International Law & National Security

International or Foreign Law as an Interpretive Aid in Supreme Court Jurisprudence

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The Supreme Court's use of international and foreign law has garnered substantial commentary in recent years, but almost all of that commentary has focused on two constitutional cases: *Lawrence v. Texas*[1] and *Roper v. Simmons*.[2] This article attempts to put the Court's reliance on international law in those cases within the broader context of the Court's use of such material in other cases. Since the twenty-first century the Court has occasionally looked abroad to interpret the Constitution, federal statutes, treaties, and federal common law. Such reliance is rare and typically uncontroversial. But in a few instances the Court's reliance on international law has been highly contentious, particularly when it appears that the Court is usurping or unduly limiting the authority of the executive branch or expanding the role of the judicial branch.

I. CONSTITUTIONAL INTERPRETATION

If there is one big story regarding the Supreme Court's reliance on international law, it is the Court's brief flirtation with constitutional comparativism from 2002 to 2005. I say brief flirtation deliberately, because since 2005 the Court has shown little to no interest in relying on international and comparative law to interpret constitutional guarantees.

The movement toward aligning constitutional law with international human rights was not on the Court's radar screen ten years ago. For example, since the 1950s the Supreme Court has adopted an evolving standard to interpret the Eighth Amendment, and on rare occasion has made passing references to international experiences in applying that standard.[3] But the dispositive question was always our own national sense of what constituted cruel and unusual punishment. Indeed, in 1989 the Supreme Court underscored that "[i]n determining what standards have 'evolved,'… we have looked not to our own conceptions of decency, but to those of modern American society as a whole."[4] The Court emphasized that "it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and various amici… that the sentencing practices of other countries are relevant."[5] This approach remained the status quo for over a dozen years.[6]

The first sign of a departure from this status quo came in 1999. In *Knight v. Florida*, Justice Breyer took the unusual step of dissenting from a denial of certiorari to argue that the Court should resolve the question of whether the "death row phenomenon" violated the Eighth Amendment. The central message of the dissent from certiorari was to challenge the status quo that had been established since 1989.[7] It was an inauspicious occasion for Justice Breyer to embrace constitutional comparativism, for it had all the signs of weakness: the Court had declined certiorari and not a single American court had adopted Justice Breyer's suggestion that the death row phenomenon constituted cruel and unusual punishment.[8] As Justice Thomas put it, "were there any such support in our own jurisprudence, it would be unnecessary for proponents of the claim to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council."[9] Justice Thomas had a point. In the absence of *any* domestic support, it appeared that Justice Breyer was looking abroad in a desperate attempt to grasp for anything that would support the claim that prolonged periods on death row was cruel and unusual punishment. It was, Justice Breyer later conceded, a "tactical error."[10]

Three years later the Court offered tepid support for constitutional comparativism in the case of *Atkins v. Virginia,* which dealt with the death penalty for the mentally retarded. In the decision, the Court dropped a footnote relying on opinions of the "world community," together with opinion polls, and the consensus from various religious groups and psychological organizations, as "additional evidence" of a "much broader social and professional consensus."[11] These opinions, the Court reasoned, are "by no means dispositive," but they offer "further support to our conclusion that there is a consensus among those who have addressed the issue."[12] With *Atkins* the opinions of the international community were given a status equal to the opinions of religious groups, psychological organizations, and public opinion polls. If international and comparative experiences had remained in this lowly position, the Court's reliance on them would not be the source of controversy that it is today. But in the two subsequent cases of *Lawrence v. Texas*[13] and *Roper v. Simmons*,[14] the Court went much further in its embrace of constitutional comparativism.

In *Lawrence* the Court relied on decisions of the European Court of Human Rights (ECHR) to suggest that the historical analysis in the homosexual sodomy case of *Bowers v. Hardwick* was incomplete.[15] The Court also referenced ECHR decisions as evidence that "[t]o 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."[16] The Court further observed that "[t]he 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."[17]

With *Lawrence* the Court appeared to be moving away from the status quo by warmly embracing a new approach of constitutional comparativism. These references to comparative experiences in *Lawrence* were an outgrowth of the Court's substantive due process jurisprudence, which looks both to whether the fundamental right in question is deeply rooted

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The research assistance of Jake Nare is gratefully acknowledged.

in our own history and tradition and is implicit in ordered liberty.[18] While the former focuses on domestic experiences, the latter opens the door to comparative reference, for to ask what ordered liberty requires is to invite the question of what other developed countries have required.[19] Of course, international law is replete with claims of universality, and ordered societies structure themselves consistent with general notions of fairness and justice. Thus, *Lawrence's* reliance on ECHR decisions was an attempt to embrace natural law notions of fairness and justice by discounting the importance of our history and tradition and elevating the importance of countervailing experiences in other parts of the world.

Roper went even further than *Lawrence*. It presented a broader theory for why this interpretive methodology was beneficial. In *Roper* the Court was not simply deciding a case; it was defining and defending a movement that had the potential to change the course of constitutional law. The Court in *Roper* argued that international and comparative law should serve a confirmatory role. As the Court put it, "[i]t 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."[20] But of course the Court was doing much more than confirming a national consensus. It was borrowing from abroad to bolster "fundamental rights" that were not central to our own heritage of freedom. The Court's discovery of a national consensus against the death penalty for juveniles was extraordinarily weak, while the international consensus was extraordinarily strong. "When the objective indicators of a national consensus are weak, the strong global consensus fortifies the Court's independent judgment."[21]

These two decisions had the potential to revolutionize Supreme Court interpretation of constitutional guarantees. They suggested that international and comparative law should be added to the existing sources of text, structure, history, and national experience as part of the canon of constitutional interpretation. Not surprisingly, these cases created a groundswell of opposition. Academics repeatedly and loudly admonished the justices for being sloppy, selective, disingenuous, and anti-democratic.[22] Leaders from the judicial, executive, and political branches joined in the chorus of condemnation.[23] In confirmation hearings, Supreme Court nominees John Roberts and Samuel Alito both expressed their firm opposition to the interpretive approach.[24]

As a result of this backlash, the internationalists on the Court quietly retreated. Since *Roper* the Supreme Court has been conspicuously silent on the subject and has repeatedly rejected opportunities to rely on international and comparative material in constitutional cases. Despite deciding over fifty constitutional cases since *Roper,* the Supreme Court has not once relied on contemporary foreign or international law and practice to interpret constitutional provisions. This is notwithstanding the obvious opportunities to do so in contexts such as abortion,[25] free speech,[26] free exercise of religion,[27] due process,[28] equal protection,[29] and the death penalty.[30] The Supreme Court's silence on this issue has been deafening. The only notable examples of constitutional comparativism since *Roper* have been in the Second Amendment case of *District of Columbia v. Heller*[31] and the Guantanamo habeas corpus case of *Boumediene v. Bush*.[32] But in both of those cases the comparative approach that was adopted was of the variety Justice Scalia has advocated: historical comparisons used to understand the original meaning of constitutional text.[33]

One cannot underestimate the potential ramifications of the rise and fall of constitutional comparativism. If it had garnered sufficient support, it had the potential to dramatically reshape the content of constitutional guarantees. The movement could have reshaped our jurisprudence to align constitutional law with international law. That could mean moving in the direction of generic constitutionalism, in which any aberrant amount of protection, whether it be too much or too little, would be subject to correction. Where we were "lagging behind" the prevailing international consensus, as with the death penalty, the Court could have forced us to join the international mainstream. Where we afforded too much protection—as with free speech or the exclusionary rule—the Court could have forced us to scale back our guarantees. But with the Court's brief flirtation with constitutional comparativism and the strong backlash that it created, we can be almost certain that international and comparative law will not be included in the canon of sources the Court uses to interpret the Constitution. In the future the Court may politely nod in the direction of international law, but it is very unlikely to have any significant impact on constitutional jurisprudence.

II. STATUTORY INTERPRETATION

International law does not feature prominently in statutory interpretation. The vast majority of cases involving statutory interpretation do not advert to international or comparative experiences. Occasionally, however, the statute will have some foreign nexus, typically because it either purports to regulate conduct abroad or overlaps with international obligations. In those situations, the role of international law becomes relevant to the interpretation of federal statutes. Two rules of statutory construction, the *Charming Betsy* doctrine and the presumption against extraterritoriality, are particularly relevant in this regard.

Under the *Charming Betsy* doctrine, international law has been used as a tool to interpret federal statutes. It is a rule of statutory construction that occasionally has been used by the Court in construing the meaning of ambiguous statutory provisions. The doctrine, in its simplest formulation, provides that "an act of [C]ongress ought never to be construed to violate the law of nations, if any other possible construction remains."[34] Although there is some debate as to the constitutional underpinnings of this doctrine, the strongest argument for the doctrine is premised on separation of powers. Whenever possible, courts will construe an ambiguous statute in light of the implications that an international law violation would have for the executive branch. Consistent with separation of powers concerns, the *Charming Betsy* doctrine reflects a "desire to interpret statutes to avoid inter-branch usurpations of power and carefully husbands the complex relationship of the federal branches in the international context."[35]

This doctrine has been applied in numerous cases.[36]

Perhaps the most significant examples in recent years have been in *Hamdi v. Rumsfeld*[37] and *Hamdan v. Rumsfeld.*[38] Both cases involved the limitation of executing authority based on the understanding that the statute in question incorporated the laws of war. The question in *Hamdi* was whether the executive had authority to detain American citizens who qualified as "enemy combatants" pursuant to congressional authorization to "use all necessary and appropriate force against those nations, organizations, or persons the Executive determines planned, authorized, committed, or aided the terrorist attacks."[39] Hamdi, an American citizen, objected to the indefinite detention, but the Court sub silentio applied *Charming Betsy* to conclude that the detention was authorized by Congress. A plurality of the Court found that "[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities" and "we understand Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles."[40] Two years later in *Hamdan* the Court again interpreted a federal statute as incorporating the laws of war. The Court reasoned that "[a]t a minimum, the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war."[41] Thus, both *Hamdi* and *Hamdan* represent important examples of statutory authority granted to the executive branch subject to implicit limitations imposed by international law.[42] This limitation is unusual if one presumes that the *Charming Betsy* doctrine has its foundation in concerns about separation of powers. But it is based on a congressional presumption that the executive branch would not wish to have implied authorization to violate international law and thereby foment international discord. Therefore, when a particular Administration does purport to exercise delegated authority inconsistent with international law, it does so without congressional authorization. Of course, Congress may wish to pass legislation that does violate international law, but any such statute that does so should be clear and explicit.

The executive branch, of course, frequently wishes to comply with international law, and the *Charming Betsy* doctrine promotes that desire by not imposing statutory obligations on the executive branch that violate international law unless the statute does so explicitly. One of the best recent examples of this was in the recent case of *Spector v. Norwegian Cruise Lines Ltd.* In *Spector* the question presented was whether foreign owned cruise ships operating in U.S. waters were required to comply with provisions of the Americans with Disabilities Act that arguably conflicted with international treaty obligations.[43] *Spector* involved a claim that barriers on foreign cruise ships should be removed to accommodate disabled passengers. Under the statute, remedial action was required only if it was "readily achievable," that is, if it could be accomplished without "much difficulty or expense."[44] Significantly, the Court adopted the position of the United States and interpreted "difficulty" to include considerations other than cost, finding that "a barrier removal requirement… that would bring a vessel into noncompliance with… any… international legal obligation would create serious difficulties for the vessel and would have a substantial impact on its operations."[45] Conflict with international law was thus imported into a statutory exception to eliminate its application to foreign vessels and thereby avoid the potential for international discord.[46]

International law has also been influential as a tool of statutory interpretation where the Court has concluded that the statute in question attempted to codify international law. This is the case with respect to the Foreign Sovereign Immunities Act (FSIA).[47] In the recent case of *Permanent Mission of India v. New York,* the Court recognized that one of the key purposes of the FSIA was to codify international law. Consequently, the Court looked to the Vienna Convention on Diplomatic Relations and case law from the Netherlands and the United Kingdom to interpret the FSIA.[48] Thus, in the easy case where the purpose of statute is to codify international law, it is hardly surprising that the Court would interpret the statute in reliance on that law.

The common thread that runs through all of these decisions is that statutes are interpreted consistent with international law not because of an explicit commitment to international law, but to avoid international discord out of deference to the political branches. But as *Hamdi and Hamdan* suggest, that does not always mean greater executive freedom. In one sense, *Charming Betsy* enhances executive freedom in the foreign affairs arena, presuming that Congress has not inadvertently required the executive to perform functions that would repudiate international obligations and generate international discord. However, the doctrine also curtails executive freedom by presuming that Congress has not inadvertently authorized the executive to perform functions that would violate international law and thereby undermine foreign relations. In both cases, the purpose of *Charming Betsy* is to interpret ambiguous statutes in a manner that avoids foreign relations difficulties for the United States.[49]

Closely related to the *Charming Betsy* doctrine is the rule of statutory construction that presumes statutes do not have extraterritorial effect. One of the most common applications of this rule applies in the antitrust context, in which our antitrust laws are enforced against foreign nationals whose conduct has a substantially negative effect on the United States. Such a scenario subjects congressional regulation to an international rule of reason, which incorporates concerns for international conflict.[50] As the Court in *F. Hoffman-La Roche Ltd. v. Empagran S.A* recently noted, "our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is… reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused."[51] *Charming Betsy* counsels that Congress intended to regulate foreign acts of foreign actors because such conduct imposes substantial harms on the domestic market. Doing so is a reasonable exercise of prescriptive jurisdiction,[52] but for structural reasons we impute no congressional intent to regulate foreign conduct that causes only foreign harm. That is unless the executive branch has reasoned that the public interest in enforcement overcomes considerations of foreign governmental sensibilities.[53] Foreign relations concerns help explain why the presumption against extraterritoriality protects

against exorbitant enforcement of our laws to police foreign harms. As the Court put it in *Hoffman-La Roche*, "This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony."[54]

Of course, the presumption against extraterritoriality requires the Court to distinguish between "territory" and "extra-territory." In some cases it will be far from clear whether the conduct subject to regulation falls within one category or the other. That, in essence, was one of the central issues in the Court's recent decision in *Boumediene v. Bush.*[55] In determining the territorial reach of federal law, the Court adopted a new test of "de facto sovereignty."[56] In addressing whether detainees in Guantanamo Bay enjoyed the writ of habeas corpus, the Court concluded that although Cuba retained de jure sovereignty, "the United States, by virtue of its complete jurisdiction and control over the base, maintains de facto sovereignty over this territory."[57] *Boumediene* raises difficult questions of what constitutes "de facto" sovereignty. At one extreme it may mean all areas the United States physically occupies and controls. At the other extreme it may be something akin to Justice Brennan's notion of the "exercise of power" model in *Verdugo-Urquidez:* if the Constitution authorizes our Government to enforce our laws abroad, then when Government agents exercise this authority, the Constitution travels with them as an unavoidable correlative of the Government's power to enforce the law. De facto sovereignty may also mean something in between. An effective control model would posit that if the United States exercised effective control over a detention facility, such a facility would be within the United States's sovereignty authority.[58]

Reading statutes consistent with international law is both controversial and uncontroversial. It appears to garner little controversy when it authorizes the executive branch to move in a manner consistent with international law without implied congressional limitations. Nor is it controversial when the limitation on the executive branch is with respect to issues that are of insignificant national interest, such as antitrust regulation of foreign markets. But the interpretation of federal statutes consistent with international law in the realm of national security has been especially controversial. Indeed, *Hamdan* and *Boumediene* are among the most controversial decisions of the Court in recent years. Perhaps this is a reflection not so much on controversy about the presumption itself but on the state of international law. It is not surprising that the Court would presume to grant the executive branch authorization to use military force consistent with the laws of war. But when the content of the laws of war do not fit squarely with the current war on terror, the Court has rendered judgments that limit executive authority in ways that are at odds with its historic deference in the realm of national security.

III. TREATY INTERPRETATION

The Supreme Court has rarely addressed treaty interpretation in a systematic way. International law has well-established principles for the interpretation of treaties, as set forth in the Vienna Convention on the Law of Treaties.[59] The Court has never embraced this approach expressly, although it occasionally has interpreted treaties in a manner consistent with this approach. The Court interprets treaties with far less frequency than it does the Constitution or federal statutes, but in recent years it has rendered several important decisions that offer guidance on its approach to the interpretation of treaties.

Two of the most significant recent decisions by the Court in the realm of treaty interpretation are *Sanchez-Llamas v. Oregon*[60] and *Medellin v. Texas.*[61] Both cases address the interface between international tribunals and federal courts in interpreting binding federal laws. The Court's decision in *Sanchez-Llamas* is noteworthy, particularly in discussing the role of the Supreme Court in interpreting treaty obligations. The treaty at issue, the Vienna Convention on Consular Relations, had been interpreted by the International Court of Justice (ICJ) prior to the Supreme Court's decision in *Sanchez-Llamas.* The Court was thus required to analyze how much deference, if any, it should give to the ICJ's prior interpretation of the treaty. The Court ruled that the self-executing treaty was federal law and therefore the ICJ's prior interpretation was "entitled only to the 'respectful consideration' due an interpretation of an international agreement by an international court."[62] The Supreme Court's interpretation, however, must be dispositive. "If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department' headed by the 'one supreme Court' established by the Constitution."[63]

Medellin went further and reinforced *Sanchez-Llamas* conclusion, but did so in the context of a claim that, because Medellin's pending execution was at issue in the ICJ's *Avena* judgment, the ICJ's decision was binding on domestic courts. The Supreme Court concluded that this could be the case, provided federal law intended to give these decisions such effect.[64] But in the absence of implementing legislation or a self-executing treaty, the Court refused to accord decisions of international tribunals binding effect in domestic courts. As for whether the treaty in question was self-executing, the Court concluded that this determination must begin with the text and also examine the negotiation history and the post-ratification understanding of the signatory nations.[65] The Court also emphasized that the purpose of the treaty in establishing the International Court of Justice was also relevant.[66] Thus, without expressly relying on it, the Court adopted an approach that is quite similar to the Vienna Convention on the Law of Treaties. The Court's approach conflates Articles 31 and 32 of the Vienna Convention, and concludes that text, context, purpose, and drafting history are all essential ingredients in the interpretation of a treaty. The clear import of *Medellin* is that treaties are not binding on domestic courts unless there is a clear expressed intent that they have such effect. That intent must be discerned from the typical sources one applies in interpreting treaties.

Equally significant in *Medellin* was the Court's pronouncement regarding the domestic effect of non-self-executing treaties. The Court noted that a treaty is "self-executing" if it has automatic domestic effect as federal law

upon ratification. "Conversely, a 'non-self-executing' treaty does not by itself give rise to domestically enforceable federal law. Whether such a treaty has domestic effect depends upon implementing legislation passed by Congress."[67] This conclusion either means that non-self-executing treaties do not have any domestic effect as federal law, or that they do not have domestic effect as federal law enforceable in court. There is language in the opinion that supports both interpretations.[68] If it is the former, it would be difficult to square with the Supremacy Clause and would potentially raise questions as to whether non-self-executing treaties preempt contrary state law. If it is the latter, then it would impose obligations on the executive branch to ensure that the law is faithfully executed, but it would not incorporate any role for the judicial branch in the enforcement of that law.

IV. FEDERAL COMMON LAW INTERPRETATION

Although rarely the subject of Supreme Court consideration, the Court has occasionally relied on international and comparative law in the course of interpreting federal common law. The most important recent example of such reliance came in the maritime case of *Exxon Shipping Co. v. Baker*,[69] which involved a challenge to a 2.5 billion dollar punitive damage award arising from the Exxon Valdez oil spill. In determining the appropriateness of punitive damages in maritime law, the Court was not considering the constitutional limitations of any such award, but rather the "desirability of regulating them as a common law remedy for which responsibility lies with this Court as a source of judge-made law in the absence of statute."[70] In its role of creating federal common law, the Court concluded that "the common sense of justice would surely bar penalties that reasonable people would think excessive for the harm caused in the circumstances."[71] In fashioning maritime common law, the Court examined the history of punitive damages and the current application of punitive damages at home and abroad. In undertaking the comparative analysis, the Court analyzed the practices of other developed common law and civil law countries to support its finding that "punitive damages overall are higher and more frequent in the United States than they are anywhere else."[72]

The approach of interpreting federal maritime law in light of foreign and international experiences is uncontroversial. Federal courts, including the Supreme Court, have routinely relied on such experiences in creating maritime common law.[73] This stems in part from the nature of maritime law, which transcends national boundaries and cannot be dependent merely upon the practices or policies of one particular state. Moreover, to the extent Congress wishes to do so, it can modify maritime common law jurisprudence by statute.

If reliance on international and comparative experiences to interpret maritime law has been uncontroversial, the Court's landmark decision in *Sosa v. Alvarez-Machain*[74] has been anything but. At issue in *Sosa* was the application of the 1789 Alien Tort Statute, which had been interpreted by numerous lower federal courts to provide a cause of action for any violation of international law.[75] The statute had become the vehicle for a cottage industry of federal court litigation alleging violations of international human rights. Despite the fact that human rights litigation had been a major source of controversy (and academic commentary) since it exploded on the scene in 1980,[76] the Supreme Court had never interpreted the Alien Tort Statute.

If, as many expected, the Court held that the statute was only jurisdictional, then in a post-*Erie* world human rights victims would lack a statutory basis for a cause of action. If, on the other hand, the Court interpreted the ATS to include a statutory cause of action, then the Supreme Court would ratify almost twenty-five years of lower court human rights jurisprudence. But the Court did neither--or, rather, both. The Court held that the statute was only jurisdictional, but given the timing of the ATS's enactment, federal common law could provide the requisite cause of action. "Although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for… international law violations with a potential for personal liability at the time."[77] As such, federal courts now rely on international law as a common law source for a federal cause of action.

Whereas prior to *Sosa* one could argue that international law was used to interpret the content of a federal statute, since 2004 we find courts using international law to interpret the content of federal common law. Whatever doubts one might have had about the extent to which customary international law is part of our law, those doubts should be resolved after *Sosa*.[78] As a result, federal court interpretation of the content of customary international law will play a fundamental role in future understandings of the content of federal common law.

At one level *Sosa* is highly controversial, as it empowers federal courts to create federal common law causes of action based on ill-defined understandings of modern customary international law. As Justice Scalia put it, "American law—the law made by the people's democratically elected representatives—does not recognize a category of activity that is so universally disapproved by other nations that it is automatically unlawful here, and automatically gives rise to a private right of action for money damages in federal court."[79] Perhaps so, but it is also true that the Court explicitly invited Congress to provide statutory guidance and, if it so desired, "shut the door to the law of nations entirely."[80] Congress has not done so. Years have passed and neither the White House nor Congress has taken the Court up on this invitation, despite the fact that both Republicans and Democrats have controlled Congress since 2004.

CONCLUSION

International law rarely plays an important role as an interpretive aid in Supreme Court jurisprudence. It is most frequently used in the context of federal common law and treaty interpretation, but those areas of federal law are only occasionally the subject of Supreme Court review. Typically there are rules of statutory construction that reference international law, but they are applied only when there already is some international or foreign nexus to the case. And interpreting the Constitution in light of foreign or international law is the

subject of tremendous academic interest. But since 2005 the Court has stepped back from its brief foray into constitutional comparativism, and it does not appear to display any interest in reviving that approach.

Looking forward, the role of international law as an interpretive aid depends on the future composition of the Court. But it would be simplistic to conclude that reliance on international law is a left/right issue. It largely depends on the circumstances. For example, in *Baker* all four conservative justices joined a majority opinion that relied on international and comparative experiences. By contrast, in the constitutional cases of *Roper* and *Lawrence,* the statutory cases of *Spector, Hamdan,* and *Boumediene,* and the federal common law case of *Sosa,* all four liberals joined a majority opinion that relied on international and comparative experiences. In some cases, as with *Permanent Mission of India, Hoffmann-LaRoche* and *Hamdi*, both liberals and conservatives relied on international or foreign law. And in some cases, as with *Medellin* and *Sanchez,* both liberals and conservatives refused to give domestic effect to decisions of international tribunals. Thus, one cannot draw simple conclusions from complex cases to explain the past or anticipate the Court's future direction with respect to reliance on international law as an interpretive aid in Supreme Court jurisprudence.

Endnotes

1 Lawrence v. Texas, 539 U.S. 558 (2003).

2 Roper v. Simmons, 543 U.S. 551 (2005).

3 Thompson v. Knight, 487 U.S. 815, 830 n.10 (1988); Enmund v. Florida,, 458 U.S. 782, 796 n.22 (1982); Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977); Trop v. Dulles, 356 U.S. 86, 101-03 (1958).

4 Stanford v. Kentucky, 492 U.S. 361, 369 (1989).

5 *Id*. at 369 n.1.

6 Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. Davis L. Rev. 1085, 1101-02 (2002) ("[a]fter *Stanford*, U.S death penalty jurisprudence has proceeded largely without reference to the opinions of mankind.").

7 Justice Breyer argued that a growing number of courts outside the United States have held that lengthy delay in administering a lawful death penalty renders the execution cruel and unusual. He argued that these courts "have considered roughly comparable questions under roughly comparable legal standards" and thus their views "are useful even though not binding." Knight v. Florida, 528 U.S. 990, 992 (Breyer, J., dissenting from denial of certiorari).

8 *Id*. at 990 (Thomas, J. concurring in the denial of certiorari).

9 *Id*.

10 *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 Int'l J. Const. L. 519, 528 (2005) ("I may have made what one might call a tactical error in referring to a case from Zimbabwe—not the human rights capital of the world. But that case, written by a good judge, Judge Gubbay, was interesting and from an earlier time.").

11 Atkins v. Virginia, 536 U.S. 304, 316 n. 21 (2002).

12 *Id*.

13 Lawrence v. Texas, 539 U.S. 558 (2003).

14 Roper v. Simmons, 543 U.S. 551 (2005).

15 *Lawrence*, 539 U.S. at 560.

16 *Id*.

17 *Id*. at 577.

18 Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

19 For a detailed discussion of "implicit ordered liberty", *see* Roger P. Alford, *In Search of a Theory for Constitutional Comparativism,* 52 UCLA L. Rev. 639, 659-73 (2005).

20 *Roper*, 543 U.S. at 554.

21 Roger P. Alford, *Roper v. Simmons and our Constitution in International Equipoise,* 53 UCLA L. Rev. 1, 16 (2005).

22 For a summary of these different concerns, *see* Roger Alford, *Four Mistakes in the Debate on "Outsourcing Authority,"* 69 Alb. L. rev. 653, 659-61 (2006).

23 *See e.g.,* Alberto R. Gonzalez, U.S. Attorney Gen., Prepared Remarks of Attorney General Alberto R. Gonzales at the University of Chicago Law School (Nov. 9, 2005), *available at* http://www.usdoj.gov/ag/speeches/2005/ag_speech_ 0511091.html; Diarmuid F. O'Scannlain, *What Role Should Foreign Practice and Precedent Play in the Interpretation of Domestic Law?*, 80 Notre Dame L. Rev. 1893 (2005); *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer,* 3 Int'l J. Const. L. 519 (2005); S. Res. 92, 109th Cong. (2005) (proposed congressional resolution condemning the use of foreign precedents by the courts).

24 *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005) (arguing that if you use foreign law you can find anything you want); *see also Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (arguing that because the United States was one of the first and foremost to develop individuals rights, judges should only look to United States precedent in interpreting the Bill of Rights).

25 Gonzalez v. Carhart, 127 S. Ct. 1610 (2007).

26 Morse v. Fredrick, 127 S. Ct. 2618 (2007).

27 McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005).

28 Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007).

29 Parents Involved in Community Schools v. Seattle School District No. 1, 127 S. Ct. 2738 (2007).

30 Kennedy v. Louisiana, 128 S.Ct. 2641 (2008); Baze v. Rees, 128 S.Ct. 1520 (2008).

31 District of Columbia v. Heller, 128 S.Ct. 2783 (2008).

32 Boumediene v. Bush, 128 S.Ct. 2229 (2008).

33 Alford, *supra* note 19, at 655 ("Whether interpreting a constitution, treaty or statute, Justice Scalia seeks to understand original meaning. Accordingly, in interpreting a modem treaty, Justice Scalia will not hesitate to examine contemporary judicial decisions in Britain and Australia because, in his view, "[f]oreign constructions are evidence of the original shared understanding of the contracting parties…'").

34 Murray v. Charming Betsy, 6 U.S. 64, 118 (1804).

35 Roger P. Alford, *Foreign Relations as a Matter of Interpretation: The Use and Abuse of Charming Betsy,* 67 Ohio St. L.J. 1339, 1352 (2006).

36 *See, e.g.*, Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004); F. Hoffman–La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004); McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003); INS v. St. Cyr, 533 U.S. 289 (2001).

37 Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (plurality opinion).

38 548 U.S. 557 (2006).

39 *Hamdi*, 542 U.S. at 510.

40 *Id*. at 520-21.

41 548 U.S. at 603; *see also id*. at 599, n. 31 ("If nothing else, Article 21 of the UCMJ requires that the President comply with the law of war in his use of military commissions…. [T]he law of war permits trial only of offenses 'committed within the period of the war.'").

42 David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding,* 121 Harv. L. Rev. 689, 719, n. 85 (2008); *but see* Curtis A. Bradley, *The Federal Judicial Power and the International Legal Order,* 2006 Sup. Ct. Rev. 59, 84-85 (2006).

43 Spector v. Norwegian Cruise Line, Ltd., 545 U.S. 119 (2005).

44 *Id*. at 135-36.

45 *Id*.

46 *See id*. at 143-44 (Ginsburg, J., concurring in part and concurring in judgment) (describing the Court's interpretation as ensuring that the statute "will not provoke 'international discord' of the kind *Benz* and *McCulloch* sought to avoid."). The dissent did not disagree with the importance of avoiding international discord, simply finding that in the absence of a clear statement, the statute did not apply to foreign-flag vessels. "Even if the Court could, by an imaginative interpretation of Title III, demonstrate that in this particular instance there would be no conflict with the laws of other nations or with international treaties, it would remain true that a ship's structure is preeminently part of its internal order; and it would remain true that subjecting ship structure to multiple national requirements invites conflict." *Id*. at 149-50, 154 (Scalia, J., dissenting).

47 Permanent Mission of India to the United Nations v. City of New York, 127 S. Ct. 2352 (2007).

48 *Id*. at 2356-58.

49 Alford, *supra* note 35, at 1356-57.

50 Restatement (Third) of Foreign Relations, § 403(2).

51 F. Hoffman-La Roche Ltd. v. Empagran S.A., 124 S.Ct. 2359, 2366 (2004).

52 *Id*.

53 *Id*. at 2370 (distinguishing between private party and government enforcement of the Sherman Act based on the government's increased self-restraint and consideration of foreign governmental sensibilities).

54 *Id*. at 2366.

55 128 S. Ct. 2229 (2008).

56 *Id*. at 2252-53.

57 *Id*. at 2253.

58 Roger P. Alford, *What is De Facto Sovereignty?* Opinio Juris (June 15, 2008) *available at* http://opiniojuris.org/2008/06/15/what-is-de-facto-sovereignty/.

59 Article 31(1) of the Vienna Convention on the Law of Treaties provides that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Article 32 provides that "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable." Vienna Convention on the Law of Treaties, art. 31, 32 (1969), 1155 UN Treaty Ser 331 (1980).

60 548 U.S. 331 (2008).

61 128 S. Ct. 1346 (2008).

62 *Sanchez-Llamas*, 548 U.S. at 355.

63 *Id*.

64 *Medellin*, 128 S. Ct. at 1366 (Congress knows how to accord domestic effect to international obligations when it desires such a result.).

65 *Id*. at 1357.

66 *Id*. at 1360 (the ICJ's "principal purpose" is said to be to "arbitrate particular disputes between national governments").

67 *Id*. at 1356 n.2.

68 *See, e.g., id.* at 1357 ("Because none of these treaty sources creates binding federal law in the absence of implementing legislation, and because it is uncontested that no such legislation exists, we conclude that the *Avena* judgment is not automatically binding domestic law."); *id*. at 1360 ("If ICJ judgments were instead regarded as automatically enforceable domestic law, they would be immediately and directly binding on state and federal courts pursuant to the Supremacy Clause."); *id*. at 1363 ("The point of a non-self-executing treaty is that it 'addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule of the Court.'"); *id*. at 1369 ("A non-self-executing treaty, by definition, is one that was ratified with the understanding that it is not to have domestic effect of its own force. That understanding precludes the assertion that Congress has implicitly authorized the President—acting on his own—to achieve precisely the same result.").

69 128 S. Ct. 2605 (2008).

70 *Id*. at 2626-27.

71 *Id*. at 2627.

72 *Id*. at 2623.

73 Brief of Professors David J. Bederman, Martin Davies, Jonathan Gutoff, Steven F. Friedell, John Paul Jones, David J. Sharpe and Steven Richard Swanson as Amici Curiae in Support of Petitioner, Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008), 2007 WL 2781072 ("More recently, this Court has derived one rule of general maritime law with reference to a consensus among the world's maritime nations….").

74 542 U.S. 692 (2004).

75 *Id*. at 694.

76 *See* Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) (Determined that U.S. courts may punish non-U.S. citizens for acts committed outside the U.S. that violate any treaty to which the United States is a party.)

77 *Sosa*, 542 U.S. at 724 ("although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.").

78 For useful commentary on this issue, *compare* Curtis A. Bradley, Jack L. Goldsmith & David S. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie,* 120 Harv. L. Rev. 869 (2007) *with* William S. Dodge, *Customary International and the Question of Legitimacy*, 120 Harv. L. Rev. 19 (2007).

79 *Sosa*, 542 U.S. at 751 (Scalia, J., concurring in part and dissenting in part).

80 *Id*. at 731.