to say that you want to be governed by an oligarchy of philosopher kings. But five wise, élite Justices imposing policies on us from the bench is not the constitutional democracy that the Framers gave us." In

May, Kennedy testified before a House committee about the Supreme Court's budget, and he mentioned in passing that, like many lawyers, he conducted legal research on the Internet. This prompted Tom DeLay, the House Majority Leader, to tell an interviewer from Fox News Radio, "We've got Justice Kennedy writing decisions based upon international law, not the Constitution of the United States. That's just outrageous, and, not only that, he said in session that he does his own research on the Internet. That is just incredibly outrageous."

When I asked Kennedy about DeLay's comments, he smiled and replied evenly, "The nature of the United States is that we're diverse." But a few weeks earlier, near the end of the Court's term, in June, Kennedy had given a more pointed retort. For a reunion of Chief Justice Rehnquist's law clerks, he made a brief video, during which he was taped sitting at his computer. He said that he was doing a little research. He signed off by saying goodbye in several languages.

Kennedy turned sixty-nine in July, but it's easy to see why he rarely figures in the speculation about retirement that clings to other Justices. He's extraordinarily fit for his age. Last year, while on vacation in Greece, he and his wife came across a group staging a reënactment of the ancient Olympic Games, and Kennedy entered the hundred-metre dash. His height gave him an advantage in the race—which was run barefoot but not, as in ancient Greece, nude—because, he said, pointing to his thigh, "the toga they gave me only came down to here." Even so, he didn't win. "They put me with forty- and fifty-year-olds," he said. "I didn't have a chance." He seems enthusiastic about his likely new colleague, John Roberts, who has argued thirty-nine cases before the Court. "He was a marvellous oral advocate," Kennedy said. "So we feel like we know him in that regard."

When the Court reconvenes next month, Kennedy could hold the balance of power on questions pertaining to church-state relations, gay rights, and, especially, abortion—all issues likely to come before the Court during the next several years. Yet, in such cases, conservatives' fears about the liberal influence of foreign law on Kennedy's views could turn out to be misplaced. Church-state traditions in other democracies vary widely. Some nations, like England, have state religions; others, like France, have a secular orientation but subsidize and regulate religious education. Kennedy has generally sided with his conservative colleagues on the separation of church and state; in June, he voted to allow the posting of the Ten Commandments at the Texas state capitol and in a Kentucky courthouse. (The full Court allowed the display in Texas, which has been in place for decades without drawing much attention, and rejected the one in Kentucky, which is newer and more controversial.)

Foreign law is more likely to affect Kennedy's positions on gay rights and abortion. His opinions in the Colorado and Texas cases have made him the Court's most visible defender of gay rights, but his support for gay marriage, a subject many expect the Court will eventually take on, seems far from certain. In the Lawrence decision, Kennedy cited a consensus in "Western civilization" against punishing homosexual sodomy. But foreign traditions of tolerance for homosexual activity have not led to broad international support for gay marriage; only Belgium, Canada, Spain, and the Netherlands currently permit gay people to wed. That does not seem like the kind of mandate that Kennedy will feel compelled to join.

Kennedy's views on abortion have long been ambiguous. In 1989, he joined an opinion by Rehnquist that appeared to call for overturning Roe v. Wade; then, in 1992, in the case of Planned Parenthood v. Casey, Kennedy joined Souter and O'Connor in an opinion that reaffirmed the core of Roe—that is, the right of a woman to terminate an early-term pregnancy. Since then, Kennedy has generally been counted as an abortion-rights vote, along with Souter, O'Connor, Stevens, Ginsburg, and Breyer, but that may not be an accurate inference. Over the past decade, Kennedy has repeatedly expressed his concerns about abortion. Dissenting from a 2000 ruling that upheld the conviction of anti-abortion protesters for trespassing, he criticized the majority for denying "these protesters, in the face of what they consider to be one of life's gravest moral crises, even the opportunity to try to offer a fellow citizen a little pamphlet, a handheld paper seeking to reach a higher law." That same year, Kennedy wrote an uncharacteristically vitriolic dissent to the Court's decision to strike down a Nebraska law banning late-term (or partial-birth) abortion—what he called "a procedure many decent and civilized people find so abhorrent as to be among the most serious of crimes against human life."

Kennedy's reservations about abortion are reflected in foreign statutes. Most other countries have more restrictive abortion laws than the United States, as Scalia pointed out in his dissent in this year's juvenile-death-penalty case, noting that the United States is "one of only six countries that allow abortion on demand until the point of viability." He accused the Justices in the majority of cherry-picking foreign laws to suit their predispositions, writing, "To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry."

When I mentioned abortion to Kennedy, I said, "You will probably be the single vote preserving Roe v. Wade."

"Perhaps, perhaps not," he replied.

Unlike some of his colleagues, Kennedy arrived at the Court without a formal judicial philosophy to help him decide each case. He has absorbed the diverse lessons of a changing world. As we concluded our talk in Salzburg, I showed him a piece of paper that his friend Wolfgang Berger had given to me at the Mass several days earlier. It was an English translation of the readings for the service, from the Book of Wisdom 12:13, which included the lines "For there is no God, other than you, who cares for everyone, to whom you have to prove that your sentences have been just." Throughout the verse, I said, God was portrayed as a judge.

"The fascinating thing I thought about when I read this was that He has considerable discretion," Kennedy said. "There's also no appeal."♦

BLOCK THAT METAPHOR!

From the San Juan (P. R.) Star.

What lies behind the low homicide numbers reported in New York? After a Byzantine brooding, I could not find a silver lining to such a wild goose chase.