DEBATE

THE USE OF INTERNATIONAL SOURCES IN CONSTITUTIONAL OPINION[1]

*Daniel Bodansky**

In 1623, the English poet John Donne wrote, "No man is an island, entire of itself; every man is a piece of the continent, a part of the main." In an increasingly globalized world, the same is true of nations. Even the United States, the sole remaining superpower, is a part of the globe, connected to other countries in myriad ways.

Our Founding Fathers were keenly aware of this fact. In the Declaration of Independence, Thomas Jefferson emphasized the importance of paying a "decent respect to the opinions of mankind." James Madison expressed a similar sentiment in *The Federalist Papers*, writing, "An attention to the judgment of other nations is important to every government. . . . [I]n 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." As he rhetorically asked, "What has not America lost by her want of character with foreign nations; and how many errors and follies would she not have avoided, if the justice and propriety of her measures had, in every instance, been previously tried by the light in which they would probably appear to the unbiased part of mankind?"[2]

In several recent cases, the Supreme Court has paid a decent respect to the opinions of mankind, looking to foreign sources and international law as indicators of the "opinions of the impartial world." Two years ago, in *Atkins v. Virginia*,[3] the court held that executing mentally retarded persons constitutes cruel and unusual punishment, in violation of the Eighth Amendment. In

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[1] I would like to acknowledge my debt to the articles by Harold Koh, Roger Alford, Michael Ramsey, Gerald Neuman and Alexander Aleinikoff in *Agora: The United States Constitution and International Law*, 98 AM. J. INT'L L. 43 (2004).

[2] FEDERALIST NO. 63 (probably Madison); *quoted in* Diane M. Amann, *Guantanamo*, 42 COLUM. J. TRANSNAT'L L. 263, 300 (2004).

[3] 536 U.S. 304 (2002).

reaching this result, the Court noted "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."[4] Last year, in *Lawrence v. Texas*,[5] the Court struck down a law criminalizing homosexual sodomy between consenting adults, reversing its earlier decision in *Bowers v. Hardwick*.[6] The majority cited three decisions of the European Court of Human Rights, noting

> [T]he reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom*. Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.[7]

International law is also likely to play a role in *Roper v. Simmons*, a Missouri case that the Supreme Court recently accepted, involving capital punishment of a juvenile offender, a practice engaged in by only a handful of countries other than the United States, including such paragons of justice as Libya and Iran.

The notion that we do not have a monopoly on wisdom and could learn from others might seem uncontroversial, particularly to the Framers of the Constitution. But it has provoked a strong reaction in some quarters. In *Lawrence*, for example, Justice Scalia characterized the reference to foreign views as "meaningless" and "dangerous" "dicta."[8] Similarly Justice Thomas, in *Foster v. Florida*, belittled deeply held values concerning the death penalty by referring to them as "foreign moods, fads, or fashions," and raised alarm bells that these "foreign moods, fads, or fashions" might somehow be "impose[d]" on Americans.[9] And, in his recent book, *Coercing Virtue*, Robert Bork characterized the appeal of internationalism as "insidious."[10]

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[4] *Id.* at 316 n.21.

[5] 123 S. Ct. 2472 (2003).

[6] 478 U.S. 186 (1986).

[7] Lawrence, 123 S. Ct. at 2483.

[8] *Id.* at 2495 (Scalia, J., dissenting).

[9] Foster v. Florida, 123 S. Ct. 470, 470 (2002) (Thomas, J., concurring in denial of certiorari).

[10] ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 15-25, 135-39

My argument for the use of international materials to interpret the Constitution will proceed in four parts. First, I will argue that international law has a venerable history in constitutional interpretation. Second, I will argue that American courts and foreign courts are engaged in a common legal enterprise and could learn from one another. Third, I will argue that the text of certain constitutional provisions invites the use of international materials. Finally, I will argue that taking international opinion into account has strong pragmatic justifications.

But before considering these arguments, first, a word of clarification. Much of the debate in cases like *Atkins* and *Lawrence* was not about the use of international law per se in constitutional interpretation, but about the use of international sources more generally. The argument in these cases was not that the United States, as a matter of international law, may not execute mentally retarded persons or may not criminalize homosexual sodomy. Indeed, if international law did prohibit these practices, then it would apply independently of the Constitution as part of our law. Instead, the role of international materials in these cases was much looser and more indirect, as will presumably be true of the juvenile death penalty case currently before the Court.[11]

With this preliminary matter out of the way, let me turn to my first argument, namely that the use of international law in constitutional interpretation is far from new. The Founding Fathers themselves had a healthy respect for international law. Thomas Jefferson, for example, characterized the law of nations (as international law was then called) as "an integral part . . . of the laws of the land." Similarly, the first Attorney General, Edmund Randolph, who had himself been a delegate at the Constitutional Convention, wrote an official opinion as Attorney General stating, "The law of nations, though not specially adopted by the constitution, or any municipal act, is essentially a part of the law of the land."

So it should not be surprising that the Supreme Court has often turned to international law in construing the powers of the federal government.[12] The

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(2003).

[11] *Cf.* Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on* Atkins *and* Lawrence, 98 AM. J. INT'L L. 69, 71 (2004) (in *Atkins* and *Lawrence*, Supreme Court relied on "fragments of international practice and international opinion," rather than on international law).

[12] *See generally* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002). The examples listed below, along with many others, are discussed in Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L.

court has found a number of implied or inherent federal powers based on the view that the United States should have all the powers of a sovereign nation under international law, including:

1. the power to acquire new territory by discovery and occupation;[13]
2. the power to exclude or expel aliens;[14] and
3. the power to compel citizens residing abroad to return.[15]

The Supreme Court has also looked to international law to construe the jurisdictional reach of constitutional provisions such as the Eighteenth Amendment, which instituted Prohibition.[16]

So my first point is simply this: the use of international law in constitutional interpretation has a long history, and reflects the Framers' own interest in, and concern about, international law.

Let me turn to my second point, which is that international sources are relevant to constitutional interpretation because American courts and foreign courts are part of a common legal enterprise. Justice Breyer has emphasized this point, noting that judges everywhere face the "same species of problems armed with the same species of legal instruments," and that there is "enormous value in any discipline of trying to learn from the similar experience of others."[17] Even Justice Rehnquist has written, "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."[18]

International sources can be useful for two reasons. First, they can be a source of good ideas. As the Supreme Court noted in *Hurtado v. California* in upholding a state criminal proceeding based on an information rather than a grand jury indictment:

82, 83 (2004).

[13] Jones v. United States, 137 U.S. 202, 212 (1890).

[14] Chinese Exclusion Case, 130 U.S. 581 (1889) (power to exclude aliens); Fong Yue Ting v. United States, 149 U.S. 698 (1893) (power to expel aliens).

[15] Blackmer v. United States, 284 U.S. 421, 437-38 (1932).

[16] Cunard S.S. v. Mellon, 262 U.S. 100, 122-24 (1923) (geographical scope of 18th Amendment interpreted in light of international law regarding coastal state jurisdiction).

[17] Stephen Breyer, The Supreme Court and the New International Law, Address to the American Society of International Law, 97th Annual Meeting, Washington, D.C. (Apr. 4, 2003).

[18] The Hon. Wiiliam H. Rehnquist, Constitutional Courts—Comparative Remarks (1989), *reprinted in* GERMANY AND ITS BASIC LAW: PAST, PRESENT, AND FUTURE: A GERMAN-AMERICAN SYMPOSIUM 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993).

> [w]hile we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown . . . There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted.[19]

In addition, by looking to foreign sources, we can get empirical evidence about how a prospective legal rule operates in practice. This point was emphasized by Justice Breyer in *Printz v. United States*, when he noted: "Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. . . . But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem."[20] Harold Koh, the new Dean of Yale Law School, makes the same point, when he argues that we should use "the experience of other nations that share [our] . . . constitutional genealogy as laboratories to test workable social solutions to common constitutional problems."[21]

A third basic reason for looking to international law in interpreting the Constitution is that the constitutional text itself is often open-ended and invites the use of community standards as a means of interpretation.[22] Some examples of open-ended provisions include:

1. the "cruel and unusual punishment" standard in the Eighth Amendment;
2. the notion of "due process of law" in the Fifth Amendment;
3. the prohibition on "unreasonable searches and seizures" in the Fourth Amendment.

Justice Scalia in *Stanford v. Kentucky* argued that the community standards implicit in these phrases are domestic standards. As he said, it is "*American* conceptions of decency that are dispositive."[23] But concepts such as "ordered

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[19] 110 U.S. 516, 531 (1884).

[20] 521 U.S. 898, 921 n.11, 977 (1997).

[21] Harold H. Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 47 (2004).

[22] *Cf.* Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3 (1983).

[23] 492 U.S. 361, 369 n.1 (1989).

liberty" are not unique to American jurisprudence; they are part of a larger legal tradition that informed the drafting of the Constitution and should continue to inform how the Constitution is interpreted today.[24]

Consider, for example, the prohibition on cruel and unusual punishment in the Eighth Amendment. In *Trop v. Dulles*, the Supreme Court said that the Eighth Amendment must draw its meaning from the "evolving standards of decency that mark the progress of a maturing society."[25] And, in that case, in finding that denationalization constitutes cruel and unusual punishment, the court looked not just to domestic concepts; it "took pains to note the climate of international opinion concerning the acceptability" of denationalization,[26] describing statelessness as "a condition deplored in the international community of democracies." Similarly, in *Enmund v. Florida*,[27] the Court struck down the felony murder rule, noting that the rule had been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and was unknown in continental Europe.

The same kind of interpretive issues arise in interpreting the "concept of ordered liberty" implicit in the due process clause. In *Rochin v. California*, the Supreme Court said that the due process clauses obliges courts to ascertain whether law or practice offends "those canons of decency and fairness which express the notions of justice of English-speaking peoples."[28]

In contrast to today, I am not aware that when the Court, in these earlier cases, paid a decent respect to the opinions of mankind, this was criticized as illegitimate or otherwise un-American. Or invited the kind of debate we are having here today.

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[24] *See* Koh, *supra* note 21, at 47

> The United States has never been a hermetically sealed legal system. It shares a common legal heritage, tradition and history with many foreign constitutional systems. For that reason, constitutional concepts like 'liberty,' 'equal protection,' 'due process of law,' and privacy have never been exclusive U.S. property, but have long carried global meaning.

Id.; *cf.* Edward S. Corwin, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (1955).

[25] 356 U.S. 86, 101 (1958).

[26] Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977).

[27] 458 U.S. 782, 797 n.22 (1982).

[28] 342 U.S. 165, 169 (1952). Even Michael Ramsey, a federalist critic of the use of international materials in constitutional interpretation, admits that "if the universal practice of the world were to recognize a right, that seems powerful evidence that the practice may be 'implicit in the cost of ordered liberty' (or, in the specific context of the Eighth Amendment, that it may be 'cruel and unusual')." Ramsey, *supra* note 11, at 76.

This year, the Court will be faced with a similar type of issue, this time concerning the juvenile death penalty. The United States stands virtually alone in openly executing juvenile offenders. Only Somalia, Congo, Pakistan, and Nigeria openly admit to executing juvenile offenders—not exactly good company. The Supreme Court has vacillated on this issue. In a 1988 case, it looked to international opinion in holding that the execution of a person for a crime committed at the age of fifteen or younger constituted cruel and unusual punishment.[29] But the following year, in an opinion authored by Justice Scalia, the Court dismissed international sources as irrelevant in upholding the execution of a person for a crime committed at the age of sixteen.[30]

The recent grant of certiorari by the Supreme Court in *Roper v. Simmons* may signal that the Court is considering reversing fields once again, back to a more internationalist orientation. Let us hope that, this time, the third try really is a charm!

A fourth and final reason to look to international materials in interpreting the Constitution is pragmatic: it helps avoid friction with the rest of world. In *Atkins*, which as you may recall involved capital punishment of a mentally retarded person, a group of American diplomats filed an *amicus* brief arguing that the execution would "strain diplomatic relations with close American allies, provide diplomatic ammunition to countries with demonstrably worse human rights records, increase American isolation and impair other United States foreign policy interests." These are not trivial problems at a time when the United States is actively seeking to enlist the assistance of other countries in the ongoing war against terrorism. The policy interest in avoiding friction with the rest of the world is reflected in the *Charming Betsy* doctrine, which states that, wherever possible, statutes, and presumably the Constitution as well, should be construed so as to be consistent with international norms.[31]

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[29] Thompson v. Oklahoma, 487 U.S. 815 (1988).

[30] Stanford v. Kentucky, 492 U.S. 937 (1989).

[31] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . . ."); *see* Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1181 (1990) (some courts, in applying the *Charming Betsy* rule, have consulted standards that do not easily qualify as international law binding on the United States).

Critics of international law simultaneously see it as a toothless joke and as a overbearing and insidious threat to American sovereignty. Both views, of course, cannot be the case. The truth, as usual, lies somewhere in between. International law is simply a tool—created, applied and enforced primarily by states—in order to achieve a more just and ordered world.

The use of international law in constitutional interpretation does not "impose" anything on the United States, be they fundamental values or passing fads. It is, instead, a resource that judges—*American* judges—can draw upon in answering difficult questions of constitutional law. Its use reflects a humility that is becoming to a superpower. It reflects the kind of decent respect for the opinions of mankind that the Framers prized and that we should continue to value today.