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Alien Authority

Edward T. Swaine

University of Pennsylvania – Wharton School of Business

Some topics excite such interest among legal academics that they produce what might be dubbed *lawgorrhea*—legal analysis of epidemic proportions. The worst cases seem to involve overlapping fields, as in the Supreme Court’s spate of opinions invoking foreign and international authority to construe the U.S. Constitution. This particular practice—which, tongue in cheek, I will call using “alien authority”—has not only produced exhaustive examination in the academy, but also engaged the Justices themselves, members of the executive branch and Congress, and the media as well. This brouhaha is particularly striking given that there is no evidence that a single judicial outcome has been affected.

What broader issue, if any, is at stake? Domestically focused work approaches the citation practice as a question of interpretive method, and internationally oriented work is more prone to see this in terms of global judicial relations. Each genre, to the extent it looks beyond the practice, tends toward a role-bound analysis of judicial behaviors: the former, grappling with the kinds of evidence that judges may properly consider in construing the Constitution, and the latter generally focusing on how courts should learn from one another so as to better discharge their judicial duties in an increasingly globalized world. Each understands the Court, ultimately, in terms of its judicial role—perceived in very different ways, to be sure—as a component of a liberal democratic state.

This paper, in contrast, describes and assesses the Court as exercising a different kind of “alien authority”—the capacity, usually attributed to the political branches, to conduct foreign relations, of a kind that is normally thought to be a constitutive element of statehood. Part One describes (very, very briefly) the Court’s recent activity and, more particularly, the sufficiency of conventional judicial explanations—such as claims that the Court is simply employing alien authority as persuasive authority, or learning from its peers abroad. Part Two explains why the Court’s activity should be understood in foreign relations terms; it argues further that this activity is not, in fact, so terribly distinctive, at least in light of parallel developments in which the Court has assumed responsibility for assessing the foreign effects of judicial doctrine. Part Three provides a normative, mildly pessimistic assessment of the Court’s capacity to perform foreign relations functions. The broader message, however, is that appraising the Court’s capacity to perform this foreign affairs function is far more important than the relatively intractable debate about the nature of the judicial role.