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INTERNATIONAL LAW

Use of Foreign Law in Domestic Jurisprudence

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Opening Argument: Should Foreign Law Be Used to Interpret Our Constitution?

National Journal

March 6, 2004

Stuart Taylor, Jr.

Practitioners of the loosey-goosey approach to constitutional interpretation that maddens original-meaning conservatives such as Supreme Court Justice Antonin Scalia are increasingly looking to a virtually unlimited source of new raw material: foreign law, including international human-rights conventions, Zimbabwe Supreme Court rulings, and whatever else might come in handy. Indeed, two of the more internationalist justices, Sandra Day O'Connor and Ruth Bader Ginsburg, have confidently predicted that (in O'Connor's words) the justices "will find ourselves looking more frequently to the decisions of other constitutional courts."

The most publicized example has been Justice Anthony M. Kennedy's majority opinion last June in *Lawrence v. Texas*, striking down all state laws that made gay sex a crime. In expanding the "liberty" protected by the 14th Amendment's due process clause, Kennedy cited (among other things) a British Parliament vote in 1967 repealing laws against homosexual acts and a European Court of Human Rights decision in 1981 that such laws violated the European Convention on Human Rights.

Scalia grumped in dissent that Kennedy had ignored "the many countries that have retained criminal prohibitions on sodomy." He also invoked Justice Clarence Thomas's assertion in a previous case that the Court "should not impose foreign moods, fads, or fashions on Americans."

But Kennedy had a plausible reason for looking abroad: The late Chief Justice

Warren E. Burger's concurrence in *Bowers v. Hardwick*, the 1986 decision that *Lawrence* overruled, had claimed that homosexual conduct had been outlawed "throughout the history of Western civilization." It was fair game for Kennedy to point out some recent history pointing in the opposite direction.

More troubling, in my view, was a 2002 decision (*Atkins v. Virginia*) that said imposing the death sentence on a mentally retarded murderer violated the Eighth Amendment's ban on "cruel and unusual punishments," in part because such sentences are "overwhelmingly disapproved" by "the world community." This assertion – which Justice John Paul Stevens based on a single brief by the European Union in another case – was a transparent effort to compensate for the fact that the "national consensus" that Stevens purported to discern against executing retarded criminals simply did not exist: The laws of 20 of the 38 capital-punishment states still allowed such executions.

Also troubling was Ginsburg's concurrence in another June 2003 decision, *Grutter v. Bollinger*, which upheld the use of racial preferences in university admissions. Joined by Justice Stephen Breyer, Ginsburg began by noting with approval that the International Convention on the Elimination of All Forms of Racial Discrimination allows the theoretically temporary "maintenance of unequal or separate rights for different racial groups" – a regime that Ginsburg suggested should continue for decades. Then she cited analogous

provisions of the Convention on the Elimination of All Forms of Discrimination Against Women, which – Ginsburg noted in a speech a few weeks later – “sadly, the United States has not ratified.”

If an international agreement that the United States has refused to ratify can be invoked as a guide to the meaning of the 136-year-old 14th Amendment, what will be next? Constitutional interpretation based on the sayings of Chairman Mao? Or Barbra Streisand?

In addition to importing foreign law to resolve purely domestic cases, Ginsburg suggested in the same speech that she wants to apply the Bill of Rights extraterritorially and enforce the “rights of any human being,” anywhere in the world, in cases involving the U.S. government. She did not say whether she would carry this to the point of ordering U.S. forces overseas to give Miranda warnings to the likes of Khalid Shaikh Mohammed, the suspected mastermind of the 9/11 attacks, who was captured in Pakistan last March.

One of the charms of foreign law is that there is so much to choose from. In a 1999 dissent suggesting that a death sentence should be struck down because of a delay of more than 20 years in executing the condemned man (*Knight v. Florida*), Breyer cited as “useful, even though not binding,” the views of the supreme courts of Zimbabwe and India, as well as the European Court of Human Rights. To be sure, the Supreme Court of Canada and the U.N. Human Rights Committee had reached the opposite conclusion. But Breyer knew which conclusion he liked.

In future cases, perhaps, justices who want to narrow the First Amendment’s guarantee of religious freedom may cite France’s

recent legislation banning all students from wearing religious symbols in public schools, the main purpose of which was to strip Muslim girls of their head scarves. And the Netherlands will come in handy for any justices who want to declare a constitutional right to same-sex marriage, assisted suicide, recreational marijuana, or prostitution.

For believers in the originalist approach to constitutional interpretation, the only question in such cases should be “the understanding of the ratifiers of the Bill of Rights in 1791 [and of other constitutional provisions], not the current views of foreign nations,” in the words of Robert H. Bork in his 2003 book, *Coercing Virtue: The Worldwide Rule of Judges*. To Bork, the foreign-law fad is simply another gambit by a Court that is determined to act as a continuing constitutional convention.

Conservatives are not alone in worrying about the dangers to our democracy of importing laws and constitutional principles crafted by intellectual elites abroad. “Since World War II, much of ‘old’ Europe has been pursuing an anti-national, anti-democratic world constitutionalism that, for all its idealism and achievements, is irreconcilable with America’s commitment to democratic self-government,” writes professor Jed Rubenfeld, of Yale Law School, in the *Wilson Quarterly*. Rubenfeld adds, “When the international community throws down the gauntlet over the death penalty in America while merely clearing its throat about the slaughter in Yugoslavia, Americans can hardly be blamed if they see a sign that an anti-American agenda can be expected to find expression in international law.”

But while it’s fun to mock the excesses of judicial one-worldism, and while it’s important to guard against the anti-

democratic drift of such thinking, the trend is not all bad.

For starters, the notion of constitutional interpretation as a purely historical inquiry into the Framers' intentions has been pretty thoroughly buried, for a long time, by the Supreme Court and the vast majority of legal scholars. Almost everybody, including Bork and Scalia, supports judicial "interpretations" that are really revisions of the Constitution in at least some cases. For better or worse, extratextual and a historical methods of discerning (or inventing) constitutional principles and values are the norm, not the exception.

This should not be carried to the point of imposing upon Americans the principles and values of other nations, as the Court did in *Atkins*. But within reasonable bounds, Supreme Court citations of foreign law can serve at least three worthwhile purposes: shedding empirical light on what might be the real-world impact of a decision following a foreign court's approach to a common problem; enhancing the persuasiveness of the Court's opinions to those who see international consensus as a badge of legitimacy; and displaying what Thomas Jefferson called "a decent respect to the opinions of mankind," a phrase regularly invoked by judicial internationalists.

Most of the justices regularly travel abroad and hobnob at conferences with judges, lawyers, and professors from around the world. And they regularly hear complaints like the one by a prominent London barrister, who asserted at a 2000 American Bar Association convention in London that "your system is quite certain it has nothing to learn from us," because the U.S. Supreme Court so rarely takes account of European court decisions.

Bork dismisses such complaints in his book as "insolent foreign browbeating." But there is more to them than that. We have long held out our own Constitution and our independent judiciary as models for other nations. Many of these nations have followed our example so enthusiastically that their judges regularly cite our Supreme Court's decisions as guides to interpretation of their own constitutions. It is understandable that they should expect American justices and judges to return the compliment, at least by giving respectful consideration to their constitutional decisions even when our own Constitution requires different answers.

At a time of unprecedented fear and resentment of the United States around the globe, we desperately need all the help we can get in the war against terrorism. That alone is a good reason for the Court to take pains to show respect not only for the rule of law but also for the work of foreign and international courts. It should, in the words of Justice Ginsburg, display "a spirit of humility" vis-a-vis world opinion. But it should display more humility vis-a-vis the American electorate too.

Don't Gag U.S. Courts

The National Law Journal

August 23, 2003

Martha F. Davis

One of the profound lessons of Sept. 11, 2001, is that isolationism is dangerous—not only because it exacerbates potential threats from outside our borders, but because it excludes sources of ideas and support from other nations that can bolster U.S. efforts internationally and domestically.

Unfortunately, this lesson seems to have been lost on many in Congress. Instead, efforts are under way to impose House Resolution 568, a 'gag order' on the federal courts, which discourages judges from looking at foreign or international precedents. After a favorable vote by the Constitution Subcommittee, the resolution, which has 74 co-sponsors, is now pending before the full House Judiciary Committee. If it goes forward, the resolution could have an immediate impact on the U.S. Supreme Court, which will hear arguments on Oct. 13 in *Roper v. Simmons*, a constitutional challenge to the juvenile death penalty. The Missouri Supreme Court decision in *Roper* relied in part on international human rights law to support striking down the law that permitted juvenile executions.

The U.S. Supreme Court has begun to embrace international dialogue on a range of issues. For many years, individual justices have noted the importance of learning from other nations. In particular, Justice Sandra Day O'Connor has urged U.S. judges to draw on decisions of the European Court of Justice, while justices Ruth Bader Ginsburg and Stephen Breyer have championed the relevance of international legal materials. Chief Justice William Rehnquist and Justice

Anthony Kennedy have also noted in speeches and writings the importance of looking to international and comparative law for inspiration.

In 2003, these individual voices came together in several constitutional decisions, including *Lawrence v. Texas* and *Grutter v. University of Michigan*. In *Lawrence*, the majority cited both the laws of other nations and international human rights law as bases for comparison with U.S. precedents. In *Grutter*, Ginsburg's concurrence made specific reference to international practices of affirmative action.

An International Dialogue

With these references, the court entered into a dialogue of ideas with its counterparts around the world. The Supreme Court of Canada, the supreme courts of India, Israel and South Africa, the European Court of Justice and many other high courts have strong traditions of looking to U.S. precedents as they shape their own domestic law.

Now U.S. courts have started to respond. But rather than the wholesale adoption of other nations' approaches to, for example, gay rights, the U.S. Supreme Court drew on our own domestic legal precedents while acknowledging the parallel processes and various outcomes in other nations with similar legal traditions and standards. This fruitful approach ensures that Supreme Court decisions canvas the best ideas and approaches available, while also engaging the judicial branch in the sort of

international human rights dialogue that-if conducted universally and responsibly might ultimately help prevent the conditions that give rise to terrorist acts.

House Resolution 568 raises a number of serious issues, not the least of which is Congress' overreaching attempt to influence judicial decision-making. A gag order that discourages the judicial branch from looking at international practices, and citing those practices where relevant, strikes at the heart of an independent judiciary.

The resolution also represents a dangerous extension of the executive branch's isolationist foreign policy to international ideas themselves. Courts and judges, after all, trade in ideas. The resolution attempts to bar consideration of a whole range of ideas simply because of their source in foreign or international law. Ironically, it is the resolution itself that is fundamentally at odds with the American values of free expression and reasoned debate. While the

House resolution has no binding effect on the judiciary, its potential to chill the judiciary is clear. Judicial nominees can expect that this issue will become the next confirmation hot button, and they may feel pressured to succumb to an isolationist ideology. Judges with life tenure may feel constrained by fears of censure or even impeachment.

The human rights dialogue initiated by the federal courts is a healthy exchange of ideas that can lead to better judicial decisions here and, in the end, a deeper understanding of human rights worldwide. Faced with the ongoing terrorist threat, Congress surely has better things to do than inject isolationist politics into the federal judiciary.

Martha F. Davis is an associate professor at Northeastern University School of Law. She is the recipient of a 2003-2004 Soros Reproductive Health and Rights Fellowship.

Thinking Outside the U.S.

The Washington Post

August 4, 2003

Charles Lane

The Supreme Court is going global – and not just in the sense that several of the justices have embarked on their annual summer voyages to European destinations. Rather, the Court's own decision-making is beginning to reflect the influence of international legal norms, as well as rulings by courts in foreign countries.

The trend peaked in the two most important cases of the recently completed term – the court's rulings permitting race-conscious admissions in higher education and abolishing state prohibitions on private, consensual homosexual conduct.

In both cases, justices invoked legal principles that were not made exclusively in the United States.

In the affirmative action case, Justice Sandra Day O'Connor wrote for a 5-to-4 majority that the University of Michigan Law School's effort to enroll a "critical mass" of black, Latino and Native American applicants could pass muster under the U.S. Constitution – though such programs might not be necessary 25 years from now. Justice Ruth Bader Ginsburg wrote a separate concurring opinion, joined by Justice Stephen G. Breyer, that noted that the court's 25-year time frame was consistent with the International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994, but that it should not be considered a firm forecast.

More decisively, Justice Anthony M. Kennedy buttressed his majority opinion in the homosexual conduct case by noting that the court's past approval of state sodomy bans was out of step with the law in other Western democracies. Citing opinions of the European Court of Human Rights, he wrote that "the right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries."

The court's consideration of international perspectives was a breakthrough for the "transnational" legal perspective, which, advocates say, recognizes that the United States – historically an innovator in constitutional adjudication – now has much to learn from the rapidly developing constitutional traditions of other democracies.

"Human rights progress is not the same in every part of the world at the same time," said Harold Hongju Koh, a professor of international law at Yale who served as assistant secretary of state for democracy, human rights and labor in the Clinton administration. "In the U.S., we're ahead on some issues, but behind on others, such as the death penalty, gay rights and immigrants' rights."

Koh noted that the Court's 2002 ruling banning the death penalty for mentally retarded criminals also invoked international opinion. In explaining why that practice violated contemporary notions of

permissible punishment, Justice John Paul Stevens writing for a 6-to-3 majority, said that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.” Stevens attributed this observation to a friend-of-the-court brief filed by the European Union.

This approach is not without its critics, however, and some of the sharpest criticism has come from within the court itself, especially from Justice Antonin Scalia.

Responding to Stevens in the death penalty case, Scalia sardonically awarded Stevens’s reference to the “world community” a “Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus.’” “

Citing his own words from one of the court’s previous death penalty cases, Scalia wrote: “We must never forget that it is a Constitution for the United States of America that we are expounding. . . . [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.”

Scalia’s view is supported by conservative legal scholars who regard the court’s use of international legal sources as an intellectually amorphous endeavor that would subject U.S. citizens to the decisions of foreign legal institutions. “When the court starts taking things like that into account, it reveals itself as more interested in making policy than interpreting the fixed texts of the Constitution or statutes,” said John C. Yoo, a former Bush administration adviser on international law, who teaches law at the University of California at Berkeley.

Koh and Yoo agree on one thing: Both said that the justices’ interest in international law has probably been influenced by meetings with fellow jurists on their frequent visits abroad.

“Today, the justices are traveling much more than they once did,” Koh said. “And when they go overseas, the question they are asked is, ‘How does your jurisprudence fit in with that of other countries?’”

Foreign Exchange: Should the Supreme Court Care What Other Countries Think?

Slate
April 9, 2004
Tim Wu

Last week Justice Antonin Scalia did something rather brave—at least in Washington terms: He gave a speech to people who disagree with him. The Supreme Court justice told more than 1,000 international lawyers—members of the American Society of International Law—something they didn't want to hear. He argued that the discussion of foreign cases in U.S. constitutional opinions is “wrong,” perhaps even unconstitutional. No surprise that Anne-Marie Slaughter, president of the society, was quick to promise “a response.”

The Scalia showdown illuminates a festering dispute that's fast becoming the court's own transatlantic divide: When is it appropriate for the Supreme Court to discuss foreign legal materials? And while Scalia's answer is “nearly never,” other members of the court see comparative constitutionalism as enriching and uplifting. To a court already divided along every ideological position imaginable, add judicial foreign policy as the latest fault line.

Scalia is not alone: His jeremiads on the subject have inspired something of a Republican crusade. House Republicans reacted angrily to last spring's *Lawrence v. Texas*, a decision that not only struck down a ban on homosexual sodomy but also had the nerve to cite a European case in the process. They began peppering their speeches with comments like “The American people have not consented to being ruled by foreign powers or tribunals.” And Tom Feeney, the representative from

Florida who made that particular remark, is co-sponsor of an antiforeign-law resolution titled the “Reaffirmation of American Independence.” Justices who ignore the resolution, he says, “may subject themselves to the ultimate remedy, which would be impeachment.” The Web site *Conservative Alerts* agitates in similar fashion: “‘No More’ to these ‘internationalist’ Supreme Court Justices,” it says, “they could be IMPEACHED for favoring OTHER countries' laws instead of the U.S. Constitution.”

Legal “comparativism” in the Supreme Court is staging a comeback. In *Atkins v. Virginia*, the 2002 decision in which the court barred the execution of the mentally retarded, the following sentence appeared in Justice Steven's opinion: “Within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.” And *Lawrence*, last year's sodomy decision, also used foreign materials, albeit to refute international claims made in an earlier case. In 1986, then-Chief Justice Warren Burger (a great xenophile) had argued in *Bowers v. Hardwick* that bans on gay sex were “firmly rooted in Judeo-Christian moral and ethical standards.” In *Lawrence*, Justice Anthony Kennedy pointed out that whatever ancient practice might have been, England in particular (perhaps under the influence of David Beckham) and Europe in general had changed their minds. Even the current chief justice, William Rehnquist, has dabbled in comparativism—discussing the Dutch

experience in the course of rejecting a right to assisted suicide in 1997's *Washington v. Glucksburg*.

It's become a bit of a Punch and Judy show: Just about every time the court cites foreign materials, Scalia and/or Clarence Thomas dissent. In the words of Scalia, "The views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution." Or, to quote Thomas on the subject, "This court should not impose foreign moods, fads, or fashions on Americans."

Contemporary objections to the use of foreign precedent have a long pedigree in American politics: There's always been a simmering fear of foreigners tainting our leaders. In the 1790s, John Adams and Thomas Jefferson were accused of being more English or French than American, respectively, after spending time abroad. Today, the fear is that Sandra Day O'Connor or Anthony Kennedy—after one too many global judicial conferences—will go the way of Justice Stephen Breyer and become hopelessly intoxicated by foreign ways.

Part of what Scalia says is undeniably correct. There is such a thing as the misuse, and even the illegal use, of foreign law by American courts. Were the Second Circuit Court of Appeals to announce a legal obligation to obey the European Court of Human Rights, most (though not all) international lawyers would join the crowds storming the Bastille. But the Supreme Court simply hasn't done that: It has not deferred to or followed foreign cases in statutory or constitutional cases. Scalia and the House Republicans, for effect really, are mixing up the difference between listening to foreign ideas and obeying foreign commands. Scalia is like the prohibitionist

who confuses drinking with alcoholism. His narrowly correct point stigmatizes a range of reasonable, indeed salutary, judicial behavior.

Everyone on the Supreme Court (including Scalia) agrees that foreign law is relevant—if not vital—to the international-law cases that land in U.S. courts. Treaties, for example, are somewhat like a contract between nations and therefore joint projects. The use of foreign law to help ascertain a treaty's meaning is uncontroversial.

Similarly, there is simply nothing constitutionally suspect about the under-recognized "judicial shout-out." Judges are not unlike rappers and bloggers: They like to pay their respects. Rapper 50 Cent in Ghetto Quran Lyrics offers:

Shout out to Clanvis and Clutch, Bob
Dre, Black Will If the flow don't kill
you the Mac will.

Which is pretty much the same thing Justice Breyer does in the 2000 case *Nixon v. Shrink Missouri Government*:

The approach taken by these cases is consistent with that of other constitutional courts facing similarly complex constitutional problems [after which he cites European and Canadian Courts].

Both stanzas are basically meaningless as a legal or lyrical matter, but both pay respect. For Justice O'Connor this is what matters most about citing foreign materials: It "creates that all-important good impression." The judicial shout-out, while without legal meaning, is a useful courtesy. If you're the world's senior constitutional court, it doesn't hurt to reach out to those more junior courts, and say, "we hear ya,"

even if we proceed to ignore their reasoning. This is especially true for the fledgling constitutional courts whose development the United States has tried to encourage for the last several decades. The shout-out, in short, is how the court increases its intellectual influence.

Third, while good judges copy, great judges steal: American courts have been borrowing ideas from other legal systems since the beginning. The 1877 landmark Supreme Court opinion in *Pennoy v. Neff* is a sterling example. In a case taught in every first-year procedure class, Justice Field borrowed concepts from public international law and made them part of the due-process clause of the United States Constitution. (More specifically, *Pennoy* tapped international concepts of territorial sovereignty to rule states judicially powerless outside of their borders.) As *Pennoy* shows, there's a difference between relying on alien cases and simply borrowing ideas from clever foreigners. The latter implies no future obligation.

The final and perhaps most important reason to discuss foreign precedent is to promote judicial honesty. What Scalia and the House Republicans advocate is a kind of judicial mind-control: They want judges to banish sinful, foreign thoughts when deciding cases, in exchange for a pure focus on that founding moment in Philadelphia. But this contemplates a level of public control over the judicial psyche that is unrealistic and, frankly, unhealthy. The big constitutional cases that reach the Supreme Court are difficult—usually without obvious answers from text of the Constitution or its history. Faced with these kinds of problems, judges, as Richard Posner puts it, will never be “potted plants.” They will (and should) exercise their own judgment. That judgment will inevitably be influenced by American

precedent, but also, let's be honest, by the novels they read, their political friends, and their visions of the ideal society and the good life. If a judge dreams of making the United States more like modern Europe or medieval England, her decisions will reflect those aspirations. So, why not come clean, confess to the charisma of foreign ideas, and err on the side of judicial candor?

Unfortunately, if the congressional resolutions are any sign, the flap over foreign citation will get stupider before it gets smarter. Which is a shame because claims of “foreign taint” are as lame a libel today as they were in the 1790s. We should ask: Is someone as intellectually stubborn as Sandra Day O'Connor realistically in danger of corruption by foreign influence? Pas question.

Courting the World: U.S. Judges Must Overcome a Culture of Legal Isolationism—Or Risk Being Left Behind

Foreign Policy
March-April, 2004
Anne-Marie Slaughter

U.S. judges must overcome a culture of legal isolationism-or risk being left behind. When the Supreme Court of the United States ruled last summer that a Texas anti-sodomy law was unconstitutional, it was a surprise victory for civil rights advocates and the gay and lesbian community. That case, *Lawrence v. Texas*, was also one of the rare instances in which the court cited the decision of a foreign court in a majority opinion. The Supreme Court overruled a 1986 decision in which then Chief justice Warren Burger had argued that nations sharing the United States' cultural heritage had long condemned homosexuality. In *Lawrence*, justice Anthony Kennedy pointed to a 1981 decision by the European Court of Human Rights that struck down an anti-sodomy law in Northern Ireland to show that many members of Western civilization had a more tolerant view than Burger had maintained.

That short citation was a victory for the internationalists on the court-led by justices Stephen Breyer, Sandra Day O'Connor, and Ruth Bader Ginsburg—who have been arguing for a decade that U.S. judges must become less parochial. On the other side of the debate are attitudes like those expressed in 1999, when justice Clarence Thomas concurred with justice John Paul Stevens in denying a death penalty appeal. Speaking for the nationalist (some would say isolationist) wing of the court, Thomas rebuked colleagues who cited foreign precedents by noting, “were there any such support [for the defendant’s argument] 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.”

At stake in this legal tussle is whether the United States will participate in an accelerating process of judicial globalization, both at the level of ordinary private commercial law and of fundamental constitutional and human rights principles. The European Commission for Democracy . . . now operates a Web site called CODICES, which regularly collects and digests the decisions of constitutional courts and courts of equivalent jurisdiction around the world. And in Asia, Taiwan’s constitutional court has translated large portions of its caselaw into English and made them available on its Web site to ensure it is part of the global dialogue. By exchanging views, sharing expertise, and citing each other’s opinions, judges around the world are cobbling together a global legal structure—one the United States ignores at its peril.

This ad hoc system is far from the hierarchical world order many international law enthusiasts have imagined. For starters, it offers no world supreme court to resolve disputes or pronounce authoritatively on binding rules of international law. Instead, what is developing is messier and more complex. It is a system comprising networks of national and international judges, usually

the product of shared jurisdiction over an area of the law—from bankruptcy to refugees—or a particular area of the world, such as the European Union (EU) or the Asia-Pacific region.

In the realm of commercial law, a globalizing economy has been crucial in driving judicial collaboration. In transnational bankruptcy disputes, for instance, national courts are concluding “cross-border insolvency cooperation protocols,” which are essentially mini-treaties setting forth each side’s role in resolving disputes. [. . .]

The judges who participate in these networks are rarely motivated by a missionary zeal to build a global system. Rather, they are driven by more prosaic concerns, such as judicial politics, the demands of a heavy caseload, and the impact of new international rules on national litigants. In the EU legal system, for instance, a lower-court judge in a national court who is butting heads with colleagues on a point of law often has the option of referring a case to the Court of Justice of the European Communities to gain support. In areas such as trade, intellectual property, the environment, and human rights, national courts around the world compare each other’s interpretations of international treaties.

Some conservatives in the United States charge that judges who look beyond their country’s borders violate their sworn duty to defend and uphold the constitution. But this nationalist position ignores the tremendous opportunity cost that comes with denying U.S. courts a voice in this global dialogue. The United States has always preached the virtues of its legal system. After the second World War, the United States helped establish new constitutional courts in

Germany and Japan. In the 1990s, the U.S. government helped shape the path-breaking International Criminal Tribunal for the former Yugoslavia. Today, the United States pushes courts in fledgling democracies to learn from its example. But why must such learning flow only one way? Does the United States have nothing to learn from any other jurisdiction? Beyond hypocrisy, the U.S. aversion to drawing on foreign decisions invites charges of judicial imperialism. Why should U.S. judges be able to consult work by economists and political scientists around the world (as they often do) but not the decisions of judges in other countries? Ginsburg, for instance, argues that U.S. courts might be able to learn from India’s legal wrangling with its caste system as U.S. judges confront the thorny issue of affirmative action. “In the area of human rights,” she observes, “experience in one nation or region may inspire or inform other nations or regions.”

Although global problems often require a global governing capacity, most governments and publics are unwilling to accept an international centralization of power. The emerging international legal dialogue offers a solution to that dilemma. A global legal system made of loose judicial networks in which national judges retain their autonomy but profit from one another’s wisdom, experience, and occasional cooperation is far more attractive to most U.S. citizens—and indeed to most Europeans, Africans, Latin Americans, and Asians—than an international legal hierarchy. It’s no world court, but it works.

Judges are rarely motivated by a missionary zeal to build a global legal system. Rather, they are driven by more prosaic concerns, such as the demands of a heavy caseload.

Judicial Interpretation of Laws Based on Foreign Precedents

Committee on House Judiciary Subcommittee on Constitution

March 25, 2004

Statement of John O. McGinnis

Professor of Law, Northwestern University

This hearing is not prompted simply by the academic question of the relevance of foreign and international law to constitutional interpretation. In the recent case of *Lawrence v. Texas* the Supreme Court held that the due process clause protected a substantive right to sodomy and relied upon a case from the European Union as persuasive authority for that result. After citing the case, Justice Anthony Kennedy, writing for the majority, pressed the European analogy: The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.

Thus, the question I want to address is whether the Court should use foreign or international law as persuasive authority in interpreting our own Constitution. I believe that subject to certain caveats the Court should not use foreign law or international law and that its use in *Lawrence* is exemplary of all that is wrong with such an approach to constitutional interpretation. I should note that this question is entirely separate from the question of whether *Lawrence* was rightly decided and certainly separate from whether laws against sodomy are wise. I, for my part, think such laws are unwise and should be repealed.

One straightforward argument that rules out most use of foreign law in constitutional interpretation is that in almost all cases it is

inconsistent with the correct way of interpreting the constitution—interpreting the Constitution according to its original meaning.

If originalism is the right interpretative theory of the Constitution, there will be little occasion to use contemporary foreign precedent as persuasive authority because contemporary foreign precedent would not generally cast light on what a reasonable person at the time of ratifying the Constitution would have understood to be its meaning.

Within an originalist theory of interpretation there are two other possible proper uses of foreign and international precedent. Resort to contemporary foreign or international law might be proper if the original Constitution calls for reference to contemporary foreign or international law. The Constitution may do this in limited circumstances as when it permits Congress to “define offenses against the law of nations.” Once again under the constitutional provisions for treaty making the political actors rather than the courts are choosing to bring international law into our domestic regime.

Finally, foreign law could be relevant to prove a fact about the world which is relevant to the law. For instance, it might be useful to evaluate an assertion that one consequence follows from another, because one could show that in some legal systems the consequence does not always follow.

I would thus modify the resolution to make clear that these uses of foreign or international law are legitimate.

Even if one does not accept an originalist theory of Constitutional interpretation, substantial pragmatic problems militate against relying on contemporary foreign and international law as sources of constitutional authority. First, the Constitution contains no rule as to which of the many bits of conflicting foreign rules of law should be used as persuasive precedent. Judges therefore are likely to use their own discretion in choosing what foreign law to apply and what foreign law to reject. Judges will use foreign law as a cover for their discretionary judgments.

Lawrence exemplifies this problem. While the European Union protects sodomy as a constitutional right, many nations still criminalize sodomy. Why should the Court look to the European Union and not these other nations?

Unfortunately, the Lawrence Court never answers this question. It instead simply felt free to pick and choose from decisions around the world the ones that it likes, to use them as justification or at least decoration for its own ruling, and to ignore decisions that are contrary. It is hard to think of a more ad hoc and manipulable basis for interpreting the United States Constitution.

Second, the problem with using foreign decisions is that they are the consequence of a whole set of norms and governmental structures that are different from those in the United States. They may be appropriate for their nations but out of place in nations with different government structures.

Thus, foreign constitutional norms do not just reflect certain views about the content

of substantive rights but also a foreign mode of defining them. Any judicial opinion from another culture is the culmination of a complex institutional structure for producing norms. The low cost of accessing the mere words of a foreign judicial opinion can blind us to the fact that we are only seeing the surface of a far deeper social structure that is incompatible with American institutions. This does not necessarily mean that the American political system as a whole is better than that of some others, but it does caution against assuming that judicial decisions from other nations will produce the same good effects here that they may produce in a significantly different political system.

Third, promiscuous use of foreign law will undermine domestic support for the Constitution. The Constitution begins: "We the People . . . do ordain and establish the Constitution of the United States." In a formal sense, the entire Constitution is an expression of the views of the people of the United States, not some other people. Relying on international or foreign law except when the Constitution directs us to look at the law flouts this first principle. This formal point has social implications. The Constitution has commanded respect and allegiance because it our Constitution, not a document imposed from abroad.

The emphatically American nature of our Constitution has been a source of affection and pride that have contributed to our social stability. I want to close by discussing an argument that some may deploy to suggest that quite a bit of foreign and international law should be used in interpreting the Constitution. It is the claim that some clauses of the Constitution themselves contemplate an evolving meaning and foreign law can help chart the course of this evolution. Thus, the Supreme Court itself

appears to interpret the cruel and unusual punishment clause in light of evolving standards of human decency rather than the standards at the time the clause was framed. It is in this context that the Supreme Court in *Atkins v. Virginia* cited to the worldwide community's general refusal to execute the cognitively impaired as evidence that evolving standards demand that the United States end such executions.

Let us assume for a moment that the cruel and unusual clause should be tied to evolving standards in general. It does not

follow that the Framers would have wanted to tie these evolving standards to the standards of other nations around the world rather than focus only on domestic evolution. At the time the Constitution was framed the United States was one of the few republican nations in the world and the Framers often distinguished its practices from the world's ancient regimes. It seems very unlikely that given the self-conscious exceptionalism of the United States that the Framers would have wanted make the standards of our Bill of Rights depend on the practices of other nations.

Judicial Interpretation of Laws Based on Foreign Precedents

Committee on House Judiciary Subcommittee on Constitution

March 25, 2004

Statement of Vicki C. Jackson

Professor of Law, Georgetown University Law Center

Thank you for the opportunity to provide a statement on proposed House Resolution 568. I want to make three points. First, the “law of nations” and the practices of other constitutional systems have been used since the Founding period to assist the Court in reaching appropriate interpretations of American law. Second, the Court’s use of foreign law in *Lawrence v. Texas* was not to bind or control its judgments of constitutional questions under U.S. law but to assist the Court in making the best interpretations of our own law. Third, legislative directions to the courts on how to interpret the Constitution raise serious separation of powers questions and might be perceived to threaten judicial independence in ways inconsistent with important traditions of American constitutionalism. For these reasons I would urge the House not to adopt the proposed resolution.

Far from being hostile to considering foreign countries’ views or laws, the Founding generation of our Nation had what the signers of the Declaration of Independence described as a “decent Respect to the Opinions of Mankind.” Congress was empowered in our Constitution to regulate foreign commerce and to prescribe “Offenses against the Law of Nations,” the President authorized to receive ambassadors, and the federal courts given jurisdiction over cases arising under treaties as well as under the Constitution and laws of the United States, and over suits affecting ambassadors, or involving aliens or foreign countries as

parties in some cases. The Federalist Papers explained that

An attention to the judgment of other nations is important to every government for two reasons: the one is, that, independently of the merits of any particular plan or measure, it is desirable ... that it should appear to other nations as the offspring of a wise and honorable policy; the second is, that in doubtful cases, particularly where the national councils may be warped by some strong passion or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can be followed.

The Federalist No. 63 (Hamilton or Madison).

Although Federalist No. 63 was not directed to the courts, Federalist No. 80 (Hamilton) explained the need for a judicial power broad enough to resolve disputes in which foreign nations had an interest in order to avoid causes for war. U.S. Supreme Court Justices from the founding period recognized the relevance of the “law of nations” in interpreting U.S. law and resolving disputes before the federal courts. As Justice Story said, in writing the foundational Supreme Court decision in *Martin v. Hunter’s Lessee*, the judicial power of the United States included categories of jurisdiction, such as admiralty,

“in the correct adjudication of which foreign nations are deeply interested[and in] which the principles of the law and comity of nations often form an essential inquiry.”

* * *

This brings me to my second point. The Court’s recent references to foreign law and legal practice seems to me entirely consistent with the founding generation’s respectful interest in other countries’ opinions and legal rules. Lawrence did not treat foreign court decisions as binding authority, which is an important distinction. Rather, the foreign decisions were cited in Lawrence for two purposes: The first was to correct or clarify the historical record referred to in Chief Justice Burger’s opinion in *Bowers v. Hardwick* a decision reversed by Lawrence.

As the Lawrence Court wrote, “The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction,” including the *Dudgeon* case decided by the European Court of Human Rights in 1981. Second, the Lawrence opinion suggested, the European decisions invalidating laws prohibiting adult, consensual homosexual conduct raised the question whether there were different governmental interests in the United States that would support such a prohibition on human freedom, and concluded there were not. This use of foreign law to interrogate and question our own understandings is something that will help improve the process of judicial reasoning, but certainly does not necessarily lead to the conclusion that our law should follow that foreign law.

Indeed, on a number of occasions our Court has referred to foreign practice to distinguish our own Constitution from that of other nations. In the great *Youngstown Steel Case*, the Court held that President Truman lacked constitutional power to order seizure of the steel companies. Justices Frankfurter and Jackson alluded to the dangers of dictatorship that other countries had recently experienced, Justice Jackson explaining in some detail features of the Weimar Constitution in Germany. After describing the protections of, inter alia, England, Scotland and India, against improper custodial confessions, the Court indicated that our own situation was similar enough that their positive experience gave “assurance that lawlessness will not result from warning an individual of his rights or allowing him to exercise them.” It went on to say:

It is consistent with our legal system that we give at least as much protection to these rights as is given in the jurisdictions described. We deal in our country with rights grounded in a specific requirement of the Fifth Amendment of the Constitution, whereas other jurisdictions arrived at their conclusions on the basis of principles of justice not so specifically defined.

Considering other courts’ decisions on shared concepts of liberty, equality, freedom of expression, cruel and unusual punishment can help clarify what the U.S. Constitution stands for to what extent its precepts are shared, and to what extent they are distinctive. The U.S. constitution has, directly or indirectly, inspired many other nations to include commitments to liberty, freedom and equality in their own constitutions. It is thus understandable that such nations may look to our courts’

decisions and over time expect our courts to be aware of their courts' interpretations of legal concepts having a common source of inspiration. For the many nations around the world whose own constitutions have been inspired in part by that of the United States, and whose judges believe that we share commitments to ideas of liberty, freedom and equality, the U.S. Court's occasional consideration of foreign court decisions is, in a sense, a recognition of common judicial commitments often inspired by the example of the United States to the protection of individual rights. And on the current Court, Chief Justice Rehnquist, as well as Justices Breyer, Ginsburg, Kennedy, Scalia and Stevens, have referred to or noted foreign or international legal sources in their opinions in U.S. constitutional cases.

It is thus not only a traditional legal practice but one that has been used by justices who otherwise have very different views. Finally, the questions of what sources are to be considered in giving meaning to the

Constitution in adjudication is one that is, in my view, committed by the Constitution to the judicial department. *Marbury v. Madison* famously explained: "It is emphatically the province and duty of the judicial department to say what the law is." [. . .]

* * *

Around the world, the most widely emulated institution established by the U.S. Constitution has been the provision for independent courts to engage in judicial review of the constitutionality of the acts of other branches and levels of government. Congress should be loath even to attempt to intrude on this judicial function, with respect to a practice that dates back to the founding, and at a time when the United States is deeply engaged in promoting democratic constitutionalism in countries around the world, including provision for independent courts to provide enforcement of constitutional guarantees.

**Remarks for the American Constitutional Society
Looking Beyond Our Borders: The Value of a Comparative Perspective in
Constitutional Adjudication**

August 2, 2003

Ruth Bader Ginsburg, Associate Justice
The Supreme Court of the United States

The United States was once virtually alone in exposing laws and official acts to judicial review for constitutionality. But particularly in the years following World War II, many nations installed constitutional review by courts as one safeguard against oppressive government and stirred up majorities. National, multinational and international human rights charters and tribunals today play a key part in a world with increasingly porous borders. My message tonight is simply this: We are the losers if we do not both share our experience with, and learn from others.

That message is hardly original. A prominent jurist put it this way 14 years ago:

For nearly a century and a half, courts in the United States exercising the power of judicial review [for constitutionality] had no precedents to look to save their own, because our courts alone exercised this sort of authority. When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional

courts to aid in their own deliberative process.

The speaker was Chief Justice William H. Rehnquist. More recently, Justice O'Connor said: "While ultimately we must bear responsibility for interpreting our own laws, there is much to learn from . . . distinguished jurists [in other places] who have given thought to the same difficult issues that we face here."

In the value I place on comparative dialogue—on sharing with and learning from others—I count myself an originalist in this sense. The 1776 Declaration of Independence, you will recall, expressed concern about the opinions of other peoples; it placed before the World the reasons why the United States of America (the new nation was called that in the Declaration) was impelled to separate from Great Britain. The Declaration did so out of "a decent Respect to the Opinions of Mankind." It submitted the "Facts"—the "long train of [the British Crown's] Abuses and Usurpations"—to the scrutiny of "a candid World."

In writing the Constitution, the Framers looked to other systems and to thinkers from other lands for enlightenment, and they understood that the new nation would be bound by "the Law of Nations," today called international law. Among powers granted Congress, the Framers enumerated the

power “[t]o define and punish [. . .] Offences against the Law of Nations.”

* * *

But, our “island” or “lone ranger” mentality is beginning to change. Our Justices, as I noted at the start of these remarks, are becoming more open to comparative and international law perspectives. The term just ended may prove a milestone in that regard. *New York Times* reporter Linda Greenhouse observed in her annual roundup of the Court’s decisions: The Court has “displayed a [steadily growing] attentiveness to legal developments in the rest of the world and to the [C]ourt’s role in keeping the United States in step with them.”

In the Michigan affirmative action cases, in separate opinions, joined in one case by Justice Breyer, in the other in full by Justice Souter and in part by Justice Breyer, I looked to two United Nations Conventions: the 1965 International Convention on the Elimination of all Forms of Racial Discrimination, which the United States has ratified; and the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, which, sadly, the United States has not yet ratified. Both Conventions distinguish between impermissible policies of oppression or exclusion, and permissible policies of inclusion, “temporary special measures aimed at accelerating *de facto* equality.” The Court’s decision in the Law School case, I observed, “accords with the international understanding of the office of affirmative action.”

A better indicator, because it attracted a majority, is Justice Kennedy’s opinion for the Court in *Lawrence v. Texas*, announce June 26. [T]he Court emphasized: “The right the petitioners seek in this case has

been accepted as an integral part of human freedom in many other countries.” In support, the Court cited the leading, 1981 European Court of Human Rights decision, *Dudgeon v. United Kingdom*, and follow on European Human Rights Court decisions affirming the protected right of homosexual adults to engage in intimate, consensual conduct.

Recognizing that forecast are risky, I nonetheless believe we will continue to accord “a decent Respect to the Opinions of [Human]kind” as a matter of comity and in a spirit of humility. Comity, because projects vital to our well being—combating international terrorism is a prime example—require trust and cooperation of nations the world over. And humility because, in Justice O’Connor’s words: “Other legal systems continue to innovate, to experiment, and to find new solutions to the new legal problems that arise each day, from which we can learn and benefit.”

In conclusion, my cheers as you undertake the challenging mission to support and nurture the Constitution, as it has evolved over the span of two centuries and more. The time is right for that mission. As Abigail Adams wrote to her son of the era in which he was coming of age:

These are the times in which a genius would wish to live. It is not in the still calm of life, or the repose of a pacific station, that great characters are formed. The habits of a vigorous mind are formed in contending with difficulties.

**We Promised the World; Now President Bush Should Honor
Our Treaty Obligations to Foreigners in U.S. Courts**

Legal Times
April 12, 2004
Stuart Taylor

Much of what goes by the name “international law” in academic and European circles these days deserves little respect from the United States, because it consists of rules made by foreign judges and professors that this sovereign nation has never adopted. Many internationalists claim, for example, that firing missiles at terrorist leaders such as Osama bin Laden, as the Clinton administration once did, and aggressively interrogating captured terrorists, as the Bush administration is doing, violate international law.

Critics in Europe and elsewhere also assail the United States for refusing to submit to the jurisdiction of the new International Criminal Court, ostensibly created to bring genocidal monsters and notorious war criminals to justice. But the Bush administration’s wariness seems vindicated by the ICC chief prosecutor’s publicly expressing an itch to go after multinational executives who do business with regimes that, in his judgment, have used the proceeds to facilitate atrocities. Meanwhile, some ICC enthusiasts dream of prosecuting U.S. commanders for civilian casualties in war zones.

The conservative backlash against such stuff is understandable. But the backlash has gone too far, with many conservatives scoffing at the idea that the United States should ever heed international law or honor inconvenient rulings by international tribunals. At a time when much of the world sees America as an international scofflaw, and when we need

the world’s help to protect ourselves from terrorism, this attitude is self-defeating.

It’s past time for the Bush administration to show respect for the legitimate demands of international law. One big test will be its so-far-noncommittal response to a debatable but quite defensible March 31 decision by the 58-year-old World Court – formally known as the International Court of Justice, and not to be confused with the ICC – in a lawsuit by Mexico against the United States on behalf of more than 50 Mexicans on death row in various state prisons.

This Was the Deal

The Vienna Convention on Consular Relations of 1963 requires that foreign nationals be notified, at the time of their arrests, that they are entitled to call and meet with their home country’s consular officials. Consulates can be helpful in finding lawyers, notifying relatives, gathering exculpatory evidence from home, and otherwise. But state and local officials are often unaware of this treaty obligation and fail to give the required notice. Mexico urged the World Court to rule that this lack of notice in itself denies a fair trial, and that the defendants’ convictions must therefore be overturned.

The court rejected this argument. Instead, it ordered the United States to provide for judicial “review and reconsideration of the convictions and sentences” on a case-by-case basis, to determine whether the

violations “caused actual prejudice” to the fair-trial rights of any of these Mexicans [or other foreign nationals]. In most or all cases, such hearings would probably end in rulings that the trials were fair and the executions could proceed. And even if some death sentences were overturned, none of the Mexicans would go free as long as their guilt is clear.

This is not to deny that the World Court’s decision presents vexing constitutional and political issues. President George W. Bush may lack constitutional power simply to order governors or state courts to delay executions and hold new hearings. A 1996 act of Congress bars lower federal courts from holding new habeas corpus hearings in these cases. The Supreme Court has been unreceptive to such appeals. Rick Perry, Bush’s successor as governor of Texas, has already, in effect, told the World Court to go jump in a lake. And that’s what Bush’s conservative base would want him to tell the court.

But this is a case in which keeping the nation’s promises is more important than pleasing the Republican base or expediting executions. Bush and his aides can and should forcefully urge state officials to waive any objections to the new hearings. If that fails, the Justice Department can and should tell state courts and, ultimately, the U.S. Supreme Court that this country has explicitly consented to comply both with the consular convention and with the World Court’s interpretation of it; that such treaties are “the supreme law of the land,” binding on “judges in every state” under Article VI of the Constitution; that the World Court’s decision is legitimate; and that international law – or, at a minimum, comity – calls for deference to it.

If, on the other hand, the Bush administration dismisses or disregards the decision, the denunciations of U.S. lawlessness will reach a new crescendo, especially in Mexico, where the case is a cause celebre. And the denouncers will have a point.

We Agreed to It

Unlike the ICC, which claims the unprecedented, politically unaccountable power to prosecute and imprison anyone in the world accused of committing or assisting certain grave crimes, the World Court hears only suits between nations that have consented to its jurisdiction. The United States has done so since 1946. The Reagan administration partially withdrew that consent in 1985, because the court was entertaining what the United States deemed an illegitimate suit over the U.S. mining of Nicaraguan harbors and arming of Contra rebels. But the United States has never withdrawn its explicit consent to comply with the World Court’s interpretation of the consular convention.

And for good reason. The consular convention is the same treaty on which U.S. nationals who find themselves in foreign jails depend for access to U.S. consular officials – perhaps the only hope of seeing daylight anytime soon in some precincts. This is also one of the treaties that the United States invoked in winning the May 1980 World Court decision ordering Iran to release its American hostages. [Iran ignored the ruling, which – like all its other rulings – the court had no practical power to enforce.]

This is the third case in which the World Court has faulted the United States for violating the consular rights of foreign nationals who ended up on death row. In all such cases, U.S. courts, including the

Supreme Court in 1998, have held that the defendants could not raise consular violations in appealing their murder convictions and death sentences, because their original lawyers had neglected to raise the issue at trial – a doctrine known as “procedural default.”

In the 1998 decision and another in 1999, the Supreme Court summarily rejected last-minute appeals to delay the executions of two inmates despite World Court rulings that they should be kept alive until that court had time to resolve suits by the inmates’ home countries – Paraguay and Germany, respectively. The World Court proceeded with Germany’s suit and held in 2001 that use of the procedural default doctrine to bar appeals in such cases itself violates the consular convention, by denying an adequate remedy for the original lack of notification.

Consider the Mexicans

Then came Mexico’s suit, which produced the more definitive Avena decision on March 31, with the lone U.S. judge joining the 14-1 majority. The World Court reaffirmed its 2001 decision and rejected the State Department’s argument that the right to seek gubernatorial clemency is an adequate remedy for consular violations. But the court did not give Mexico everything it wanted. Not only did it refuse to find the convictions and sentences invalid; it also rejected Mexico’s argument that any confessions or other evidence obtained from prisoners before notification of consular rights must be excluded from future trials.

Critics nonetheless assail the World Court decision as an overly aggressive, even outrageous effort by America-bashing death penalty opponents to interject foreign judges into routine state court proceedings. In my

view, however, it is not unreasonable to ask that – before putting foreign nationals to death over their own governments’ objections – the United States and its courts provide an opportunity to prove that they wouldn’t have been convicted or condemned but for U.S. violations of their consular rights.

Even though the guilt of most or all of these prisoners is not in doubt, such hearings would be worth the time and effort. In some cases, Mexico and other governments might be able to show that, if given timely notice, their consular officials could have found enough mitigating evidence to persuade trial juries not to vote for death. More important, the U.S. government might be able to show that it takes its treaty obligations seriously.

The Supreme Court is going global – and not just in the sense that several of the justices have embarked on their annual summer voyages to European destinations. Rather, the court’s own decision-making is beginning to reflect the influence of international legal norms, as well as rulings by courts in foreign countries.

The trend peaked in the two most important cases of the recently completed term – the court’s rulings permitting race-conscious admissions in higher education and abolishing state prohibitions on private, consensual homosexual conduct.

In both cases, justices invoked legal principles that were not made exclusively in the United States.

In the affirmative action case, Justice Sandra Day O’Connor wrote for a 5-to-4 majority that the University of Michigan Law School’s effort to enroll a “critical mass” of black, Latino and Native American applicants could pass muster under the U.S. Constitution – though such programs might

not be necessary 25 years from now. Justice Ruth Bader Ginsburg wrote a separate concurring opinion, joined by Justice Stephen G. Breyer, that noted that the court's 25-year time frame was consistent with the International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994, but that it should not be considered a firm forecast.

More decisively, Justice Anthony M. Kennedy buttressed his majority opinion in the homosexual conduct case by noting that the court's past approval of state sodomy bans was out of step with the law in other Western democracies. Citing opinions of the European Court of Human Rights, he wrote that "the right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries."

The court's consideration of these international perspectives was a breakthrough for the "transnational" legal perspective, which, advocates say, recognizes the United States – historically an innovator in constitutional adjudication – now has much to learn from the rapidly developing constitutional traditions of other democracies.

"Human rights progress is not the same in every part of the world at the same time," said Harold Hongju Koh, a professor of international law at Yale who served as assistant secretary of state for democracy, human rights and labor in the Clinton administration. "In the U.S., we're ahead on some issues, but behind on others, such as the death penalty, gay rights and immigrants' rights."

Koh noted that the court's 2002 ruling banning the death penalty for mentally

retarded criminals also invoked international opinion. In explaining why that practice violated contemporary notions of permissible punishment, Justice John Paul Stevens writing for a 6 to 3 majority, said that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." Stevens attributed this observation to a friend-of-the-court brief filed by the European Union.

This approach is not without its critics, however, and some of the sharpest criticism has come from within the court itself, especially from Justice Antonin Scalia.

Responding to Stevens in the death penalty case, Scalia sardonically awarded Stevens's reference to the "world community" a "Prize for the Court's Most Feeble Effort to fabricate 'national consensus.'" "

Citing his own words from one of the court's previous death penalty cases, Scalia wrote: "We must never forget that it is a Constitution for the United States of America that we are expounding. [. . .] [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution."

Scalia's view is supported by conservative legal scholars who regard the court's use of international legal sources as an intellectually amorphous endeavor that would subject U.S. citizens to the decisions of foreign legal institutions. "When the court starts taking things like that into account, it reveals itself as more interested in making policy than interpreting the fixed texts of the Constitution or statutes," said John C. Yoo,

a former Bush administration adviser on international law, who teaches law at the University of California at Berkeley.

Koh and Yoo agree on one thing: Both said that the justices' interest in international law has probably been influenced by

meetings with fellow jurists on their frequent visits abroad.

"Today, the justices are traveling much more than they once did," Koh said. "And when they go overseas, the question they are asked is, 'How does your jurisprudence fit in with that of other countries?'"

**Sosa v. Alvarez-Machain,
United States v. Alvarez-Machain
(124 S.Ct. 2739)**

Ruling Below: 331 F.3d 604; 2003 U.S. App. LEXIS 10949

Mexican citizens, acting on behalf of the Drug Enforcement Administration (DEA), kidnapped the Mexican national from Mexico and transported him to the U.S., where he was held, tried, and acquitted for his alleged involvement in the murder of a DEA agent. The Mexican national subsequently filed suit. The district court found that the former Mexican policeman was liable under the ATCA, but dismissed FTCA claims. On appeal, the court held that the DEA had no authority to effect the Mexican national's arrest and detention in Mexico, and the Mexican national could seek relief in federal court. The district court erred by dismissing the FTCA claims; the foreign activities exception did not apply because the Mexican national's kidnapping fit the headquarters doctrine. Nor did the intentional tort exception apply.

Questions Presented: Whether respondent Alvarez-Machain's allegation that the Drug Enforcement Administration instigated his abduction from Mexico for criminal trial in the United States supports a claim against the Government under the Federal Tort Claims Act (FTCA or Act), 28 U.S.C. § 1346(b)(1), §§ 2671-2680, and whether he may recover under the Alien Tort Statute (ATS), 28 U.S.C. § 1350.

**Jose FRANCISCO SOSA, Petitioner,
v.
Humberto ALVAREZ-MACHAIN, et. al., Respondent.**

**UNITED STATES, Petitioner,
v.
Humberto ALVAREZ-MACHAIN, et. al.**

Supreme Court of the United States
Decided June 29, 2004

[Excerpt; some footnotes and citations omitted]

SOUTER, J.:

[. . .] We hold that [Alvarez-Machain] is not entitled to a remedy under either statute.

Facts

In 1985, an agent of the Drug Enforcement

Administration (DEA), Enrique Camarena-Salazar, was captured on assignment in Mexico and taken to a house in Guadalajara, where he was tortured over the course of a 2-day interrogation, then murdered. Based in part on eyewitness testimony, DEA officials in the United States came to believe that respondent Humberto Alvarez-Machain

(Alvarez), a Mexican physician, was present at the house and acted to prolong the agent's life in order to extend the interrogation and torture.

In 1990, a federal grand jury indicted Alvarez for the torture and murder of Camarena-Salazar, and the United States District Court for the Central District of California issued a warrant for his arrest. The DEA asked the Mexican Government for help in getting Alvarez into the United States, but when the requests and negotiations proved fruitless, the DEA approved a plan to hire Mexican nationals to seize Alvarez and bring him to the United States for trial. As so planned, a group of Mexicans, including petitioner Jose Francisco Sosa, abducted Alvarez from his house, held him overnight in a motel, and brought him by private plane to El Paso, Texas, where he was arrested by federal officers. [. . .]

The case was tried in 1992, and ended at the close of the Government's case, when the District Court granted Alvarez's motion for a judgment of acquittal.

In 1993, after returning to Mexico, Alvarez began the civil action before us here. So far as it matters here, Alvarez sought damages from the United States under the FTCA, alleging false arrest, and from Sosa under the ATS, for a violation of the law of nations. The former statute authorizes suit "for [. . .] personal injury [. . .] caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." The latter provides in its entirety that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

* * *

We granted certiorari in these companion cases to clarify the scope of both the FTCA and the ATS. We now reverse in each.

The Government seeks reversal of the judgment of liability under the FTCA on two principal grounds. It argues that the arrest could not have been tortious, because it was authorized by 21 U.S.C. § 878, setting out the arrest authority of the DEA, and it says that in any event the liability asserted here falls within the FTCA exception to waiver of sovereign immunity for claims "arising in a foreign country[.]" We think the exception applies and decide on that ground.

The FTCA "was designed primarily to remove the sovereign immunity of the United States from suits in tort and, with certain specific exceptions, to render the Government liable in tort as a private individual would be under like circumstances." The Act accordingly gives federal district courts jurisdiction over claims against the United States for injury "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." But the Act also limits its waiver of sovereign immunity in a number of ways. [. . .]

Here the significant limitation on the waiver of immunity is the Act's exception for "any claim arising in a foreign country," a provision that on its face seems plainly applicable to the facts of this case. In the

Ninth Circuit's view, once Alvarez was within the borders of the United States, his detention was not tortious, the appellate court suggested that the Government's liability to Alvarez rested solely upon a false arrest claim. Alvarez's arrest, however, was said to be "false," and thus tortious, only because, and only to the extent that, it took place and endured in Mexico. The actions in Mexico are thus most naturally understood as the kernel of a "claim arising in a foreign country," and barred from suit under the exception to the waiver of immunity. [. . .]

* * *

(Discussing the headquarters doctrine as subjecting the United States to suit despite to FTCA's foreign country exception.)

When the FTCA was passed, the general rule, as set out in various state statutes, was that "a cause of action arising in another jurisdiction, which is barred by the laws of that jurisdiction, will [also] be barred in the domestic courts."

[. . .] Any tort action in a court of the United States based on the acts of a Government employee causing harm outside the State of the district court in which the action is filed requires a determination of the source of the substantive law that will govern liability. When the FTCA was passed, the dominant principle in choice of law analysis for tort cases was *lex loci delicti*: courts generally applied the law of the place where the injury occurred. [. . .]

The application of foreign substantive law exemplified in these cases was, however, what Congress intended to avoid by the foreign country exception. [. . .]

* * *

Alvarez has also brought an action under the ATS against petitioner, Sosa, who argues (as does the United States supporting him) that there is no relief under the ATS because the statute does no more than vest federal courts with jurisdiction, neither creating nor authorizing the courts to recognize any particular right of action without further congressional action. Although we agree the statute is in terms only jurisdictional, we think that at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law. [. . .]

* * *

But holding the ATS jurisdictional raises a new question, this one about the interaction between the ATS at the time of its enactment and the ambient law of the era. Sosa would have it that the ATS was stillborn because there could be no claim for relief without a further statute expressly authorizing adoption of causes of action. *Amici* professors of federal jurisdiction and legal history take a different tack, that federal courts could entertain claims once the jurisdictional grant was on the books, because torts in violation of the law of nations would have been recognized within the common law of the time. [. . .]

* * *

[. . .] In the years of the early Republic, this law of nations comprised two principal elements, the first covering the general norms governing the behavior of national states with each other [. . .]

The law of nations included a second, more pedestrian element, however, that did fall within the judicial sphere, as a body of judge-made law regulating the conduct of

individuals situated outside domestic boundaries and consequently carrying an international savor. [. . .] The law merchant emerged from the customary practices of international traders and admiralty required its own transnational regulation. [. . .]

There was, finally, a sphere in which these rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships. Blackstone referred to it when he mentioned three specific offenses against the law of nations addressed by the criminal law of England: violation of safe conducts, infringement of the rights of ambassadors, and piracy. It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on minds of the men who drafted the ATS with its reference to tort.

* * *

[. . .] There is too much in the historical record to believe that Congress would have enacted the ATS only to leave it lying fallow indefinitely.

[. . .] Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations. Uppermost in the legislative mind appears to have been offenses against ambassadors, violations of safe conduct were probably understood to be actionable, and individual actions arising out of prize captures and piracy may well have also been contemplated. But the common law appears to have understood only those three of the hybrid variety as definite and actionable, or at any rate, to have assumed only a very limited set of claims. [. . .]

* * *

In sum, 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.

[. . .] [T]here are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind. Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized. This requirement is fatal to Alvarez's claim.

* * *

[. . .] [T]he general practice has been to look for legislative guidance before exercising innovative authority over substantive law. It would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries.

[. . .] [T]his Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases. [. . .]

* * *

[. . .] We have no congressional mandate to seek out and define new and debatable violations of the law of nations [. . .]

* * *

While we agree with JUSTICE SCALIA to the point that we would welcome any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations, nothing Congress has done is a reason for us to shut the door to the law of nations entirely. It is enough to say that Congress may do that at any time (explicitly, or implicitly by treaties or statutes that occupy the field) just as it may modify or cancel any judicial decision so far as it rests on recognizing an international norm as such.

* * *

Thus, Alvarez's detention claim must be gauged against the current state of international law, looking to those sources we have long, albeit cautiously, recognized.

To begin with, Alvarez cites two well-known international agreements that, despite their moral authority, have little utility under the standard set out in this opinion. He says that his abduction by Sosa was an "arbitrary arrest" within the meaning of the Universal Declaration of Human Rights (Declaration). And he traces the rule against arbitrary arrest not only to the Declaration, but also to article nine of the International Covenant on Civil and Political Rights (Covenant), to which the United States is a party, and to various other conventions to which it is not. But the Declaration does not of its own force impose obligations as a matter of international law. [. . .] And, although the Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.

Accordingly, Alvarez cannot say that the Declaration and Covenant themselves establish the relevant and applicable rule of international law. [. . .]

* * *

Alvarez thus invokes a general prohibition of "arbitrary" detention defined as officially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances. [. . .] Alvarez cites little authority that a rule so broad has the status of a binding customary norm today. [. . .] His rule would support a cause of action in federal court for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place, and would create a cause of action for any seizure of an alien in violation of the Fourth Amendment, supplanting the actions under Rev. Stat. § 1979, and *Bivens v. Six Unknown Fed. Narcotics Agents*, that now provide damages remedies for such violations. It would create an action in federal court for arrests by state officers who simply exceed their authority; and for the violation of any limit that the law of any country might place on the authority of its own officers to arrest. And all of this assumes that Alvarez could establish that Sosa was acting on behalf of a government when he made the arrest, for otherwise he would need a rule broader still.

Alvarez's failure to marshal support for his proposed rule is underscored by the Restatement (Third) of Foreign Relations Law of the United States (1987), which says in its discussion of customary international human rights law that a "state violates international law if, as a matter of state policy, it practices, encourages, or condones [. . .] prolonged arbitrary detention." [. . .] Any credible invocation of a principle

against arbitrary detention that the civilized world accepts as binding customary international law requires a factual basis beyond relatively brief detention in excess of positive authority. [. . .]

* * *

The judgment of the Court of Appeals is *Reversed*.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, concurring in part and concurring in the judgment.

There is not much that I would add to the Court's detailed opinion, and only one thing that I would subtract: its reservation of a discretionary power in the Federal Judiciary to create causes of action for the enforcement of international-law-based norms. [. . .]

* * *

(Discussing the general lack of authority to create causes of action through federal common law.)

With these general principles in mind, I turn to the question presented. The Court's detailed exegesis of the ATS conclusively establishes that it is "a jurisdictional statute creating no new causes of action." The Court provides a persuasive explanation of why respondent's contrary interpretation, that "the ATS was intended not simply as a jurisdictional grant, but as authority for the creation of a new cause of action for torts in violation of international law," is wrong. [. . .]

[. . .] None of the exceptions to the general rule against finding substantive lawmaking power in a jurisdictional grant apply. [. . .]

The analysis in the Court's opinion departs from my own in this respect: After concluding in Part III that "the ATS is a jurisdictional statute creating no new causes of action," the Court addresses at length the "good reasons for a restrained conception of the *discretion* a federal court should exercise in considering a new cause of action" under the ATS. By framing the issue as one of "discretion," the Court skips over the antecedent question of authority. This neglects the "lesson of *Erie*," that "grants of jurisdiction alone" (which the Court has acknowledged the ATS to be) "are not themselves grants of law-making authority." [. . .]

[. . .] [C]ourts cannot possibly be thought to have been given, and should not be thought to possess, federal-common-law-making powers with regard to the creation of private federal causes of action for violations of customary international law.

To be sure, today's opinion does not itself precipitate a direct confrontation with Congress by creating a cause of action that Congress has not. But it invites precisely that action by the lower courts [. . .] In holding open the possibility that judges may create rights where Congress has not authorized them to do so, the Court countenances judicial occupation of a domain that belongs to the people's representatives. [. . .]

[. . .] This Court seems incapable of admitting that some matters – *any* matters – are none of its business [. . .]

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, concurring in part and concurring in the judgment.

I join in full the Court's disposition of Alvarez's claim pursuant to 28 U.S.C. §

1350. As to Alvarez's Federal Tort Claims Act (FTCA or Act) claim, although I agree with the Court's result and much of its reasoning, I take a different path and would adopt a different construction of 28 U.S.C. § 2680(k). [. . .]

* * *

[. . .] Congress included in the FTCA a series of exceptions to that sovereign-immunity waiver. Relevant to this case, the Act expressly excepts "any claim arising in a foreign country." § 2680(k). I agree with the Court that this provision, the foreign-country exception, applies here, and bars Alvarez's tort claim against the United States. But I would read the words "arising in," as they appear in § 2680(k), to signal "place where the act or omission occurred," § 1346(b)(1), not "place of injury."

On its face, the foreign-country exception appears to cover this case. Alvarez's suit is predicated on an arrest in Mexico alleged to be "false" only because it occurred there. [. . .]

* * *

Accepting, as the Ninth Circuit did, that no tortious act occurred once Alvarez was within United States borders, the Government's liability on Alvarez's claim for false arrest necessarily depended on the foreign location of the arrest and implicated foreign law.[. . .]

The interpretation of the FTCA adopted by the Ninth Circuit, in short, yielded liability based on acts occurring in Mexico that entangled questions of foreign law. Subjecting the United States to liability depending upon the law of a foreign sovereign, however, was the very result §

2680(k)'s foreign-country exception aimed to exclude.

* * *

[. . .] By directing attention to the place where the last significant act or omission occurred, rather than to a United States location where some authorization, support, or planning may have taken place, the ["last significant act or omission"] rule preserves § 2680(k) as the genuine limitation Congress intended it to be.

The "last significant act or omission" rule works in this case to identify Mexico, not California, as the place where the instant case arose. I would apply that rule here to hold that Alvarez's tort claim for false arrest under the FTCA is barred under the foreign-country exception. [. . .]

JUSTICE BREYER, concurring in part and concurring in the judgment.

I join JUSTICE GINSBURG's concurrence and join the Court's opinion in respect to the Alien Tort Statute (ATS) claim. [. . .]

I would add one further consideration. Since enforcement of an international norm by one nation's courts implies that other nations' courts may do the same, I would ask whether the exercise of jurisdiction under the ATS is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement. [. . .]

* * *

Today international law will sometimes similarly reflect not only substantive agreement as to certain universally condemned behavior but also procedural agreement that universal jurisdiction exists

to prosecute a subset of that behavior. [. . .]
That subset includes torture, genocide,
crimes against humanity, and war crimes. [. .
.]

The fact that this procedural consensus exists suggests that recognition of universal jurisdiction in respect to a limited set of norms is consistent with principles of international comity. That is, allowing every nation's courts to adjudicate foreign conduct involving foreign parties in such cases will not significantly threaten the practical harmony that comity principles seek to protect. That consensus concerns criminal jurisdiction, but consensus as to universal criminal jurisdiction itself suggests that universal tort jurisdiction would be no more threatening. Cf. Restatement § 404,

Comment *b*. That is because the criminal courts of many nations combine civil and criminal proceedings, allowing those injured by criminal conduct to be represented, and to recover damages, in the criminal proceeding itself. [. . .]

Taking these matters into account, as I believe courts should, I can find no similar procedural consensus supporting the exercise of jurisdiction in this case. [T]he ATS does not recognize the claim at issue here – where the underlying substantive claim concerns arbitrary arrest, outside the United States, of a citizen of one foreign country by another.

Human Rights Abuses Worldwide Are Held to Fall under U.S. Courts

The New York Times

June 30, 2004

Linda Greenhouse

A Supreme Court decision on Tuesday kept federal courts open to lawsuits by foreigners who allege that they were victims of serious human rights violations anywhere in the world.

The decision interpreting the Alien Tort Statute came as a relief to human rights organizations that had feared the court would accept the Bush administration's invitation to narrow the application of the 215-year-old law.

At the same time, the result was a sharp disappointment to international business interests, which have been alarmed by increasing use of the law to sue multinational corporations for human rights violations and had looked to the Supreme Court to curb the trend.

The case before the court did not involve a corporate defendant, and the 6-to-3 decision did not conclusively resolve the status of such cases. That opportunity may come soon, because lower courts with corporate cases on their dockets have been deferring decisions while waiting to see how the Supreme Court would rule in this case.

A case brought on behalf of residents of Myanmar charging the Unocal Corporation with human rights violations in connection with a gas pipeline project has already been argued before the federal appeals court in San Francisco and could reach the Supreme Court quickly.

The case before the justices was an appeal of an earlier ruling by the same appeals court, the United States Court of Appeals for the Ninth Circuit. That court permitted a Mexican doctor, Humberto Alvarez-Machain, to use the Alien Tort Statute to sue a Mexican who helped the federal Drug Enforcement Administration to kidnap him from his office in Guadalajara and bring him to the United States to stand trial for murder. A grand jury had indicted Dr. Alvarez-Machain in the murder of a federal narcotics agent, Enrique Camarena-Salazar. He was acquitted at his 1992 trial.

The Alien Tort Statute, which was among the laws enacted by the First Congress in 1789, provides jurisdiction in federal district courts "of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The meaning of this statutory language, including the odd phrase "for a tort only," is obscure and the law was scarcely used until lower federal courts began applying it in international human rights cases in the 1980's.

In Dr. Alvarez-Machain's case, the Ninth Circuit found that the cross-border kidnapping violated international law and was thus the type of injury for which a foreigner could sue in federal court. A jury awarded the doctor a \$25,000 judgment against the Mexican defendant, Jose Francisco Sosa, who then appealed to the Supreme Court.

In the decision on Tuesday, the last day of the Supreme Court's term, all nine justices voted to overturn the Ninth Circuit's judgment. "A single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law" and was not the type of egregious human rights violation that the Alien Tort Statute was intended to cover, Justice David H. Souter wrote for the court.

But the specific fate of Dr. Alvarez-Machain's lawsuit was not what made this case, *Sosa v. Alvarez-Machain*, No 03-339, one of the most closely watched on the court's docket. What mattered for future cases was the court's broader interpretation of the statute.

The Bush administration had urged the court to hear the case and to rule that the Alien Tort Statute did nothing more than define an aspect of the federal courts' original jurisdiction, without conferring an ability to bring private lawsuits or to invoke modern notions of international law.

There was "no basis," the administration's brief said, to view the law as having established "a roaming cause of action that permits aliens to come to United States courts and recover money damages for violations of international law anywhere around the globe." Congress had to specifically provide a basis for suing under the law, the brief said.

Justice Souter's majority opinion rejected that argument. He said that while the law should be applied with "judicial caution," it should also be interpreted as its authors intended it. He said the First Congress, "which reflected the understanding of the framing generation and included some of the framers, assumed that federal courts could

properly identify some international norms as enforceable" under the law it wrote. "It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals," he added.

Justice Souter said that in the 18th century, there were three offenses that were seen as violating the contemporary concept of international law: violation of a promise to give "safe conduct," piracy and "infringement of the rights of ambassadors." Calling these offenses "paradigms," he said that the Alien Tort Statute should be interpreted today as applying to their modern equivalents: international norms with "definite content and acceptance among civilized nations."

Human rights lawyers said Tuesday that while this analysis did not extend to the brief detention of Dr. Alvarez-Machain, it would cover universally recognized violations like torture, genocide, slavery and prolonged arbitrary detention.

"These are core human rights claims," Paul L. Hoffman, who argued in the court for Dr. Alvarez-Machain and who also represents the plaintiffs in the Unocal lawsuit, said in an interview. "The court has accepted that international law evolves and that this law has contemporary meaning."

Dissenting from this portion of the opinion, Justice Antonin Scalia said the majority had adopted "a 20th-century invention of internationalist law professors and human-rights advocates" and opened the door to an "illegitimate lawmaking endeavor" by federal judges.

"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 action for money damages in federal court,” Justice Scalia said. Chief Justice William H. Rehnquist and Justice Clarence Thomas signed his opinion.

Echoing that criticism, Robin Conrad, a lawyer with the United States Chamber of Commerce, expressed the disappointment of international business interests with the decision. In an interview, she said the ruling “leaves far too much discretion to courts” and creates “an ever-expanding universe of judge-made law.” Ms. Conrad added: “We didn’t succeed in cutting these cases off at the pass. We’re back to square one.”

Justice Souter’s densely worded, 45-page

opinion contained numerous words of caution for lower courts in handling future cases. He said courts should be sensitive to the foreign policy implications of cases under the Alien Tort Statute, citing in particular cases now pending against corporations that cooperated with the apartheid regime in South Africa.

The South African government has opposed these lawsuits on the ground that they interfere with its own post-apartheid approach to reconciliation and reconstruction, and the State Department has endorsed South Africa’s view. “In such cases, there is a strong argument that federal courts should give serious weight to the executive branch’s view of the case’s impact on foreign policy,” Justice Souter said.

The Court of Last Resort

The New York Times

August 7, 2003

Arlen Specter

The events of 9/11, as well as the war in Iraq, require our government to intensify its efforts to combat terrorism. So it is more important than ever that we do our utmost to show the world that we will enforce human rights laws evenhandedly.

Fortunately, the United States already has the tools to lead by example. The Alien Tort Claims Act, passed in 1789 by the first Congress, allows aliens – that is, people who are not citizens of the United States – to sue in federal court for a “violation of the law of nations or a treaty of the United States.” More than two centuries later, in 1992, the Torture Victim Protection Act became law. This law creates a right for victims – even aliens – of state-sponsored torture and summary execution in other countries to sue in federal court here.

Despite this history, the Justice Department has decided to contest the application of these laws by federal courts to human rights violations. Protecting human rights through litigation, according to the administration, might disrupt relations with some of our allies. In a pending federal case involving slave labor in Burma, the Justice Department argued that this and similar lawsuits may complicate foreign policy by angering nations helping fight terrorism.

In 1992, the Justice Department made a similar argument. Congress considered and rejected it, as did President George H. W. Bush. Both the president and Congress recognized that suits brought under these laws will not be successful against sitting

governments and leaders who have immunity. They will bear fruit only when used against former leaders and corporations that have violated fundamental human rights laws recognized since the trials of Nuremberg.

These two laws cover only the most extreme violations of international law. The Alien Tort Claims Act has been interpreted to apply only to genocide, war crimes, piracy, slavery, torture, unlawful detention and summary execution. The Torture Victims Protection Act is limited to torture and summary execution. There is no room for moral relativism.

American credibility in the war on terrorism depends on a strong stand against all terrorist acts, whether committed by foe or friend. Our credibility in the war on terrorism is only advanced when our government enforces laws that protect innocent victims. We then send the right message to the world: the United States is serious about human rights.

Playing the Security Card

The Nation
July 5, 2004
David Cole

To all the arguments lodged against gay marriage, add this one—it's a matter of national security. So argued a woman interviewed recently by NPR at the National Association of Evangelicals convention in Colorado Springs. Her reasoning: By breaking down the family, we're not having enough kids, while "other countries" with an agenda to hurt America are having boatloads of babies. If we legalize gay marriage, the terrorists will eventually outnumber us. One might be tempted to dismiss this as a desperate rant if it weren't so close to arguments the Bush Administration itself has been making. As the election campaign gets under way, national security has become the ultimate all-purpose trump card. The Bush crowd will play it anywhere.

Consider Attorney General John Ashcroft's justification for a ruling last year that all Haitians seeking refuge here should be detained. In Ashcroft's view, national security warranted locking them all up, not because any of them posed a threat to national security but because detaining them all would deter other Haitians from seeking refuge here, and that would save money that could then be deployed elsewhere to protect our national security. On this theory, any initiative that reduces government expenditures—from welfare reform to cutting spending on environmental protection is warranted by national security, because those funds can then be used to fight terrorism.

More recently, the Administration has invoked national security in appealing a landmark human rights case to the Supreme

Court. In *Sosa v. Alvarez-Machain*, the Administration contends that court enforcement of human rights protections might cramp its style as it fights for our security. The case involves a 1789 statute, the Alien Tort Claims Act, that human rights victims have used to hold perpetrators liable for their crimes against humanity. The law is a beacon in the human rights field because it provides a critical vehicle for developing and enforcing human rights law in individual cases.

This time, however, the case implicates human rights violations by the United States. The case challenges the abduction and kidnapping of a Mexican doctor at the behest of Drug Enforcement Administration officials to stand trial here for alleged complicity in the killing of a DEA agent in Mexico. Dr. Alvarez-Machain was acquitted at his criminal trial, then turned around and sued his abductors, obtaining a judgment against them for international human rights violations in his cross-border abduction.

Urging the Supreme Court to overturn the judgment, the Bush Administration has again played the national security card, arguing that if federal courts enforce international human rights norms, their decisions might interfere with the government's prerogatives in the war on terror. But of course the whole point of international law is to limit the prerogatives of nations, at least when it comes to fundamental rights owed to all persons.

The most recent development along these lines is a Congressional resolution

introduced by Republican Representative Tom Feeney, maintaining that the Supreme Court should not look to foreign law at all, much less human rights law, in deciding constitutional cases. The resolution was apparently prompted by recent Supreme Court decisions, including last year's ruling invalidating sodomy laws, that have looked to other countries' judicial decisions for guidance in resolving similar disputes here. It is commonplace in many countries to consider the decisions of other nations' courts, but it is apparently anathema to those who contend that we can and should write our own rules, regardless of what the rest of the world thinks. It is no coincidence that the resolution has surfaced at a time when the Supreme Court is about to address the detentions at Guantanamo Bay, a practice that many foreign and international legal experts have condemned as lawless.

The irony is that when we lock up people without evidence that they are dangerous, treat human rights as mere obstacles to our political prerogatives and dismiss other nations' laws and decisions as entirely irrelevant to our resolution of fundamental issues of justice, we make ourselves less, not more, secure. A Pew Charitable Trust poll recently found that anti-Americanism is at an all-time high around the world. Much of the resentment stems from our claim that we can bypass any principle of international law that we deem inconvenient.

In the long run, it is this rising tide of anti-Americanism that poses the greatest threat to our security. The true path to safety lies in respect for human rights and the views and experiences of others, not in asserting, in the name of national security, unilateral authority to be a law unto ourselves.

**Justices Open Door With Alien Tort Case;
What Kind of Claims Remain is Contested**

National Law Journal

July 5, 2004

Marcia Coyle

In the wake of a recent U.S. Supreme Court ruling, big business and human rights groups are preparing to battle over just how wide the door remains open to federal court suits by aliens with foreign human rights claims.

They disagree that last week's decision requires dismissal of recent pending suits against corporations, such as one against oil giant Unocal for alleged slavery, rapes and murder in the construction of a pipeline in Myanmar.

But they agree that the justices painted a "big bull's eye" on a suit in New York against corporations for alleged abuses during the apartheid regime in South Africa.

"If there are very specific and limited circumstances where international law has been violated, there may be appropriate instances where those claims can be adjudicated," said Daniel M. Petrocelli of O'Melveny & Myers, who filed an amicus brief on behalf of the National Foreign Trade Council and other corporate interests in the high court case.

"These are not the sort of claims that have been brought against American companies and certainly not claims brought against Unocal," he insisted.

"I'm not sure either side really knows that," said human rights litigator Paul L. Hoffman of Schonbrun DeSimone Seplow Harris & Hoffman of Venice, Calif. "I think what the court is saying is they are only opening the

door to claims that have very solid support in international law," he added. "Our corporate claims do have that and deal with very serious human rights violations."

Hoffman represented Humberto Alvarez-Machain in the high court case, *Sosa v. Alvarez-Machain*, No. 03-339, and *U.S. v. Alvarez-Machain*, No. 03-485. The justices were asked whether Alvarez-Machain could recover damages against the United States and Mexican national Jose Sosa under the Federal Tort Claims Act and the Alien Tort Statute [ATS] for his kidnapping from Mexico by Sosa and others at the instigation of the Drug Enforcement Administration. Alvarez-Machain was brought to the United States and acquitted in a criminal trial of charges that he assisted in the torture and murder of a DEA agent.

Although the case had nothing to do with corporations, it galvanized the business community, which has been up in arms over the spate of lawsuits under the ATS in the last decade charging corporations with human rights violations committed abroad.

The high court denied relief to Alvarez-Machain under both statutes. But the court also rejected arguments by business and the Bush administration that any claim for relief under the ATS, a jurisdictional statute only, requires a separate statute by Congress expressly authorizing a cause of action.

International law scholars and others say Hoffman and his supporters lost the battle

but won the war in the Alvarez-Machain case. Whether that is true will be learned as pending cases unfold.

Last week, the high court in its decision allowing Guantanamo Bay detainees access to federal courts on their habeas challenges said those courts also had jurisdiction to hear their claims under the ATS.

And the Center for Constitutional Rights, whose litigation more than 20 years ago awakened the long-dormant Alien Tort Statute, recently filed an ATS suit in California on behalf of former prisoners at Iraq's Abu Ghraib prison against two corporations that provided interrogation and language services at the prison.

"They discovered the planet Pluto by seeing strange aberrations in the orbits of other planets around Pluto," said international law scholar William Casto of Texas Tech University School of Law, whose writings were cited by the court in Alvarez-Machain. "I think there's a Pluto in this opinion and obviously it's the war on terrorism."

The ATS, also known as the Alien Tort Claims Act, originally appeared in Section 9 of the first Judiciary Act of 1789, which created the U.S. judicial court system. The statute provides that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

The act was largely dormant until 1982, when the 2d U.S. Circuit Court of Appeals decided *Filartiga v. Pena-Irala*.

Represented by lawyers at the Center for Constitutional Rights, Dolly Filartiga filed a civil suit under the ATS against her brother's murderer, the former Inspector

General of Police in Asuncion, Paraguay, seeking compensatory and punitive damages. Her lawyers argued that just as piracy was a violation of the law of nations when the ATS was enacted, torture was a crime against the law of nations in 1979. The 2d Circuit agreed.

Since then, there have been three waves of alien tort litigation: *Filartiga*-type cases-torture, killing or disappearance abroad committed by one alien against another alien; suits against U.S. corporations and some foreign corporations for participating in human rights abuses abroad; and suits against U.S. government officials or those acting at their direction, a wave that now includes the Abu Ghraib abuse litigation.

In the high court last week, Justice David H. Souter, writing for a 6-3 court, carefully examined the history, cases and other legal materials surrounding the ATS. He rejected the government's "stillborn" argument about the ATS.

He said that "there is every reason" to suppose that the first Congress did not pass the ATS as a jurisdictional convenience "to be placed on the shelf" for the future when a Congress might authorize the creation of causes of action.

History, he added, indicates that the ATS furnished jurisdiction for a relatively modest set of actions alleging violations of the law of nations, such as assaults on ambassadors, violations of safe conduct and piracy. In the last two centuries, Souter said, Congress has done nothing to preclude federal courts from recognizing a claim under the law of nations.

"Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of

international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th Century paradigms we have recognized," he held.

Souter also directed that courts be extremely cautious in recognizing new causes of action, that they consider whether a claimant has exhausted any remedies available in the domestic legal system, and give serious weight to the executive branch's view of the impact on foreign policy. The latter factor, he noted, was particularly relevant in the litigation, *In re South African Apartheid Litig.*, 238 F. Supp. 2d 1379 [J.P.M.L. 2002], where both the U.S. and South African governments have said the litigation interferes with domestic and foreign policy.

Causes of action

The court's ruling was the first substantive high court decision on the ATS in the statute's history, said international law scholar William Aceves of California Western School of Law. "I think there are going to be a subset of international claims that are universal and that are well defined," he said. "When you begin to focus on these very narrow claims, you can readily identify them-genocide, torture, summary execution, slavery."

Human rights activists, he predicted, will not disregard the high court's concern about the foreign policy implications of this litigation, which could doom ATS claims filed by Guantanamo detainees. But, he added, courts should balance that concern with the reality that Congress has spoken and believes these lawsuits should proceed.

Aceves noted that the Bush administration has increased the number of occasions where the government has intervened in

ATS litigation. And, he added, the administration has intervened almost exclusively on behalf of multinational corporations.

O'Melveny's Petrocelli said he expects many of the ATS cases against corporations to be dismissed as a result of the high court ruling. In *Unocal*, for example, which is pending in the 9th Circuit, he said plaintiffs are trying to hold the corporation vicariously liable for actions by Burmese soldiers guarding the pipeline construction against Burmese residents. Those are local claims, he said.

Paul Kamenar of the Washington Legal Foundation agreed, adding that the high court decision "would certainly take care of *Unocal* and cases like it where you have this third-party liability tort action so attenuated it would not be recognized at federal common law."

Many of the suits against corporations involve claims of violations of international law and could subject government officials to liability under the statute, said Casto.

"The real issue is not whether there is a cause of action against the government or individual officers, but whether we are going to create a cause of action for conspiracy or aiding and abetting that would bring in U.S. corporations," he said, adding that only English-speaking countries recognize the conspiracy theory.

But Hoffman said, "There's no reason to believe vicarious liability claims or complicity claims will not succeed. Claims against industrialists go back as far as Nuremberg."

Casto and others believe the justices had the war on terror clearly in mind as they decided

the ATS case. In rejecting Alvarez-Machain's ATS claim for arbitrary arrest, said Casto, how could the justices not be thinking of a possible kidnapping by the United States of Osama bin Laden in a foreign country and the arrival of enemies of the U.S. in the federal courts to sue American officials?

And in allowing the courthouse doors to remain open to some ATS claims, he added, certainly the justices had the Abu Ghraib situation on their minds and the Department of Justice's torture memo.

"Do we give the president carte blanche when this is the sort of advice he is receiving from his lawyers, when we know there are instances of beatings and even death?" Casto said the justices may have thought. "They don't want the president to feel there is no possibility of judicial review."