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SOVEREIGNTY AND THE AMERICAN COURTS  
AT THE COCKTAIL PARTY OF INTERNATIONAL  
LAW: THE DANGERS OF DOMESTIC JUDICIAL  
INVOCATIONS OF FOREIGN AND  
INTERNATIONAL LAW

Donald J. Kochan

# Sovereignty and the American Courts at the Cocktail Party of International Law: The Dangers of Domestic Judicial Invocations of Foreign and International Law

*Donald J. Kochan*<sup>1</sup>

## ABSTRACT

With increasing frequency and heightened debate, United States courts have been citing foreign and “international” law as authority for domestic decisions. This trend is inappropriate, undemocratic, and dangerous. The trend touches on fundamental concepts of sovereignty, democracy, the judicial role, and overall issues of effective governance. There are multiple problems with the judiciary’s reliance on extraterritorial and extra-constitutional foreign or international sources to guide their decisions. Perhaps the most fundamental flaw is its interference with rule of law values. To borrow from Judge Harold Levant, the use of international sources in judicial decision-making might be described as “the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one’s friends.” Activism is emboldened and the rule of law is diminished. Sovereignty dictates that a nation governs itself and creates its own laws. When authorities begin to allow the piercing of the veil of sovereignty – allowing outside sources to pierce the boundaries of domestic law – there is a surrender of the legislative autonomy a nation holds.

But if the legislature is the ultimate lawmaking power, it is inappropriate for the judiciary to look beyond domestic pronouncements of law and invoke foreign or international pronouncements of “law” to decide governance standards. Predilections of particular judges should not punctuate domestic pronouncements or allow the projection of international standards into controlling law when not promulgated through the political process.

There is an emerging and growing debate regarding the judicial invocation and citation of international “law” or foreign law. Courts interpreting United States law should be interpreting *United States* law. The invocation of foreign or international sources in judicial opinions circumvents the solemn duty of the judiciary to decide what the law is, not what it should be.

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<sup>1</sup> Assistant Professor of Law, Chapman University School of Law. J.D. 1998 Cornell Law School; B.A. 1995 Western Michigan University. Former Visiting Assistant Professor of Law, George Mason University School of Law, 2002-2003; Olin Research Fellow, University of Virginia School of Law, 2003-2004. I thank my research assistants Kristi Collins, Amanda Collopy, and Miles Brandon Fuller for their assistance in preparation for portions of this Article.

## ARTICLES

# SOVEREIGNTY AND THE AMERICAN COURTS AT THE COCKTAIL PARTY OF INTERNATIONAL LAW: THE DANGERS OF DOMESTIC JUDICIAL INVOCATIONS OF FOREIGN AND INTERNATIONAL LAW

*Donald J. Kochan\**

### INTRODUCTION

With increasing frequency and heightened debate,<sup>1</sup> U.S. courts have been citing foreign and “international” law as authority for domestic decisions.<sup>2</sup> This trend is inappropriate, undemocratic, and dangerous.<sup>3</sup> The judicial citation to foreign and international law—“a relatively new and certainly controver-

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\* Assistant Professor of Law, Chapman University School of Law; J.D., Cornell Law School; B.A., Western Michigan University. Former Visiting Assistant Professor of Law, George Mason University School of Law, 2002-2003; Olin Research Fellow, University of Virginia School of Law, 2003-2004. I thank my research assistants Kristi Collins, Amanda Collopy, and Miles Brandon Fuller for their assistance in preparation for portions of this Article.

1. See ROBERT BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* 22 (2003) (“The insidious appeal of internationalism is illustrated by the fact that some justices of the Supreme Court have begun to look to foreign decisions and even to foreign legislation for guidance in interpreting the Constitution.”); see also Andrew B. Ayers, Note, *International Law as a Tool of Constitutional Interpretation in the Early Immigration Power Cases*, 19 *GEO. IMMIGR. L.J.* 125, 129 (2004) (“The controversy seems only to be growing . . .”).

2. See Lawrence Connell, *The Supreme Court, Foreign Law, and Constitutional Governance*, 11 *WIDENER L. REV.* 59, 70 (2004) (quoting Justice O’Connor as saying that the Supreme Court “will rely increasingly on international and foreign law in resolving what now appear to be domestic issues”); see also Mark Tushnet, *Transnational/Domestic Constitutional Law*, 37 *LOY. L.A. L. REV.* 239, 245 (2003) (“[R]eferences to non-U.S. constitutional law have become more frequent in recent years than they had been in the decades from 1960 to 1990.”). *But see* Daniel W. Drezner, *On the Balance Between International Law and Democratic Sovereignty*, 2 *CHI. J. INT’L L.* 321, 321 (2001) (“The competition for authority between national sovereignty and international law has waxed and waned for centuries.”).

3. See Editorial, *International Law*, *INVESTOR’S BUS. DAILY*, May 3, 2005, at A12 (“It is now disturbingly clear that some justices no longer feel constrained by U.S. law and increasingly rely on foreign courts and opinion.”).

sial" phenomenon<sup>4</sup>—is part of a larger discussion on the role of international law in domestic governance.<sup>5</sup> It has been described colloquially as a "big deal,"<sup>6</sup> and explained that "the growing influence of international law should not be ignored."<sup>7</sup> Indeed, the trend touches on fundamental concepts of sovereignty, democracy, the judicial role, and overall issues of effective governance.<sup>8</sup>

There are multiple problems with the judiciary's reliance on extraterritorial and extra-constitutional foreign or international sources to guide its decisions.<sup>9</sup> Perhaps the most fundamental flaw is its interference with rule of law values.<sup>10</sup> To borrow from

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4. Peter Berkowitz, *Laws of Nations*, POL'Y REV., Apr.-May 2005, at 71, 74. *But see* Sean D. Murphy, *The Law of the Lands: Why U.S. Courts Look Overseas*, BOSTON GLOBE, June 5, 2005, at D12 (arguing that the use of international or foreign law is not unusual and has been appropriately applied).

5. As Professor Peter Berkowitz explains:

Among American law professors, international law became in the 90s and continues to be today what American constitutional law was in the 70s and 80s—the fashionable front line for advancing progressive social change. Yet even more than constitutional law, international law's sources and authority are open to dispute. Even more than constitutional law, international law has an ineliminable and robust political dimension.

Berkowitz, *supra* note 4, at 71; *see also* Ayers, *supra* note 1, at 126 ("In the last decade, a firestorm of sorts has erupted over the role of international law in constitutional jurisprudence. . . . Pundits, activists, legislators, and justices of the Supreme Court have harshly criticized the use of international precedent.").

6. Tony Mauro, *U.S. Supreme Court vs. the World*, USA TODAY, June 20, 2005, at 15A ("Before your eyes glaze over or wander to a nearby cartoon, let me add: This issue is a big deal and has already played a significant role in the court's decision-making in recent years.").

7. Drezner, *supra* note 2, at 335 ("The power of international law should not be exaggerated. . . . The question of whether international law will persistently trump democratic sovereignty remains open to debate.").

8. *See generally* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

9. Professor Berkowitz explains:

Critics raise a number of serious objections. First, officials of international institutions (to say nothing of NGOs) charged with promulgating international law lack democratic accountability. . . . Second, as most international institutions—possessing neither police force nor military—lack the capacity to enforce their rulings and resolutions, their legal pronouncements are impotent and make a mockery of the rule of law. Third, international institutions rely on the dangerous misconception that individuals do, or will come to, place a premium on global citizenship. . . .

Berkowitz, *supra* note 4, at 72.

10. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY 4 (1977) ("Against the fulfillment of cherished ideals that turns on fortuitous appointments must be weighed the cost of warping the Constitution, undermining the 'rule of law.'").

Judge Harold Leventhal, the use of international sources in judicial decision-making might be described as “the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one’s friends.”<sup>11</sup> When judges are allowed to cherry-pick from laws around the world to define and interpret their laws at home, activism is emboldened and the rule of law is diminished.<sup>12</sup>

The “cocktail party” analogy and debate recently reached the U.S. Senate floor when the newly appointed Chief Justice John Roberts went through his confirmation hearings.<sup>13</sup> Responding to questions on the trend of using foreign or international laws, Chief Justice Roberts rejected its legitimacy and cautioned its dangers:

Domestic precedent can confine and shape the discretion of the judges. Foreign law, you can find anything you want. If you don’t find it in the decisions of France or Italy, it’s in the decisions of Somalia or Japan or Indonesia or wherever. As somebody said in another context, looking at foreign law for support is like looking out over a crowd and picking out your friends. You can find them. They’re there. And that actually expands the discretion of the judge. *It allows the judge to incorporate his or her own personal preferences, cloak them*

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11. See *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (quoting Judge Harold Leventhal on the subjective process of using legislative history in statutory interpretation); see also Donald J. Kochan, *Constitutional Structure as a Limitation on the Scope of the “Law of Nations” in the Alien Tort Claims Act*, 31 CORNELL INT’L L.J. 153, 189 n.196 (1998) (presenting this analogy).

12. As Senator John Kyl (R-Ariz.) stated, “it would put us on a dangerous path by trying to pick and choose among those foreign laws that we liked or didn’t like.” *I Believe That No One Is Above the Law Under Our System*, N.Y. TIMES, Sept. 14, 2005, at A26 [hereinafter *Above the Law*]; see also Sheryl Young, *Roberts’ Confirmation Offers Acid Test For Senate*, TAMPA TRIB., Aug. 2, 2005, at 13 (editorializing that reliance on international opinion in interpreting U.S. law “contradicts our Constitution, interferes with the rights of citizens to a fair trial and endangers our national sovereignty”); *House Resolution on the Appropriate Role of Foreign Judgments in the Interpretation of the Constitution of the United States: Hearing on H.R. 97 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 23 (2005) (statement of M. Edward Whelan, III, President, Ethics and Public Policy Center) [hereinafter *Whelan Testimony*] (“Preserving her own flexibility to pick and choose opportunistically, [Justice Ruth B.] Ginsburg also utterly fails to delineate any principle that would dictate when foreign decisions should come into play and what weight they should have.”). Speaking of the six Supreme Court Justices that have invoked international or foreign law, Whelan also testified that “these six Justices see foreign law as another powerful tool that they can wield whenever it suits them.” *Id.* at 27.

13. See *Above the Law*, *supra* note 12.

*with the authority of precedent*—because they're finding precedent in foreign law—and use that to determine the meaning of the Constitution.<sup>14</sup>

Chief Justice Roberts's comments underscore the concern that reference or reliance on extraterritorial laws can be abused to buttress an activist's conclusion.

The debate has also recently hit the floor of the U.S. House of Representatives. For example, on February 15, 2005, House Resolution 97 was introduced to express the sense of the House that invocations of foreign law are improper.<sup>15</sup> House Resolution 97 read, in part:

*Resolved*, That it is the sense of the House of Representatives that judicial interpretations regarding the meaning of the Constitution of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution of the United States.<sup>16</sup>

That resolution was referred to the Committee on the Judiciary,

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14. *Id.* (emphasis added). One leading commentator predicted nominees would be asked about this issue. See Mauro, *supra* note 6, at 15A ("So here is a safer prediction: When and if a new justice is nominated, he or she will be grilled about an issue you have probably not heard much about: whether it is proper for the Supreme Court to use international or foreign law as a resource in deciding U.S. cases.")

15. See Whelan Testimony, *supra* note 12, at 16 ("House Resolution 97 is a fit and proper step in response to the Supreme Court's improper reliance on foreign law.")

16. H.R. Res. 97, 109th Cong. (2005). The preceding text of Resolution 97 provides that:

Whereas the Declaration of Independence announced that one of the chief causes of the American Revolution was that King George had "combined to subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws";

Whereas the Supreme Court has recently relied on the judgments, laws, or pronouncements of foreign institutions to support its interpretations of the laws of the United States, most recently in *Lawrence v. Texas*, 123 S.Ct. 2472, 2474 (2003);

Whereas the Supreme Court has stated previously in *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997), that "We think such comparative analysis inappropriate to the task of interpreting a constitution . . ."

Whereas Americans' ability to live their lives within clear legal boundaries is the foundation of the rule of law, and essential to freedom;

Whereas it is the appropriate judicial role to faithfully interpret the expression of the popular will through the Constitution and laws enacted by duly elected representatives of the American people and our system of checks and balances;

Whereas Americans should not have to look for guidance on how to live

and on September 29, 2005, the Subcommittee on the Constitution referred it to the full Committee.<sup>17</sup> House Resolution 97 had been preceded by proposed House Resolution 568 in 2004, which similarly attempted to call for the courts to refrain from citing foreign or international law.<sup>18</sup>

Sovereignty dictates that a Nation governs itself and creates

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their lives from the often contradictory decisions of any of hundreds of other foreign organizations; and

Whereas inappropriate judicial reliance on foreign judgments, laws, or pronouncements [sic] threatens the sovereignty of the United States, the separation of powers and the President's and the Senate's treaty-making authority: Now, therefore, be it

*Resolved, . . . .*

*Id.*

17. See Library of Congress, Bill Summary & Status—House Resolution 97, <http://thomas.loc.gov> (search for H Res 97) (last visited Feb. 1, 2006).

18. See, e.g., H.R. Res. 568, 108th Cong. (2004) (“Whereas the Declaration of Independence announced that one of the chief causes of the American Revolution was that King George had ‘combined to subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws.’”). Resolution 568 also declared:

Whereas Americans should not have to look for guidance on how to live their lives from the often contradictory decisions of any of hundreds of other foreign organizations; and

Whereas inappropriate judicial reliance on foreign judgments, laws, or pronouncements [sic] threatens the sovereignty of the United States, the separation of powers and the President's and the Senate's treaty-making authority

. . . .

*Id.*; see also *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing on H.R. Res. 568 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. 32 (2004) (statement of Professor John O. McGinnis, Professor of Law, Northwestern University), available at <http://www.house.gov/judiciary/mcginnis032504.pdf> (“[P]romiscuous use of foreign law will undermine domestic support for the Constitution”); *id.* at 10-14 (statement of Jeremy Rabkin, Professor of Law, Cornell University), available at <http://www.house.gov/judiciary/rabkin032504.htm> (“Appeals to foreign practice tend to undermine the notion that we really do (or really should) have a distinct constitution in our own country.”); *id.* at 18-28 (statement of Michael D. Ramsey, Professor of Law, University of San Diego), available at <http://www.house.gov/judiciary/ramsey032504.pdf> (When courts [use foreign materials to support decisions of moral and social policy], the rule of law and the role of courts is undermined.”). See generally Stuart Taylor, Jr., *Should Foreign Law Be Used to Interpret Our Constitution?*, 36 NAT'L J. 689 (2004) (identifying risks and benefits of importing foreign law); Ayers, *supra* note 1, at 128 (“[S]everal dozen members of the U.S. House of Representatives introduced a resolution condemning the Supreme Court's use of international jurisprudence.”); Jeffrey McDermott, *Citation to Foreign Precedent: Congress vs. the Courts*, FED. LAWYER, July 2004, at 20 (discussing House Resolution 568); Tom Curry, *A Flap over Foreign Matter at the Supreme Court: House Members Protest Use of Non-U.S. Rulings in Big Cases*, MSNBC, Mar. 11, 2004, <http://msnbc.msn.com/id/4506232/> (discussing controversy surrounding use of foreign precedent in constitutional analysis).

its own laws, not outsiders.<sup>19</sup> We in the United States create our own laws, or do we? As Blackstone stated, “[s]overeignty and legislature are indeed convertible terms; one cannot subsist without the other.”<sup>20</sup> Internalization of governance and control is critical to the concept that a Nation may, and indeed has the prerogative to, govern itself.<sup>21</sup> When authorities begin to allow the piercing of the veil of sovereignty—allowing outside sources to pierce the boundaries of domestic law—there is a surrender of the legislative autonomy a Nation holds in a Westphalian system.<sup>22</sup> A Nation’s right to exclude, the right to include, and the methods for determining lie at the heart of sovereign authority.<sup>23</sup>

If the legislature is the ultimate lawmaking power, however, is it appropriate for the judiciary to look beyond domestic pronouncements of law and invoke foreign or international pronouncements of “law” to decide governance standards?<sup>24</sup> This is the fundamental question addressed in this Article.

Predilections of particular judges should not punctuate domestic pronouncements or allow the projection of international standards into controlling law when not promulgated through the political process. Such actions are outside the judicial role.<sup>25</sup>

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19. See, e.g., JEREMY A. RABKIN, *WHY SOVEREIGNTY MATTERS* (1998).

20. WILLIAM BLACKSTONE, 1 COMMENTARIES \*46.

21. See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); JEREMY A. RABKIN, *LAW WITHOUT NATIONS? WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES* (2005). Peter Berkowitz has summarized Rabkin’s position as follows:

The United States should hold fast to the doctrine of state sovereignty because abandoning it would be both unlawful and unwise, contravening the Constitution and endangering the rights of American citizens while leaving responsibility for the protection of human rights around the world to unaccountable authorities and in weak hands.

Berkowitz, *supra* note 4, at 78.

22. See, e.g., BERGER, *supra* note 10, at 4-5 (“The Court has shown in the past that the Constitution can also be twisted to frustrate the needs of democracy.”).

23. See, e.g., NIHAL JAYAWICKRAMA, *THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL, REGIONAL AND INTERNATIONAL JURISPRUDENCE* 17 (2002) (“[A] sovereign state [traditionally] had full, complete and exclusive authority to deal with its own territory and with its own nationals.”).

24. See, e.g., Robert Araujo, *Sovereignty, Human Rights and Self-Determination: The Meaning of International Law*, 24 FORDHAM INT’L L.J. 1477, 1510-23 (2001) (contending that “reproductive rights” claims are not human rights claims cognizable in the courts).

25. See Connell, *supra* note 2, at 61 (“Recently . . . the Supreme Court has shown that the absence of shared American history and values is no obstacle to the Court’s imposing its view on the American people.”).



When the British colonies in North America chose to cast off their chains by revolution, they chose to create a sovereign Nation-State that was beyond the shackles and controls of outside influences.<sup>26</sup> The U.S. Declaration of Independence declared that “[King George III] has combined with others to subject us to a jurisdiction foreign to our constitution,”<sup>27</sup> in an effort to justify the need for independence and revolution. This was to be a country that would govern itself and create its own rules. Independence and foreign control were anathema. Reliance on uniquely U.S. law was seen as the appropriate standard, guiding force, and goal for the creation of the new, independent country—or so it seemed. Other countries have made similar demands to be free from extraterritorial control. For example, France’s Declaration of the Rights of Man states: “The nation is essentially the source of all sovereignty: nor can any individual or any body of men be entitled to any authority which is not expressly derived from it.”<sup>28</sup> Courts with the authority and duty to pronounce the state of the law must determine what the law is, and in so doing, must understand that the sovereign is the source from which law emanates.

Yet, today there is an emerging and growing debate regarding the judicial invocation and citation of international or foreign law to inform the domestic decisions on U.S. law—both as persuasive and sometimes as controlling authority.<sup>29</sup> Courts interpreting U.S. law should be interpreting *U.S.* law—law distinct to the U.S. legal system.<sup>30</sup> The invocation of foreign or international sources in judicial opinions circumvents the solemn duty of the judiciary to decide what the law is, not what it should be.<sup>31</sup>

The recent confirmation hearings for Chief Justice Roberts

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26. See generally THE DECLARATION OF INDEPENDENCE (U.S. 1776).

27. *Id.* at para. 3.

28. DECLARATION OF THE RIGHTS OF MAN (France 1789), quoted in THOMAS PAINE, POLITICAL WRITINGS 115 (Bruce Kuklick ed., Cambridge Univ. Press 1989) (1791).

29. See generally GOLDSMITH & POSNER, *supra* note 21 (advancing a theory of international law as a product of national self-interest).

30. See, e.g., The Supreme Court of the United States, The Court and Constitutional Interpretation, <http://www.supremecourtus.gov/about/constitutional.pdf> (“The Supreme Court is distinctly American in concept and function, as Chief Justice Charles Evans Hughes observed.”) (last visited Feb. 2, 2006).

31. Chief Justice John Marshall stated that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see also *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004) (upholding *Marbury*’s principle in noting that “the judicial department has no business enter-

reflect the growing debate over the tension between sovereign control and foreign influence. As an *Investor's Business Daily* editorial phrased it:

On Sept. 17, 1787, the constitution of the world's oldest democratic republic was completed and signed by a majority of the delegates attending a convention in Philadelphia. It's that constitution that Roberts, if confirmed as Chief Justice, will swear to defend, protect and interpret as written. And no one else's.

[W]hen asked what, "if anything, is the proper role of foreign law in U.S. Supreme Court decisions?"

"If we're relying on a decision from a German judge about what our Constitution means, no president accountable to the people appointed that judge and no Senate accountable to the people confirmed that judge," Roberts replied. "And yet he's playing a role in shaping the law that binds the people in this country. I think that's a concern that has to be addressed."

It is a growing and disturbing trend in recent Supreme Court decisions . . . .<sup>32</sup>

The question becomes whether judicial invocation of international and foreign law is appropriate.<sup>33</sup> This Article contends that it is indeed inappropriate and dangerous.

As Justice Oliver Wendell Holmes once stated, "[t]here is no mystic over-law to which even the United States must bow."<sup>34</sup>

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taining . . . question[s] entrusted to one of the political branches are or [that] involve[ ] no judicially enforceable rights.")

32. Editorial, *We the (American) People*, *INVESTOR'S BUS. DAILY*, Sept. 20, 2005, at A13.

33. See, e.g., Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 *UCLA L. REV.* 639 (2005) [hereinafter Alford, *Constitutional Comparativism*]; Daniel Bodansky, *The Uses of International Sources in Constitutional Opinion*, 32 *GA. J. INT'L & COMP. L.* 421 (2004); Roger P. Alford, *The Misuse of International Sources to Interpret the Constitution*, 98 *AM. J. INT'L L.* 57, 63 (2004) [hereinafter Alford, *Misuse of International Sources*].

34. *In re Western Maid*, 257 U.S. 419, 432 (1922). Justice Holmes stated:

In deciding this question we must realize that however ancient may be the traditions of maritime law, however diverse the sources from which it has been drawn, it derives its whole and only power in this country from its having been accepted and adopted by the United States. There is no mystic over-law to which even the United States must bow. When a case is said to be governed by foreign law or by general maritime law that is only a short way of saying that for this purpose the sovereign power takes up a rule suggested from without and makes it part of its own rules.

*Id.*

James Madison made a similar observation in Federalist No. 42 when discussing the issue of offenses and felonies on the high seas and the import of foreign or international law, stating that "neither the common, nor the statute law of that or of any other nation ought to be a standard for the proceedings of this, unless previously made its own by legislative adoption."<sup>35</sup> Importation of these over-laws in recent judicial decisions is entirely inappropriate for a country that has a constitution and a commitment to govern itself.

Part I of this Article presents the background regarding the invocation of foreign and international law in federal courts. It discusses their use as precedential and supportive sources of authority and as the bases for legal liability. Part II discusses the fundamental infirmities and dangers related to the invocation of international and foreign law in U.S. jurisprudence. This Part discusses the implications of such behavior on sovereignty, the rule of law, democratic values, constitutional adherence, foreign policy, and development. In conclusion, this Article finds that adherence or even reference to foreign and international authorities should be avoided if the foundational principles of the Republic are to be respected.

### I. THE U.S. JUDICIARY AND INTERNATIONAL LAW

Over the past several years, the invocation of foreign and international law in domestic judicial opinions has been rising in a number of contentious areas of law.<sup>36</sup> As the trend continues,

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35. THE FEDERALIST NO. 42 (James Madison), at 303-04 (Benjamin Fletcher Wright ed., 1961).

36. See Mauro, *supra* note 6, at 15A ("In landmark rulings upholding affirmative action, supporting gay rights and, most recently, striking down the death penalty for juvenile offenders, justices have invoked the practices of foreign nations and the rulings of international courts, e.g., to support their conclusions."). There are a variety of cases citing or discussing international or foreign laws, besides the prominent three recent cases. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (discussing worldwide disapproval of capital punishment for the mentally retarded); *id.* at 347-48 (Scalia, J., dissenting) (citing *Thompson v. Oklahoma*, 487 U.S. 815, 868-69 n.4 (1988)) (arguing that the opinions of the "World Community" should not bear on the meaning of the Constitution); *Foster v. Florida*, 537 U.S. 990, 992-93 (2002) (Breyer, J., dissenting from denial of certiorari) (citing Canadian and European cases finding "that delays of 15 years or less can render capital punishment degrading, shocking, or cruel"); *Knight v. Florida*, 528 U.S. 990, 995-96 (1999) (mem.) (Breyer, J., dissenting from denial of certiorari) (citing cases from Canada, India, and Jamaica that consider "lengthy incarceration before execution" as potentially violating "principles of fundamental justice") (in-

parties of all political preferences have an interest—and may be impacted—if foreign sources of authority are given legitimacy.<sup>37</sup> This trend has opened the door to new sources of political advocacy that may impact the agendas of the left, center, and right.<sup>38</sup> This trend has permeated decisions in U.S. district courts, courts of appeals, state courts, and even the U.S. Supreme Court.<sup>39</sup> At least six Justices on the Rehnquist Court have referenced foreign and international law as influence in their decisions.<sup>40</sup>

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ternal quotations omitted); *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997) (stating that while comparative surveys of national laws might be helpful in drafting a constitution, a comparative survey of such contemporary laws is not an appropriate aid to for constitutional interpretation); *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) (rejecting the relevance of sentencing practices of other nations); *id.* at 389-90 (Brennan, J., dissenting) (discussing the general disapproval of execution of juvenile offenders among the world community); *Thompson*, 487 U.S. at 830-31 (enumerating nations that do not execute juveniles); *Bowers v. Hardwick*, 478 U.S. 186, 211 (1986) (Blackmun, J., dissenting) (urging that biblical and historical sources invoked by petitioner cut against the argument petitioner advanced); *Enmund v. Florida*, 458 U.S. 782, 796-97 n.22 (1982) (citing *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977)) (stating that international opinion “concerning the acceptability of a particular punishment” is “not irrelevant”); *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (referring to “evolving standards of decency,” “a maturing society,” and “objective indicia derived from history” in addressing challenges to the constitutionality of “double celling,” whereby two prisoners were housed in one cell) (internal quotations omitted); *Coker*, 433 U.S. at 596 n.10 (1977) (referencing a 1965 survey of “major nations” regarding the imposition of the death penalty in rape cases); *Estelle v. Gamble*, 429 U.S. 97, 116 n.13 (1976) (Stevens, J., dissenting) (stating that denial of medical care is not among the punishments that civilized nations should allow); *Trop v. Dulles*, 356 U.S. 86, 102 n.35 (1958) (describing the international consensus among the world’s democracies that “statelessness” is a deplorable condition).

37. As legal commentator Jeffrey Rosen opines:

Conservatives are right to fear the internationalization of the culture wars—that is, the danger that American traditions will be struck down in the name of international values. But liberals should fear this development as well. Kenneth Anderson of the Washington College of Law predicts that, in the wake of *Roper*, citations to international authorities “will spread throughout the U.S. judicial system like an Internet virus—because both sides will have to assume in any litigation that it now matters.” We may soon see shaky claims about a purported international consensus invoked in cases ranging from corporate litigation to free speech. And liberal values will hardly be reliable winners.

Jeffrey Rosen, *Juvenile Logic—Court Outsourcing*, NEW REPUBLIC, Mar. 21, 2005, at 11.

38. See, e.g., *id.* (“To the degree that foreign authorities do agree about moral values in other cases involving basic rights, they tend to be far less consistently progressive than liberals assume.”).

39. See, e.g., Alford, *Constitutional Comparativism*, *supra* note 33; Alford, *Misuse of International Sources*, *supra* note 33; Bodansky, *supra* note 33.

40. See Sarah H. Cleveland, *Is There Room for the World in Our Courts?*, WASH. POST, Mar. 20, 2005, at B4 (“Breyer and at least five other members of the [Rehnquist Court],

A. *Recent Notable U.S. Judicial Invocations of International and Foreign Law*

Three recent Supreme Court cases highlight the trend and debate over the invocation of foreign and international law in domestic judicial decisions—*Atkins v. Virginia*,<sup>41</sup> *Lawrence v. Texas*,<sup>42</sup> and *Roper v. Simmons*.<sup>43</sup> Each involved decisions of U.S. domestic law, but several Justices endorsed references to foreign and international law in reaching their decisions.<sup>44</sup>

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on the other hand, argue that international norms should inform our constitutional analysis in a world increasingly united by globalization, democratization and the spread of universal human rights.”).

41. 536 U.S. 304. For commentary, see J. Richard Broughton, *Off the Rails of a Crazy Train?: The Structural Consequences of Atkins and Modern Death Penalty Jurisprudence*, 11 WIDENER L. REV. 1 (2004); Connell, *supra* note 2, at 61 (“[T]he majority’s reliance on European law in those cases, to justify its interpretation of the United States Constitution, improperly interferes in matters that historically have been left to state legislatures, thereby undermining both principles of federalism and American sovereignty.”); Charles Hobson, *Atkins v. Virginia, Federalism, and Judicial Review*, 11 WIDENER L. REV. 23 *passim* (2004) (arguing that the Supreme Court’s reliance on foreign authority, particularly in *Atkins*, interferes with state tort law); and Harold Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 55-57 (2004) (suggesting that *Lawrence* and *Atkins* represent the demise of “national jurisprudence” and such decisions’ reliance on “transnational legal materials” forecast precedential reliance on international and foreign laws).

42. *Lawrence v. Texas*, 539 U.S. 558 (2003). For commentary, see Rex D. Glensy, *Which Countries Count?: Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT’L L. 357 *passim* (2005); Joan L. Larsen, *Importing Constitutional Norms from a “Wider Civilization”: Lawrence and the Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283, 1304-05 (2004); Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1607 (2004) (“Flaunting a cosmopolitan sensibility may be quite chic, but this high style comes with a price.”); Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT’L L. 69, 73 (2004).

43. *Roper v. Simmons*, 125 S. Ct. 1183 (2005).

44. For an early discussion of Supreme Court cases that have addressed issues of international law, see generally Paul B. Stephan III, *International Law in the Supreme Court*, 1990 SUP. CT. REV. 133, 134 (1990) (identifying “a conception of international law as a body of contingent principles derived from intergovernmental bargaining”). In addition to the cases discussed herein, see also Justice Ruth B. Ginsburg’s concurring opinion in *Grutter v. Bollinger*, 439 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (noting that suggestions regarding the appropriateness of affirmative action are in “accord . . . with the international understanding of the office of affirmative action,” citing the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women). For commentary, see Jeremy A. Rabkin, *Recalling the Case for Sovereignty*, 5 CHI. J. INT’L L. 435, 447 (2005) (“[T]he Supreme Court has indicated that international practice or international opinion can justify reinterpreting the US Constitution, even when the new interpretation runs precisely contrary to interpretations previously advanced by the Court itself.”).

In *Atkins v. Virginia*,<sup>45</sup> the Court invalidated laws providing that mentally retarded offenders could be sentenced to death, using in part foreign authorities. In the footnotes, the majority cited the opinion of the "world community" to support its conclusion.<sup>46</sup> The Court relied, in part, on an amicus brief filed by the European Union, concluding that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."<sup>47</sup> Not shockingly, Justice Antonin Scalia (joined by Chief Justice William Rehnquist and Justice Clarence Thomas) dissented and disagreed with the Court's invocation of extraterritorial authority. Scalia stated in dissent:

[T]he Prize for the Court's Most Feeble Effort to fabricate "national consensus" must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called "world community," and respondents to opinion polls . . . . [I]rrelevant are the practices of the "world community," whose notions of justice are (thankfully) not always those of our people. ". . . [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."<sup>48</sup>

Justice Scalia's dissent contributed to a growing debate as to the utility and appropriateness of world views in defining domestic law.

*Lawrence v. Texas* found unconstitutional a Texas statute barring same-sex sodomy. Writing for the majority, Justice Anthony Kennedy cited as authority a decision by the European Court of Human Rights permitting homosexual conduct as evidence of a lack of consensus on such conduct's illegality.<sup>49</sup> Again, Justice Scalia (joined by then Chief Justice Rehnquist and Justice Thomas) dissented, in part because of the Court's reference to foreign authorities. Here, Justice Scalia stated in dissent:

In any event, an "emerging awareness" is by definition

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45. 536 U.S. 304.

46. *See id.* at 316 n.21.

47. *Id.*

48. *Id.* at 347-48 (Scalia, J., dissenting) (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 868-69 n.4 (1988)).

49. *See Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

not “deeply rooted in this Nation’s history and tradition[s],” as we have said “fundamental right” status requires. Constitutional entitlements do not spring into existence . . . because *foreign nations* decriminalize conduct. The *Bowers* majority opinion *never* relied on “values we share with a wider civilization,” but rather rejected the claimed right to sodomy on the ground that such a right was not “‘deeply rooted in *this Nation’s* history and tradition.’” *Bowers’* rational-basis holding is likewise devoid of any reliance on the views of a “wider civilization,” . . . . The Court’s discussion of these foreign views . . . is therefore meaningless dicta. Dangerous dicta, however, since “this Court . . . should not impose foreign moods, fads, or fashions on Americans.”<sup>50</sup>

According to Justice Scalia, domestic law should not be defined by, nor depend on, international or foreign views.

The most recent Supreme Court debate over the invocation of international or foreign law came in the March 2005 decision in *Roper v. Simmons*.<sup>51</sup> *Roper* held that the Constitution forbids the imposition of the death penalty on juvenile offenders—those under age eighteen when their crimes were committed.<sup>52</sup> The Court relied substantially on the supposed views of the “international community” on the matter.<sup>53</sup> Justice Kennedy wrote the

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50. *Id.* at 598 (Scalia, J., dissenting) (citations omitted) (quoting *Foster v. Florida*, 537 U.S. 990 (2002) (Thomas, J., concurring in denial of certiorari)).

51. 125 S. Ct. 1183 (2005); see also Tony Mauro, *Justices Divided on Juvenile Executions*, LEGAL TIMES, Oct. 18, 2004, at 10 (summarizing oral argument in *Roper*).

52. See *Roper*, 125 S. Ct. at 1200.

53. See *id.* at 1198-1200. As Senator John Kyl explained:

In deciding the case, the Supreme Court not only, in my view, engaged in questionable analysis of American law, it spent perhaps 20 percent of its legal analysis discussing the laws of Great Britain, Saudi Arabia, Yemen, Iran, Pakistan, Nigeria and China. The court claimed that we ought not to, “stand alone on this issue” and that we should pay attention to what other nations do when we interpret our Constitution.

*Above the Law*, *supra* note 12, at A26. But an alternative reading of *Roper* downplays the foreign influence:

[I]f foreign and international law does no more than merely confirm judgments already reached on domestic grounds, the majority gave it far more emphasis than strictly needed.

. . . .  
The real role of foreign and international law in the outcome was probably more than the majority let on, but less than the exaggerated claims of Scalia.

Douglass W. Cassel, Jr., *Top Court Embraces a World View*, CHI. DAILY L. BULL., Mar. 4, 2005, at 5.

majority opinion. Legal commentator Jeffrey Toobin has opined that Justice Kennedy "has become a leading proponent of one of the most cosmopolitan, and controversial, trends in constitutional law: using foreign and international law as an aid in interpreting the U.S. Constitution."<sup>54</sup> Justice Kennedy raised such ire with his decision in *Roper* that some were even calling for his impeachment.<sup>55</sup> Justice Kennedy's confidence that the judiciary can discern international consensus has been described as wrong and, at the very least, questionable.<sup>56</sup>

*Roper* clearly represents a significant turning point in the acceptance of foreign and international precedent to define domestic law.<sup>57</sup> Indeed, some have described it as a "sweeping" opening for new activism.<sup>58</sup>

54. Jeffrey Toobin, *Swing Shift*, NEW YORKER, Sept. 12, 2005, at 42; see also Tony Mauro, *Justices Defend Judiciary Against Hill*, NAT'L L.J., Apr. 18, 2005, at 14 (describing questioning of Justice Anthony Kennedy on the invocation of foreign and international law during budgetary hearings regarding the judiciary); Jason DeParle, *In Battle to Pick Next Justice, Right Says Avoid a Kennedy*, N.Y. TIMES, June 27, 2005, at A1 ("In writing a decision this year that banned the death penalty for juveniles, Justice Anthony Kennedy bolstered his argument by citing similar bans in such questionable arenas of human rights as Nigeria and Iran.").

55. See Tony Mauro, *A Revolution on Hold: As the Supreme Court Embraced Moderation, the Conservative Agenda Stalled*, LEGAL TIMES, June 27, 2005, at 1 ("Conservatives pounced on Kennedy, asserting that his invocation of international law and norms was a nearly impeachable offense."); see also Margaret Talev, *Conservatives Still Holding Supreme Grudge*, FORT WAYNE J. GAZETTE (Ind.), May 6, 2005, at 11A (claiming that *Roper* "simultaneously enraged capital punishment advocates and nationalists who say that what happens in other countries should have no bearing on how a judge interprets U.S. law").

56. See, e.g., Rosen, *supra* note 37, at 11 ("Kennedy is also wrong to suggest that it's possible to generalize meaningfully about a purported international consensus on any hotly contested issue involving life or death, crime or punishment.").

57. See Kenneth Anderson, *Foreign Law and the U.S. Constitution*, POL'Y REV., June-July 2005, at 33 ("Until [*Roper*] was handed down . . . it remained possible to view the appearance of foreign law in constitutional decisions as nothing more than a minor hobbyhorse for Justice Stephen Breyer or Justice Kennedy—a merely rhetorical nod.").

58. See, e.g., *id.* at 34. Anderson argues:

Justice Kennedy's *Roper* majority opinion puts paid to the conceit that this is all just a bit of fluff exaggerated into something sinister and conspiratorial by Federalist Society right-wing ideologues. *Roper* asserts far more, it turns out, than the prior use of foreign law in contemporary constitutional cases would have suggested. It blesses in the contemporary era a new doctrine of constitutional adjudication, what has been called "constitutional comparativism," that is very far indeed from mere flirtation. It invites the deployment of a sweeping body of legal materials from outside U.S. domestic law into the process of interpreting the U.S. Constitution—and, moreover, invites it into American society's most difficult and contentious "values" questions.

*Id.*



Adding emphasis to the internationalization of domestic jurisprudence, foreigners and non-governmental organizations have entered the fray.<sup>59</sup> Trying to influence outcomes in favor of foreign and international opinions, *Roper* is an instance where such parties appeared as amici to attempt to influence the results.<sup>60</sup> This type of court-centered lobbying can be valuable to such individuals and groups when attempting to gain ground in advancing group preferences that may not be successful through the democratic process.<sup>61</sup> When the courts are willing to listen to groups who rely on extraterritorial sources, there is a greater incentive for such groups to become involved in litigation.

Dissenting in *Roper*, Justice Scalia (in an opinion joined by then Chief Justice Rehnquist and Justice Thomas) sharply dis-

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59. See, e.g., JEREMY RABKIN & JAMES SHEEHAN, *GLOBAL GREENS, GLOBAL GOVERNANCE* (1999); JAMES SHEEHAN, *GLOBAL GREENS I* (1998); Sanford E. Gaines, *Global and Regional Perspectives on International Environmental Protection*, 19 HOUS. J. INT'L L. 983, 1000-03 (1997) (detailing the substantial role played by NGOs in the formation and structure of the North American Free Trade Agreement, Commission on Environmental Cooperation, and the North American Agreement on Environmental Cooperation). See generally Christopher C. Horner, *Modern Developments in the Treaty Process: Recent Developments Regarding Advice and Consent, Withdrawal, and the Growing Role of Nongovernmental Organizations in International Agreements with Particular Examination of the 1997 Kyoto Protocol*, Federalist Soc'y for Law & Pub. Policy Studies White Paper, available at <http://www.cei.org/pdf/3243.pdf> (last visited Feb. 2, 2006) (citing a report, among others, on bias in the selection process at the 2002 United Nations Child Summit).

60. See, e.g., David Stout, *Dozens of Nations Weigh In on Death Penalty Case*, N.Y. TIMES, July 20, 2004, at A14 ("Countries from the European Union along with Canada, Mexico and other nations filed friend of the court briefs in a Missouri death penalty case. So did former President Jimmy Carter, former Soviet President Mikhail S. Gorbachev and others, including the American Bar Association, the American Medical Association and religious groups."); Phyllis Schlafly, *Global Benchmarks*, WASH. TIMES, Nov. 1, 2004, at A13 ("The Supreme Court recently accepted amicus briefs from Mikhail Gorbachev and from 48 foreign countries in a case considered this fall involving the death penalty for juveniles . . . . The justices have increasingly cited foreign law to weaken our death penalty, though the U.S. Constitution in several places expressly recognizes its legality."); *id.* ("Earlier this year, the Supreme Court allowed the Commission of the European Communities for the first time to present oral argument as a friend of the court.").

61. See Robert H. Bork, *Travesty Time, Again: In Its Death-Penalty Decision, the Supreme Court Hits a New Low*, NAT'L REV., Mar. 28, 2005, at 17 ("What is clear is that foreign elites understand the importance of having the Supreme Court on their side, which is precisely why their human-rights [sic] organizations have begun filing amicus briefs urging our Supreme Court to adopt the foreign, elite view of the American Constitution."). See generally Donald J. Kochan, *The Political Economy of the Production of Customary International Law: The Role of NGOs and United States Courts*, 22 BERKELEY J. INT'L L. 240 (2004).

agreed with the Court's reliance on foreign sources to reach its conclusion.<sup>62</sup> Justice Scalia argued that reliance on supposed international consensus was entirely inappropriate in setting domestic constitutional standards:

More fundamentally, however, the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand. In fact the Court itself does not believe it. In many significant respects the laws of most other countries differ from our law—including not only such explicit provisions of our Constitution as the right to jury trial and grand jury indictment, but even many interpretations of the Constitution prescribed by this Court itself.<sup>63</sup>

After describing multiple court rulings that would need to be overturned if the Court were to consistently rely on foreign sources of authority, Justice Scalia continued:

The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners' views as part of the *reasoned basis* of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.<sup>64</sup>

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62. See *Roper v. Simmons*, 125 S. Ct. 1183, 1217-30 (2005) (Scalia, J., dissenting); see also Tony Mauro, *U.S. Supreme Court Bans Death Penalty for Juveniles*, DAILY BUS. REV. (Broward), Mar. 2, 2005, at 10 ("[I]n the fullest exposition of deep disagreements over the value of foreign law in the court's jurisprudence, [Justice] Scalia upbraided the majority for selectively invoking the international consensus against executing juveniles while ignoring it in other contexts, such as abortion rights.").

63. *Roper*, 125 S. Ct. at 1226 (Scalia, J., dissenting).

64. *Id.* at 1228. Much commentary in the press after *Roper* endorsed Scalia's concerns. See, e.g., A. Barton Hinkle, *The Constitution Does Not Consist of World Public Opinion*, RICHMOND TIMES-DISPATCH, Mar. 4, 2005, at A11 ("[Justice] Kennedy's suggestion is profoundly disturbing for revealing his willingness to—well, to put aside the issue of whether the juvenile death penalty is constitutional, and to substitute what he thinks the rest of the world thinks for what the Constitution and precedent actually say."); Thomas P. Kilgannon, *Does the Constitution Matter*, WASH. TIMES, Mar. 12, 2005, at A15 ("[F]ive jug-headed jurists on the Supreme Court invoked international law, European opinion and a concept they dubbed 'the evolving standards of decency that mark the progress of a maturing society,' to find in the Constitution a right of immunity from the death penalty for minors."); Ed Feulner, *Courting Trouble*, WASH. TIMES, Mar. 16, 2005, at A18 (calling *Roper* "judicial overreach," and noting that "[t]he United States has an excellent Constitution, and plenty of homegrown laws. We don't need to import any from foreign lands. Our judges must confine themselves to interpreting our own laws, instead of subjecting us to foreign laws."). But see Mauro, *supra* note 6, at 15A ("But to hear conservatives' violent reaction to the decision, you would think that it was the only

In sum, Justice Scalia exclaimed that the Court's invocation of international and foreign authorities is selective, activist, and inappropriate.<sup>65</sup>

Also dissenting in *Roper*, Justice Sandra Day O'Connor refused to go as far as Scalia. Justice O'Connor explained that international and foreign law has a role in U.S. jurisprudence:

I disagree . . . that foreign and international law have no place in our Eighth Amendment jurisprudence. Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency. . . . Obviously, American law is distinctive in many respects . . . . But this Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement—expressed in international law or in the domestic laws of individual countries—that a particular form of punishment is inconsistent with fundamental human rights.<sup>66</sup>

Justice O'Connor disagreed with the majority, but she did not fault the majority for relying on international and foreign laws as authority to inform constitutional interpretation.<sup>67</sup>

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justification, and that [Justice] Kennedy had suddenly ceded the authority of the Supreme Court to the laws of Klingon, or Mars.”)

65. For a commentary that Justice Scalia “overstates” the concern, see, for example, Stanley E. Adelman, *Supreme Court Bans Death Penalty for Under-18 Offenders*, CORRECTIONS TODAY, Aug. 1, 2005, at 58. Also, for commentary contrary to Justice Scalia's critique, see Marcia Coyle, *Foreign Law Is Key in Juvenile Capital Case: Justices Split on Non-U.S. Law's Role*, NAT'L L.J., Oct. 11, 2004, at 1 (endorsing a greater international role in domestic judicial decisionmaking); Martha F. Davis, *Don't Gag U.S. Courts*, MIAMI DAILY BUS. REV., Aug. 30, 2004, at 6 (calling reference to foreign laws a “fruitful approach” that “ensures that Supreme Court decisions canvass for the best ideas and approaches available,” and accusing Congress of placing a “gag order” on the federal courts” by trying to demand they refrain from examining foreign laws); Amy Howe, *A Little Worldly*, LEGAL TIMES, July 5, 2004, at 50 (describing an “increasingly interdependent international legal system,” and noting that “any progress is welcome and, at bottom, inevitable. . . . U.S. courts cannot shy away from their basic duty of stating what the law is, not only with regard to the other branches of government but also in the international system.”); and *id.* (“The role of both foreign legal materials and international law in cases turning on interpretations of the U.S. Constitution remains the most contentious—even if the hullabaloo so far has proved to be much ado about nothing.”).

66. *Roper*, 125 S. Ct. at 1215-16 (O'Connor, J., dissenting).

67. For a discussion of the emerging presence of international law, including an

Outside the courtroom, at speeches and in the press, several Supreme Court Justices have recently expressed their views on the use of international law in interpretation and decisions of U.S. law.<sup>68</sup> For example, several Justices have delivered presentations on the topic.<sup>69</sup> In January 2005, Justices Scalia and Breyer even engaged in an unprecedented debate on the use of interna-

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opening essay by U.S. Supreme Court Justice Sandra Day O'Connor on the matter, see generally Symposium, *The Interaction Between National Courts and International Tribunals*, 28 N.Y.U. J. INT'L L. & POL. 1 (1996). See, e.g., Editorial, *supra* note 32, at A13 ("[Justice] O'Connor said recently, 'I suspect that over time we will rely increasingly on . . . international and foreign courts in examining domestic issues.'").

68. See, e.g., Editorial, *Other Nation's Laws*, WASH. TIMES, Mar. 13, 2005, at B2. Notable comments include:

As Yale's Harold Koh has put it in the past, the point of the new thinking is "bringing international law home." Justice Ruth Bader Ginsburg said in 2003 that she hoped America could discard its "Lone Ranger" approach to the Constitution. Justice Stephen Breyer, who has invoked the rulings of Zimbabwe and India in his opinions, said on ABC's "This Week" in 2003 that Americans will need to figure out whether the Constitution "fits into the governing documents of other nations." Justice O'Connor herself has a track record here. In 1997 she said that American judges and lawyers "sometimes seem a bit insular" and "forget that there are other legal systems in the world."

*Id.*

69. See, e.g., Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1 (2003); Mauro, *supra* note 6, at 15A ("But in today's world, ignoring it altogether is not an option, [Justice O'Connor] has said. In a speech before the American Society of International Law in 2002, [Justice] O'Connor put it this way: 'Because of the scope of the problems that we face, understanding international law is no longer just a legal specialty. It is becoming a duty.'"); Schlafly, *supra* note 60, at A13 ("In a speech last year, Justice Ruth Bader Ginsburg told the American Constitution Society that 'your perspective on constitutional law should encompass the world.'"); Stephen Breyer, Assoc. Justice, U.S. Supreme Court, *The Supreme Court and the New International Law*, Address Before the American Society of International Law (Apr. 4, 2003), available at [http://www.humanrightsfirst.org/us\\_law/inthecourts/Supreme\\_Court\\_New\\_Interl\\_Law\\_Just\\_Breyer%20.pdf](http://www.humanrightsfirst.org/us_law/inthecourts/Supreme_Court_New_Interl_Law_Just_Breyer%20.pdf); Ruth Bader Ginsburg, Assoc. Justice, U.S. Supreme Court, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, Address Before the American Constitution Society (Aug. 2, 2003), available at [http://www.humanrightsfirst.org/us\\_law/inthecourts/Ginsburg\\_transcript\\_080203.pdf](http://www.humanrightsfirst.org/us_law/inthecourts/Ginsburg_transcript_080203.pdf); Sandra Day O'Connor, Assoc. Justice, U.S. Supreme Court, *Remarks to the Southern Center for International Studies* (Oct. 28, 2003), available at [http://www.humanrightsfirst.org/us\\_law/inthecourts/SOUTHERN\\_CENTER\\_INTERNATIONAL\\_STUDIES\\_Justice\\_O%27Connor.pdf](http://www.humanrightsfirst.org/us_law/inthecourts/SOUTHERN_CENTER_INTERNATIONAL_STUDIES_Justice_O%27Connor.pdf); Sandra Day O'Connor, Assoc. Justice, U.S. Supreme Court, *Keynote Address, Proceedings of the Ninety-Sixth Annual Meeting of the American Society of International Law* (Mar. 16, 2002), available at [http://www.humanrightsfirst.org/us\\_law/inthecourts/ASIL\\_Keynote\\_Add\\_2002\\_Just\\_O%27Connor.pdf](http://www.humanrightsfirst.org/us_law/inthecourts/ASIL_Keynote_Add_2002_Just_O%27Connor.pdf); Whelan Testimony, *supra* note 12, at 21 ("On April 1, 2005, Justice Ginsburg delivered a speech to the American Society of International Law that defended the Supreme Court's increasing use of foreign law in support of its rulings on the meaning of the Constitution.").

tional law in U.S. jurisprudence, broadcast on C-SPAN.<sup>70</sup>

Most recently in April 2005, Justices Stephen Breyer, O'Connor, and Scalia again sat down to publicly debate the propriety of using foreign or international law in decisionmaking. Again, it was covered on C-SPAN and discussed in the press, and highlighted some of the stark differences of opinion between the Justices on the appropriate jurisprudential approach.<sup>71</sup>

These unusual appearances and pronouncements by typically insulated judges demonstrate the current intensity of this debate. It also illustrates that the proper judicial role in relation to foreign and international precedents is an ongoing discussion with an ongoing progression towards this resort to extraterritorial precedential support.

70. See Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer, Jan. 13, 2005, <http://domino.american.edu/AU/media/mediaref.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument>; see also Justices Debate Role of International Law in Rare Televised Debate, Jan. 14, 2005, <http://www.ap.org/> (search for title in "AP Archive"); Antonin Scalia, *Keynote Address: Foreign Legal Authority in the Federal Courts*, 98 AM. SOC'Y INT'L L. PROC. 305 (2004); Charles Lane, *The Court Is Open for Discussion*, WASH. POST, Jan. 14, 2005 ("It was the first time in recent memory that two sitting justices representing opposing factions on the court took their disagreements so completely public, and the effect was, at times, electrifying."); Mauro, *supra* note 62, at 10 ("[Justice Scalia] relented in his usual opposition toward broadcast coverage of his remarks on [January] 13 when he allowed C-SPAN to air a debate between him and Justice Stephen Breyer on the issue at American University. [Justice] Kennedy sat stone-faced as [Justice] Scalia scoffed at his decision in one of the most vituperative dissents in years.").

71. The following summary is an example of press coverage of the April 2005 debate:

[T]he National Constitution Center hosted a "Constitutional Conversation" with three other justices: Stephen Breyer, Antonin Scalia and Sandra Day O'Connor.

For her part, [Justice] O'Connor surmised that "over time we will rely increasingly . . . on international and foreign courts in examining domestic issues." Added [Justice] Breyer: "We see all the time . . . how the world really is growing together. The challenge (will be) whether our Constitution . . . fits into the governing documents of other nations."

Editorial, *supra* note 3, at A12; see also Stephen Henderson, *Call This Trio . . . the Supremes*, PHILA. INQUIRER, Apr. 22, 2005, at A9; Guy Taylor, *Justices Argue International Law*, WASH. TIMES, Apr. 25, 2005, at A4; *Candid Camera with Supreme Court Justices: In Rare Q&A, Three Talk of Political Pressures, International Law*, MSNBC, Apr. 22, 2005, <http://msnbc.msn.com/id/7598231/>; Hope Yen, *O'Connor Dismisses ADO over Int'l Law*, S.F. GATE, Apr. 21, 2005, <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2005/04/21/national/w190519D86.DTL>. A video of the conversation is available online: *U.S. Supreme Court Justices Interview with Tim Russert* (C-SPAN television broadcast Apr. 21, 2005), available at <http://c-span.org/Search/advancedsearchform.asp> (search for "Supreme Court Justices Interview").

It cannot be dismissed that the role of international law in domestic jurisprudence is increasing in its application, controversy, and danger. Lower courts will undoubtedly struggle with these recent decisions as they attempt to decide which "law" can be appropriately applied.<sup>72</sup>

As Judge Robert Bork has opined, the Framers may be turning over in their graves: "The most ominous aspect of *Roper* . . . is the Court majority's reliance upon foreign decisions and unratified treaties. . . . If the meaning of a document over 200 years old can be affected by the current state of world opinion, James Madison and his colleagues labored in vain."<sup>73</sup> It is a Constitution the courts should be expounding,<sup>74</sup> not other people's laws.

### B. *The Alien Tort Statute*

Citation for interpretation is not the only means by which international and foreign law has entered the judicial decision-

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72. See, e.g., *Kane v. Winn*, 319 F. Supp. 2d 162, 201 (D. Mass. 2004) ("The United States has at times demonstrated a certain unwillingness to permit international law to decide domestic disputes. . . . This is particularly remarkable, given how recently the Supreme Court has reaffirmed the importance of international law in defining the liberties protected by the Bill of Rights."); *United States v. Quinones*, 2004 WL 1234044, at \*2 (S.D.N.Y. 2004) ("As a district court, moreover, this Court must scrupulously adhere to the teachings of the higher federal courts; and the Supreme Court, which has not been unmindful of the impact of international law in this context, as elsewhere . . . has not indicated the slightest support for the notion that international law bars the death penalty *per se*."); *Pillsbury Co. v. United States*, 368 F. Supp. 2d 1319, 1332 (Ct. Int'l Trade 2005) ("When the United States has departed from international norms, constructions of U.S. statutes by foreign governments are wholly irrelevant. . . . [W]hy the Court would be swayed by the position of foreign governments on U.S. law is unclear."), *vacated*, 403 F. Supp. 2d 1354 (Ct. Int'l Trade 2005). As Kenneth Anderson notes, there is no doubt that this series of cases, especially *Roper*, will empower, embolden, or inspire all federal courts to consider citation to foreign authorities:

None of this is confined, of course, solely to Supreme Court cases. On the contrary, there are good reasons to believe that, given the open invitation of *Roper*, the practice will rapidly spread throughout the federal courts. Why shouldn't it? . . . The practice will now spread like an internet virus across the legal system, under pressure from both plaintiffs and defendants, liberals and conservatives, activists and those answering activists. Once one side has deployed them in litigation, the other side will have to respond to them and, crucially, find something to counterbalance them from the same *corpus juris* of foreign and international materials. . . . *Roper* tells U.S. judges, in effect, that they should strive not to be the Ugly Judicial American.

Anderson, *supra* note 57, at 49.

73. Bork, *supra* note 61, at 17.

74. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) ("[W]e must never forget that it is a *constitution* we are expounding.") (emphases in the original).

making process. One significant development in the past twenty-five years has manifested itself in the use of the Alien Tort Statute ("ATS") (or Alien Tort Claims Act ("ATCA")).<sup>75</sup> Old but little known for most of its life since passed as part of the Judiciary Act of 1789,<sup>76</sup> the Alien Tort Statute has become the principle mechanism for injecting international norms and human rights into U.S. courts. Lawsuits under the ATS have been filed exponentially against Nation-States, State actors, and even private individuals or corporations for supposed violations of international law. The ATS provides that "[t]he 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."<sup>77</sup>

It remained almost entirely dormant for almost 200 years, but now the ATS is playing an exponentially significant role in the application of international law in U.S. courts. There have been five principal waves in the evolution of ATS litigation. This section discusses the most significant cases in the ATS waves of evolution. The first wave was disuse and dormancy; the second was the acceptance of liability under the ATS for official State acts, including its recognition as a statute providing both jurisdiction and a cause of action and liability evidenced by noncompliance with customary international law outputs; and the third was the movement toward an acceptance that quasi-State and indeed private individuals could be liable for violations of customary international law. The fourth wave in ATS jurisprudence involves suits against private individuals and corporations. The fifth wave involves the first guidance from the U.S. Supreme Court and its decision that contributes to the debate over the use

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75. See 28 U.S.C. § 1350 (2000); see also Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 587-91 (2002) (explaining that "Alien Tort Statute" ("ATS") is preferable to "Alien Tort Claims Act" ("ATCA") if one believes that § 1350 does not create a cause of action).

76. Judge Henry Friendly has described the Act as an "old but little used section" that is "a kind of legal Lohengrin; . . . no one seems to know whence it came." *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

77. 28 U.S.C. § 1350. The original Act, enacted by the First Congress, read: "The district courts . . . shall have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77 (1789).

of international law, but fails to truly clarify the role of U.S. courts vis-à-vis international and foreign sources of authority.

Wave one was that of dormancy. The ATS remained essentially unaccessed—or “dormant” in the parlance of literature in this field—for almost 200 years.<sup>78</sup>

The second wave emerged in 1980 when the U.S. Court of Appeals for the Second Circuit decided *Filartiga v. Pena-Irala*.<sup>79</sup> *Filartiga* set the stage for the use of the ATS for civil litigation based on human rights and other international norms.<sup>80</sup> Dolly Filartiga, a citizen of the Republic of Paraguay, sued Americo Norberto Pena-Irala, formerly an Inspector General of Police of Paraguay, for allegedly kidnapping, torturing, and killing her brother while in office.<sup>81</sup> The alleged actions took place in Paraguay.<sup>82</sup> The district court dismissed the action for lack of subject matter jurisdiction.<sup>83</sup> The Second Circuit reversed and remanded. It held that deliberate torture by State officials violates international law and that alleging such torture creates jurisdiction under the ATS.<sup>84</sup> The court found that the ATS created jurisdiction and provided a cause of action.

78. See Mark K. Moller, *Old Puzzles, Puzzling Answers: The Alien Tort Statute and Federal Common Law in Sosa v. Alvarez-Machain*, in CATO SUP. CT. REV. 209 (2004) (noting that the ATS was, “until recently, long-dormant”); see also Hari M. Osofsky, *Environmental Human Rights Under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations*, 20 SUFFOLK TRANSNAT'L L. REV. 335, 345 (1997) (“From its passage as part of the Judiciary Act of 1789 until *Filartiga*, almost two hundred years later, the Alien Tort Statute virtually lay dormant . . .”).

79. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). For general discussions of the case and its approach, see, for example, Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53 (1981); Dean Rusk, *A Comment on Filartiga v. Pena-Irala*, 11 GA. J. INT'L & COMP. L. 311 (1981); Louis B. Sohn, *Torture as a Violation of the Law of Nations*, 11 GA. J. INT'L & COMP. L. 307 (1981); Gabriel M. Wilner, *Filartiga v. Pena-Irala: Comments on Sources of Human Rights Law and Means of Redress for Violations of Human Rights*, 11 GA. J. INT'L & COMP. L. 317 (1981); Farooq Hassan, Note, *A Conflict of Philosophies: The Filartiga Jurisprudence*, 32 INT'L & COMP. L.Q. 250, 255 (1983); Michael C. Small, Note, *Enforcing International Human Rights Law in Federal Courts: The Alien Tort Statute and the Separation of Powers*, 74 GEO. L.J. 163 (1985); and Mark P. Jacobsen, Comment, 28 U.S.C. 1350: *A Legal Remedy for Torture in Paraguay?*, 69 GEO. L.J. 833, 834, 849 (1981).

80. Judge Charles Robb of the U.S. Court of Appeals for the D.C. Circuit described the *Filartiga* approach as “judicially will[ing] that statute a new life.” *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 827 (D.C. Cir. 1984) (per curiam) (Robb, J., concurring).

81. *Filartiga*, 630 F.2d at 878.

82. See *id.*

83. See *id.*

84. See *id.*



The *Filartiga* court held that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties."<sup>85</sup> *Filartiga* established that modern concepts of "international law" were synonymous with the phrase "law of nations" in the statute. The court also held that international law is an evolving concept to be ascertained by the courts.<sup>86</sup> The Second Circuit held that courts ascertaining the law of Nations "must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."<sup>87</sup>

The *Filartiga* decision inspired multiple lawsuits against States and State actors.<sup>88</sup> Courts struggled to discern the proper role of international law and the definition thereof. For example, the D.C. Circuit departed from the *Filartiga* approach to international law in *Tel-Oren v. Libyan Arab Republic*.<sup>89</sup> Representatives of persons killed in a civilian bus in Israel, along with the injured survivors of the attack, sued the Libyan Arab Republic, the Palestine Liberation Organization, the Palestine Information Office, the National Association of Arab Americans, and the Palestine Congress of North America.<sup>90</sup> The plaintiffs claimed the defendants committed multiple tortious acts in violation of international law.<sup>91</sup>

Although there were three separate opinions, the D.C. Circuit panel agreed unanimously that the court lacked jurisdiction over the plaintiffs' causes of action.<sup>92</sup> Judge Edwards, adhering

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85. *Id.*

86. *See id.* at 881.

87. *Id.*

88. *E.g.*, *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1540 (N.D. Cal. 1987) (ordering Argentine plaintiffs to amend complaints of official torture, and noting that ATS provides "not merely jurisdiction, but a cause of action . . . arising by recognition of certain 'international torts'").

89. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (*per curiam*), *cert. denied*, 470 U.S. 1003 (1985). For a discussion of the case, see Debra A. Harvey, Comment, *The Alien Tort Statute: International Human Rights Watchdog or Simply "Historical Trivia"?*, 21 J. Marshall L. Rev. 341, 349-52 (1988); and Kenneth Marc Schneider, Note, *Hanoch Tel-Oren: The Retreat from Filartiga*, 4 CARDOZO L. REV. 665 *passim* (1983).

90. *See Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542, 544-45 (D.D.C. 1981). For a discussion of the district court opinion, see Eileen Rose Pollock, *Terrorism as a Tort in Violation of the Law of Nations*, 6 FORDHAM INT'L L.J. 236 *passim* (1982).

91. *See Tel-Oren*, 517 F. Supp. at 544 (district court decision).

92. *See Tel-Oren*, 726 F.2d at 775.

to *Filartiga*, contended that violations of the law of Nations are a narrow category reserved to "a handful of heinous actions—each of which violates definable, universal and obligatory norms,"<sup>93</sup> and that the alleged actions in this case did not trigger such jurisdiction.<sup>94</sup> However, Edwards noted that the judiciary should exercise jurisdiction in cases where a proper cause of action satisfies the requirements of the ATS.<sup>95</sup>

Judge Robb's concurrence was based primarily on the political question doctrine. He argued that an exercise of jurisdiction would improperly involve the judiciary in foreign affairs—an area beyond the province and expertise of the judiciary and one interfering with the province of the political branches.<sup>96</sup> In addition, Judge Robb rejected the *Filartiga* formulation for ascertaining international law under the ATS.<sup>97</sup> Robb opined that:

Courts ought not to serve as debating clubs for professors willing to argue over what is or what is not an accepted violation of the law of nations. Yet this appears to be the clear result if we allow plaintiffs the opportunity to proceed under § 1350. . . . The typical judge or jury would be swamped in citations to various distinguished journals of international legal studies, but would be left with little more than a numbing sense of how varied is the world of public international "law."<sup>98</sup>

International law was too indeterminate, and if the sovereign law making authority—Congress—has not given the judiciary guidance on the incorporation of international law, Judge Robb opined that the judiciary had no cognizance under the statute.<sup>99</sup>

Judge Bork, also concurring in a separate opinion, found that the ATS provided only jurisdiction at best and did not provide a separate, private cause of action for violations of international law.<sup>100</sup> Judge Bork proclaimed that even if international

93. *Id.* at 781 (Edwards, J., concurring).

94. *See id.* at 776; *see also* *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 365 (E.D. La. 1997) (accepting a broader scope of the law of Nations, which included action by private individuals, but dismissing for failure to state a claim under the ATS upon which relief can be granted).

95. *See Tel-Oren*, 726 F.2d at 789 (Edwards, J., concurring).

96. *See id.* at 823 (Robb, J., concurring).

97. *See id.* at 827 ("We ought not to cobble together for [the ATS] a modern mission on the vague idea that international law develops over the years. Law may evolve, but statutes ought not to mutate.")

98. *Id.* at 827.

99. *See id.*

100. *See id.* at 799 (Bork, J., concurring).

law provides rules of decision, it does not automatically provide causes of action.<sup>101</sup> When there exists "sufficient controversy of a politically sensitive nature about the content of any relevant international legal principles" implicated in the litigation, Bork proclaimed that it is improper to adjudicate those claims in light of separation of powers principles.<sup>102</sup> Finally, Judge Bork extended his opinion to argue that the meaning of "law of nations" in the ATS should be limited to the types of offenses understood to constitute the whole of international law at the Founding.<sup>103</sup>

Wave three is identified by the 1995 decision by the U.S. Court of Appeals for the Second Circuit in *Kadic v. Karadzic*.<sup>104</sup> The plaintiffs in *Kadic* were Croat and Muslim citizens of Bosnia-Herzegovina.<sup>105</sup> They alleged various atrocities including rape, torture, and summary executions by the Bosnian-Serb military forces.<sup>106</sup> The suit was brought against Radovan Karadzic, in his capacity as the President of the Bosnian-Serb faction. The district court dismissed the case for lack of subject-matter jurisdiction.<sup>107</sup> The Second Circuit reversed this ruling,<sup>108</sup> and further

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101. *See id.* at 811.

102. *Id.* at 808. Judge Bork further stated that "[a]djudication of those claims would require the analysis of international legal principles that are anything but clearly defined and that are the subject of controversy touching 'sharply on national nerves.'" *Id.* at 805 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1963)).

103. *See id.*

104. *Kadic*, 70 F.3d 232 (2d Cir. 1995), *reh'g denied*, 74 F.3d 377 (2d Cir. 1996), *cert. denied*, 518 U.S. 1005 (1996). Judge Newman highlighted the odd nature of the case in his opinion: "Most Americans would probably be surprised to learn that victims of atrocities committed in Bosnia are suing the leader of the insurgent Bosnian-Serb forces in a United States District Court in Manhattan." *Id.* at 236. Several case notes and articles have been published on the *Kadic* opinion. *See, e.g.*, Judith Hippler Bello et al., *International Decision*, 90 AM. J. INT'L L. 658 (1996); David S. Bloch, *Dangers of Righteousness: Unintended Consequences of Kadic v. Karadzic*, 4 TULSA J. COMP. & INT'L L. 35 (1996) (arguing that, while international law litigation in U.S. courts is generally good, *Kadic* itself "muddies international law, weakens American diplomacy and strengthens the very outlaws it is intended to attack"); Pamala Brondos, Note, *International Law—The Use of the Torture Victim Protection Act as an Enforcement Mechanism*, 32 LAND & WATER L. REV. 221 (1997); Amy E. Eckert, Note, *Kadic v. Karadzic: Whose International Law?*, 25 DENV. J. INT'L L. & POL'Y 173 (1996) (concluding *Kadic* went too far); Alan Frederick Enslin, Note, *Filartiga's Offspring: The Second Circuit Significantly Expands the Scope of the Alien Tort Claim Act with Its Decision in Kadic v. Karadzic*, 48 ALA. L. REV. 695 (1997); Justin Lu, Note, *Jurisdiction over Non-State Activity Under the Alien Tort Claims Act*, 35 COLUM. J. TRANSNAT'L L. 531 (1997).

105. *See Kadic*, 70 F.3d at 236.

106. *See id.* at 236-37.

107. *See id.*

108. *See id.* at 251.

expanded the role of international law in U.S. jurisprudence.<sup>109</sup> The Second Circuit held that the ATS applies to actions by State actors or even private individuals that are in violation of the most egregious portions of law identified as customary international law.<sup>110</sup> Official State action, the court stated, is not essential for a cognizable violation of the law of Nations to exist.<sup>111</sup> It cobbled together a laundry list of authorities to define the norms of contemporary international law that the court felt justified imposing liability.<sup>112</sup> Significant cases in other circuits followed.<sup>113</sup>

Wave four followed cases throughout the 1980s and early 1990s where several suits were brought against multinational corporations for alleged violations of customary international law.<sup>114</sup> These suits were largely unsuccessful.<sup>115</sup> The progression, however, continued in 1997 when a federal district court in California issued its decision in the case of *Doe I v. Unocal Corp.*, upholding subject matter jurisdiction under the ATS based on allegations that an U.S. oil company, acting allegedly in concert with the Myanmar/Burmese government, committed various civil and human rights abuses.<sup>116</sup>

In a 2002 opinion by the U.S. Court of Appeals for the

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109. See Charles F. Marshall, *Reframing the Alien Tort Act After Kadic v. Karadzic*, 21 N.C. J. INT'L L. & COM. REG. 591, 597 (1996).

110. See *Kadic*, 70 F.3d at 239.

111. See *id.*

112. See *id.* at 238-39.

113. See, e.g., *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996) (involving political opponents of President Ferdinand Marcos of the Philippines who brought ATS action seeking to recover from Marcos' estate for damages caused by alleged human-rights abuses occurring during Marcos' tenure in office); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (involving ATS claims made by former prisoners in Ethiopia, suing official of former Ethiopian government who was allegedly responsible for allegations of torture and other cruel acts); *Trajano v. Marcos (In re Estate of Ferdinand E. Marcos Human Rights Litigation)*, 978 F.2d 493, 501-03 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993) (involving Philippine citizen who brought action against daughter of former Philippine President, asserting wrongful death claim in connection with death of her Philippine son caused by torture).

114. See, e.g., *Carmichael v. United Techs. Corp.*, 835 F.2d 109 (5th Cir. 1988) (involving British national who brought action under ATS against various businesses for his imprisonment and torture in Saudi Arabia); *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668 (S.D.N.Y. 1991) (granting dismissal motion on jurisdictional grounds by Delaware corporation accused by U.K. corporation and its U.S. agent of violating ATS and Resource Conservation and Recovery Act).

115. See *supra* note 114.

116. See *Doe I v. Unocal Corp.*, 963 F. Supp. 880, 883, 891 (C.D. Cal. 1997), *aff'd in part, rev'd in part*, 395 F.3d 932 (9th Cir. 2002) (holding that civil rights abuses by Burmese government did not fall within commercial activity exception to Foreign Sover-

Ninth Circuit, the circuit court reversed in part a decision by the district court to grant a motion for summary judgment in favor of Unocal.<sup>117</sup> There, the circuit court held that sufficient evidence existed to support the plaintiffs' allegations—accusing Unocal of aiding and abetting forced labor, murder, rape, and torture, committed by the Myanmar/Burmese government—to allow the case to proceed to trial. The court again cited numerous international sources to reach their conclusion. It also reasoned that international law was superior to the use of domestic law:

Application of international law—rather than the law of Myanmar, California state law, or our federal common law—is also favored by a consideration of the factors listed in the Restatement (Second) of Conflict of Laws § 6 (1969). First, “the needs of the . . . international system . . .” are better served by applying international rather than national law. Second, “the relevant policies of the forum” cannot be ascertained by referring—as the concurrence does—to one out-of-circuit decision which happens to favor federal common law and ignoring other decisions which have favored other law, including international law. . . . Finally, “the basic polic[*y*] underlying the particular field of law” is to provide tort remedies for violations of international law. This goal is furthered by the application of international law, even when the international law in question is criminal law but is similar to domestic tort law . . . .<sup>118</sup>

The court's holding was an endorsement of a substantial role for international law in federal court adjudication.

After the original 1997 *Unocal* decision, lawsuits against private corporations by plaintiffs attempting to invoke international law have proliferated.<sup>119</sup> Of course, these cases have faced mixed success, yet they demonstrate an increasing willingness by U.S. courts to adopt international standards, or at least consider doing so. They also demonstrate an awareness by plaintiffs and their attorneys of that new pool of potential ammunition in litigation.

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eign Immunities Act and that there was jurisdiction over human rights claims against oil company under ATS).

117. See *Doe I v. Unocal Corp.*, 395 F.3d 932, 936 (9th Cir. 2002).

118. *Id.* at 949 (emphasis added).

119. See, e.g., Robert Vosper, *Conduct Unbecoming*, CORP. LEGAL TIMES, Oct. 2002, at 35.

Wave five—the current wave of ATS litigation—came in June 2004 when, for the first time in 215 years, the Supreme Court made significant pronouncements on the interpretation and application of the ATS. The two relevant opinions were *Rasul v. Bush*<sup>120</sup> and *Sosa v. Alvarez-Machain*.<sup>121</sup>

In *Rasul v. Bush*, the U.S. Supreme Court concluded without significant commentary that the district court below had jurisdiction to hear ATS claims brought by individuals in U.S. military custody at Guantanamo Bay.<sup>122</sup> As Justice Scalia (joined by then Chief Justice Rehnquist and Justice Thomas) pointed out in dissent, however, the ATS controversy was not even raised in the appeal for the Court's review.<sup>123</sup> Although it discusses the ATS, the Court added little to our understanding of its role.

Far more interesting, yet far from fully enlightening, was the U.S. Supreme Court's decision in *Sosa v. Alvarez-Machain*—in-

120. *Rasul v. Bush*, 542 U.S. 466 (2004).

121. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

122. See *Rasul*, 542 U.S. at 483.

123. Justice Scalia noted:

[The ATS jurisdictional issue] is not presented to us. The ATS, while invoked below, was repudiated as a basis for jurisdiction by all petitioners, either in their petition for certiorari, in their briefing before this Court, or at oral argument.

*Id.* at 504 n.6 (Scalia, J., dissenting) (citation omitted). The lower court opinion was more interesting. In March 2003, Judge Raymond Randolph of the D.C. Circuit Court of Appeals wrote a concurring opinion in the lower court opinion, *Al Odah v. United States*, which seriously questioned the expansive reach of recent ATS judicial recognition. See 321 F.3d 1134, 1147 (D.C. Cir. 2003). *Al Odah* (*sub nom. Rasul*) involved petitions for habeas corpus relief by detainees in Guantanamo Bay, Cuba, that the D.C. Circuit ultimately denied. See *id.* at 1145. The detainees premised part of their claims on the ATS and international law. The D.C. Circuit's majority opinion did not address the ATS or its proper interpretation, but Judge Randolph's concurring opinion did. His opinion constitutes one of very few judicial opinions to question the legitimacy of modern ATS application, and will undoubtedly serve as motivation for more critical judicial examination of the ATS in forthcoming decisions. Judge Randolph questioned many of the premises upon which ATS jurisprudential expansion has been based for the past twenty-three years, and opined that "[t]o have federal courts discover [customary international law] among the writings of those considered experts in international law and in treaties the Senate may or may not have ratified is anti-democratic and at odds with principles of separation of powers." *Id.* at 1148. In a similar interesting development in *United States v. Yousef*, the Second Circuit also called into question, and, some argue, took a newly restrictive view of the appropriate sources that courts may look to when attempting to define customary international law. See *United States v. Yousef*, 327 F.3d 56 *passim* (2d Cir. 2003) (holding *inter alia* that the United States could exercise extraterritorial criminal jurisdiction over defendants who were charged with attempted plane bombing in Southeast Asia based on the protective principle of customary international law, among other treaty-based and U.S. law).

volving the abduction and transportation to the United States of a Mexican national, Alvarez, at the instigation of U.S. Drug Enforcement Agency ("DEA") officials.<sup>124</sup> Among other claims, Alvarez sued the United States and the abductor, Sosa, under the ATS.<sup>125</sup> The U.S. Supreme Court decided that Alvarez was not entitled to recover damages from Sosa under the ATS.<sup>126</sup> This was the first time the U.S. Supreme Court had substantively decided an ATS claim.

The Supreme Court held principally that "we agree the [ATS] is in terms only jurisdictional, [but] 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."<sup>127</sup> Thus, although the majority opinion recognizes that the ATS is purely jurisdictional, it acknowledges that federal courts may recognize some international norms as enforceable law in certain situations. The Court endorsed a discretion-based framework without much guidance to lower courts addressing ATS cases. Indeed, this may empower lower court judges to exercise their discretion to serve their own personal interpretations of which international norms should or should not be recognized as "enforceable." Although the Supreme Court demanded "caution," it nonetheless accepted the ideas adopted in earlier wave cases that international law is part of "our law," that international law evolves, and that there are a number of sources that courts should reference to identify customary international law, including the works of jurists and scholars in the field (persons often biased by the self-perpetuation of their field).<sup>128</sup>

The primary holding of the Supreme Court in *Sosa* was that the ATS is a jurisdictional statute but causes of action for violations of "international law" may still be considered:

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124. See *Sosa*, 542 U.S. 692.

125. See *id.* at 697-98.

126. See *id.* at 711-13.

127. *Id.* at 711.

128. The Court articulated the following guideline for evaluating ATS claims: Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under § 1350, we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.

*Id.* at 732.

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 . . . . We assume, too, that no development in the two centuries from the enactment of § 1350 to the birth of the modern line of cases beginning with *Filartiga v. Pena-Irala* has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law.<sup>129</sup>

The Supreme Court set certain standards for bringing claims under the ATS, but rejected the ATS as a general vehicle for "international law" claims.

The Supreme Court nonetheless called for great caution in light of the potential for international law jurisprudence to interfere with foreign affairs responsibilities of the elected branches: "Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution."<sup>130</sup> Yet, the majority explained that the courts cannot completely disassociate themselves from the world community: "It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals,"<sup>131</sup> but "the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today."<sup>132</sup>

Despite "caution," some words of the *Sosa* majority seemed to have no problem with, and in fact endorsed, the expansionist evolution of ATS jurisprudence described in the first four waves:

We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all ca-

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129. *Id.* at 724-25 (citation omitted).

130. *Id.* at 728. The Court further noted that "jurisdiction was originally understood to be available to enforce a small number of international norms that a federal court could properly recognize as within the common law enforceable without further statutory authority." *Id.* at 729.

131. *Id.* at 730.

132. *Id.* at 729.



capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism. Later Congresses seem to have shared our view. The position we take today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided *Filartiga v. Pena-Irala* . . . .<sup>133</sup>

In the end, however, the *Sosa* Court found Alvarez did not have a claim for unlawful abduction in violation of international law.<sup>134</sup>

In *Sosa*, Justice Scalia concurred in the judgment but opined separately (joined by then Chief Justice Rehnquist and Justice Thomas) to contest the idea of federal common law including international law as “nonsense on stilts”:

In modern international human rights litigation of the sort that has proliferated since *Filartiga v. Pena-Irala*, a federal court must first *create* the underlying federal command. But “the fact that a rule has been recognized as [customary international law], by itself, is not an adequate basis for viewing that rule as part of federal common law.”<sup>135</sup>

Justice Scalia emphasized the general rejection of federal “common law” since *Erie Railroad Co. v. Tompkins*.<sup>136</sup>

Justice Scalia also questioned the interference with Congress and foreign relations associated with judicial recognition of customary international law claims.<sup>137</sup> He opined that asking

133. *Id.*

134. *See id.* at 738. The Court explained:

Whatever may be said for the broad principle Alvarez advances, in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require. Creating a private cause of action to further that aspiration would go beyond any residual common law discretion we think it appropriate to exercise.

*Id.*

135. *Id.* at 743 (Scalia, J., concurring) (citation omitted).

136. *Id.* (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

137. *See id.* at 747. Justice Scalia stated the following:

[M]any attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences . . . .

. . . Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law . . . .

These considerations are not, as the Court thinks them, reasons why courts must be circumspect in use of their extant general-common-law-making powers. They are reasons why courts cannot possibly be thought to have been given, and should not be thought to possess, federal-common-law-making pow-

judges to define international laws applicable in U.S. courts threatens democratic principles:

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.<sup>138</sup>

Justice Scalia's concurrence reflects the concerns that judicial invocation of international law allows activism subjectivity contrary to rule of law and democratic values. Justice Scalia continued his disagreement by arguing that judges violate the separation of powers when adopting foreign or international laws: "We Americans have a method for making the laws that are over us. . . . For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law."<sup>139</sup> Much like citing to foreign and international law for purposes of interpreting U.S. laws, opening the gates through causes of action based on such sources presents significant problems and dangers.

## II. THE DANGERS UNDERLYING JUDICIAL REFERENCE TO FOREIGN AND INTERNATIONAL LAWS

The invocation of foreign and international law, whether as supporting precedent or as the bases for liability theories, represents a disturbing development in the recent interpretation and development of federal law.<sup>140</sup> It also deviates from the tradi-

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ers with regard to the creation of private federal causes of action for violations of customary international law.

*Id.* (emphasis added). Justice Scalia further emphasized that "[t]he Second Circuit, which started the Judiciary down the path the Court today tries to hedge in, is a good indicator of where that path leads us: directly into confrontation with the political branches." *Id.* at 748 (citing *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995)).

138. *Id.* at 747.

139. *Id.* at 750.

140. See Michael M. Uhlmann, *The Supreme Court Rules*, FIRST THINGS: MONTHLY J. RELIGION & PUB. LIFE, Oct. 2003, at 45. But see Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1123 (2000) ("Judges are globalizing. So what?"); Tushnet, *supra* note 2, at 267 ("[A]rguments presented against making non-U.S. law a rule of decision in U.S. cases are no more than replays of arguments about statutory and constitutional interpretation in the purely domestic context."); Sanford Levinson, *Has the Supreme Court Gone Too Far? A Symposium*, COMMENT., Oct. 2003, at 37, 39 ("As for looking

tional role of governance and the judicial role in the U.S. system.<sup>141</sup> The practice, as Bork has contended, "comes pretty close to accepting foreign control of the American Constitution."<sup>142</sup> With such implications, judges should refrain from looking outside U.S. borders and recognize that it is *U.S. law* they are interpreting and applying.

### A. Constitutional Concerns

There is a fundamental constitutional objection to the use of international and foreign law in U.S. judicial decisionmaking. Except for a few discrete categories recognized in Article III, there is no general constitutional grant for U.S. courts to apply or even recognize foreign or international law.<sup>143</sup> The judiciary is a branch of limited jurisdiction and authority utilize international law—defined by Article III. Moreover, attempts by Article III courts to do so necessarily interfere with the constitutional prerogatives of the elected branches (the Executive and Congress) and thereby raises serious separation of powers issues.

If the United States is to have an independent but limited judiciary, the courts must feel constitutionally constrained from searching for, and then applying, extraterritorial sources for purported authority in reaching decisions. Non-adherence to such constraints cannot be justified when the United States is a coun-

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to transnational and international norms in trying to discern what such notions as due process or equal protection might mean, I see no harm in this.").

141. Consider, for example, Judge Bork's description of the judicial role:

The democratic integrity of law . . . depends entirely upon the degree to which its processes are legitimate. A judge who announces a decision must be able to demonstrate that he began from recognized legal principles and reasoned in an intellectually coherent and politically neutral way to his result. Those who would politicize the law offer the public, and the judiciary, the temptation of results without regard to democratic legitimacy.

ROBERT H. BORK, *THE TEMPTING OF AMERICA* 2 (1990).

142. Bork, *supra* note 61, at 17 ("What is really alarming about *Roper* and other cases citing foreign law (six Justices now engage in that practice) is that the Court, in tacit coordination with foreign courts, is moving toward a global bill of rights."). Professor Berkowitz reaches a similar conclusion:

How can the Constitution remain the supreme law of the land if, as [Professor Anne-Marie] Slaughter counsels, American judges look beyond and above the Constitution to an increasingly authoritative "global constitutional jurisprudence" and if office holders in all three branches "also see themselves as representing a larger transnational or even global constituency"?

Berkowitz, *supra* note 4, at 78.

143. See, e.g., Bradley, *supra* note 75; Kochan, *supra* note 11.

try of limited, defined, and enumerated powers with elected branches that create laws and a judiciary that is limited to interpreting them.

### B. *Sovereignty Concerns*

A Nation has the right to make its own laws and to define the means by which those laws are created and interpreted.<sup>144</sup> In the United States, laws are not created by the judiciary, but instead, by collaboration between the elected branches. "Sovereignty denotes independence. A sovereign [State] is one that acknowledges no superior power over its own government."<sup>145</sup> Indeed, sovereignty was the basis for the revolution and the independence of the United States.<sup>146</sup>

Yet the idea of sovereignty is under attack in today's society—in part by judges who rely on extraterritorial authority.

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144. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 133 (June 27) (stating that "the whole of international law" is based upon the "fundamental principle of sovereignty"); see also Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 *STAN. L. REV.* 959, 985 (2000).

145. RABKIN, *supra* note 19, at 2; see also *id.* at 101 ("America's first duty must be to protect its own democracy and the rights and resources of its own people—by safeguarding its own sovereignty."); Ronald A. Brand, *Sovereignty, the State, the Individual, and the International Legal System in the Twenty-First Century*, 25 *HASTINGS INT'L & COMP. L. REV.* 279 (2002). See generally JEREMY A. RABKIN, *THE CASE FOR SOVEREIGNTY: WHY THE WORLD SHOULD WELCOME AMERICAN INDEPENDENCE* 291 (2004) (noting that the twentieth-century "application[s] of municipal law in municipal courts" against sovereign actors have eroded the concept of "sovereign immunity"); Rabkin, *supra* note 44, at 459 ("Sovereignty is not the answer to every political question any more than individual rights are the answer to every personal challenge. . . . In moral terms, sovereignty is the first line of national defense.").

146. As Congressman Bob Barr explains:

The Founders realized that Americans possess nothing more indispensable than national sovereignty. This realization was the fundamental rationale for the revolution against England—freedom to self-govern. To the detriment of the country and its posterity, this sacrosanct freedom has been slowly and methodically eroded since the inception of the United Nations. Today, nary a thought is given when international organizations, like the [United Nations], attempt to enforce their myopic vision of a one-world government upon America, while trumping our Constitution in the process. Moreover, many in our own government willfully or ignorantly cede constitutionally guaranteed rights and freedoms to the international community. The hour has arrived in which we must soberly question our involvement in global organizations and our implementation of internal policies that directly threaten our precious sovereignty—the very sovereignty that so many have shed blood protecting.

Bob Barr, *Protecting National Sovereignty in an Era of International Meddling: An Increasingly Difficult Task*, 39 *HARV. J. ON LEGIS.* 299, 323-24 (2002).

Some prominent authorities lead the fight against its sanctity: "In the spring of 1994, Louis Henkin, then the president of the American Society for International Law, urged that the word 'sovereignty' should be 'banished from polite or educated society.'"<sup>147</sup>

Judges who recognize this concept of sovereignty clearly overstep their role in the United States when they resort to "law" that has been developed outside the constitutional processes for law through U.S. institutions.<sup>148</sup> As one author states:

The case against transnational law is sometimes made purely in terms of sovereignty: giving force to transnational rules laid down by non-American decision makers surrenders U.S. sovereignty. The reasoning appears self-evident: sovereignty as a "final say" is a sine qua non of statehood, and it is indivisible. To the extent that a state is subject to law made elsewhere, it has lost its sovereignty and, perhaps, in some deep way, its right to call itself a "state."<sup>149</sup>

It is primarily a matter of control.<sup>150</sup> A Nation should have the freedom to control the development of its own laws.<sup>151</sup> The elected branches, which develop U.S. law, lose that control if

147. Rabkin, *supra* note 44, at 435 (quoting *Notes from the President*, AM. SOC'Y INT'L L. NEWSL. (Am. Soc'y of Int'l Law, Washington, D.C.), Mar. 1993, at 1, 6).

148. See Rabkin, *supra* note 44, at 440 ("The initial point of sovereignty is to put the exercise of physical coercion under constitutional control.").

149. T. Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 TEX. L. REV. 1989, 1992-93 (2004); see also NEIL MACCORMICK, *QUESTIONING SOVEREIGNTY: LAW, STATE, AND NATION IN THE EUROPEAN COMMONWEALTH* 127 (1999) ("Sovereign power is . . . territorial in character, and is power not subject to limitation by higher or coordinate power."); Connell, *supra* note 2, at 61 ("[R]eliance upon foreign authorities raises significant questions not only about the resulting impact upon our federal system of government, but also upon our national sovereignty."). F.H. Hinsley writes:

[A]t the beginning, at any rate, the idea of sovereignty was the idea that there is a final and absolute political authority in the political community; and everything that needs to be added to complete the definition is added if this statement is continued in the following words: "and no final and absolute authority exists elsewhere.

F.H. HINSLEY, *SOVEREIGNTY* 25-26 (2d ed. 1986).

150. See, e.g., Ernest A. Young, *The Trouble with Global Constitutionalism*, 38 TEX. INT'L L.J. 527, 542 (2003) (discussing "[t]he [a]biding [i]mportance of [s]overeignty").

151. See Drezner, *supra* note 2, at 323 ("[S]overeignty endows a government with the power to regulate the affairs of a well-defined territory and its resident population without interference from organizations or individuals external to the jurisdiction. In other words, a sovereign state has the final say on the rule of law within its territory.").

judges are able to exhort extraterritorial and extra-constitutional sources for the determination of legally applicable standards.

The invocation of international or foreign law invades the lawmaking authority of the elected branches on many counts. If Congress has not chosen to reduce a norm to legislation it is presumptuous for the courts to pretend they know better. The boundaries of sovereignty are weakened when courts can rely on non-domestic sources in reaching decisions.

The consequences of such intrusions on sovereign control should not be understated. If, indeed, sovereignty means the right to national autonomy, exclusion of foreign law is essential to the preservation of national identity and independence.

### *C. The Cocktail Party: Rule of Law, Selectivity, and Judicial Activism Concerns*

The development of rules in the United States is meant to be tough—bicameralism and presentment, for example, is one means by which the production of law is controlled. Such controls do not necessarily exist in the production of foreign and international law, making them more suspect and, in a system based in the rule of law, inappropriate for judicial application.

When a judge is defining law, reference to laws generated according to U.S. constitutional processes is a closed set. Accepting judicial ability to search the world allows judges to select from an open set, creating the risk of selection bias.<sup>152</sup> Outcome determinative judges will select what best supports their desired result. It is like giving a referee in America's National Football League ("NFL") the power to selectively apply Australian rules when it suits him during the game.

This brings the Article back to the cocktail party. If the crowd at the party is the whole world, judges have a nearly infinite number of guests they can find to infuse and support their decisions. It is an intoxicating opportunity for judicial activists. As stated previously, injecting international and foreign sources in judicial decision-making can be described as the same as en-

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152. See Connell, *supra* note 2, at 74 ("Justice Stevens' reliance on foreign opinion is highly selective, citing only opinion that favors his desired result, and none that might point to a different conclusion . . . . These examples are a further illustration of the antidemocratic nature of many foreign laws, as well as the irrelevance of the European Union's official opinion.").

tering a crowded cocktail party and avoiding all the unknown people, disliked people, annoying people, or boring people, and scoping the scene to maneuver toward your friends.<sup>153</sup> With foreign and international law as potential and acceptable sources of authority, judges have a large crowd to pick from and a large pool to ignore or reject. Determining which countries matter, what principles matter, and what constitutes "authority" is difficult, and—when decided by a judge looking beyond U.S. borders—constitutes a preferential decision not necessarily endorsed by U.S. lawmakers.<sup>154</sup>

There is no reliable discerning principle for the selection of applicable and appropriate extra-constitutional laws to the interpretation of U.S. law.<sup>155</sup> The concomitant effect is that the citizenry has no certain, predictable, and identifiable means for understanding what the "law" is that governs their actions when reference to, or reliance on, extra-constitutional sources of law are allowed.

If judges can cite foreign or international authorities in their interpretation of U.S. law or in the definition of liabilities

153. See *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (quoting Judge Leventhal on the subjective process of using legislative history in statutory interpretation).

154. See BORK, *supra* note 1, at 137. Bork further states:

Internationalism is illegitimate when courts decide to interpret their own constitutions with guidance from the decisions of foreign courts under their national constitutions. The American Constitution, for example, was framed and amended in light of specific American history, culture, and aspirations. It has a meaning given to it not only by judicial decisions but by the practices of national and state governments. It is not apparent when an American court should take guidance from the decisions of the courts of Jamaica, India and Zimbabwe, reflecting their very different histories, cultures, aspirations and practices.

*Id.*

155. Recent literature has identified this threat of unrestrained application of extra-constitutional laws:

But the damage goes beyond that to American sovereignty. No principle of American law explains the Court's reliance on foreign law to interpret the United States Constitution. Moreover, the Court articulated no principle for when or how foreign law ought to be used in the construction of the Constitution, leaving open the prospect of its being used for any purpose, at any time. Connell, *supra* note 2, at 71; see also C. Donald Johnson, Jr., *Filartiga v. Pena-Irala: A Contribution to the Development of Customary International Law by a Domestic Court*, 11 GA. J. INT'L & COMP. L. 335, 336-37 (1981) (arguing "[t]he difficulty of the task [of defining international law] is made more obvious by the wide variance among academic specialists in the field in approaching the sources of international law" and describing the "often nebulous law represented by the usage and practice of nations").

in tort litigation, there is a tremendous amount of leeway to inject personal preferences at the expense of adherence to established law.<sup>156</sup> The rule of law requires that judicial authority be insulated from such preferential powers.<sup>157</sup>

This debate is not simply a political issue. If liberals can invoke foreign or international law to advance their preferences, conservatives can do the same.<sup>158</sup> In both cases, this attempt to legitimize preferences is beyond the judicial role.

Furthermore, rule of law issues are affected not simply by selection bias but by the non-U.S. nature of production of foreign and international sources. In other words, these "laws" were not created under the strictures of the U.S. Constitution. As such, they lack formal elements or intentions as enforceable law.

Most often, customary international law outputs are intended only as aspirational or symbolic, rather than drafted as enforceable legal obligations or with the intent of creating liability.<sup>159</sup> If these outputs are used as evidence of enforceable cus-

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156. Before the Subcommittee on the Constitution of the House Committee on the Judiciary, M. Edward Whelan III testified:

No Justice has articulated, and there is not, any legitimate basis for the Supreme Court to rely on contemporary foreign laws or decisions in determining the meaning of provisions of the Constitution. Moreover, it is clear that there is no principle that any Justice has devised or will adopt that will explain why it would be proper to look to some contemporary foreign and international legal materials, but not others, to construe the Constitution in some instances but not in others. The six Justices who nonetheless resort to these materials do so because they embrace an essentially lawless—i.e., unconstrained—view of their own role as Justices.

Whelan Testimony, *supra* note 12, at 26.

157. See, e.g., LEONARD LEVY, *AGAINST THE LAW* xiii (1974) ("[R]esult-oriented jurisprudence [is a] judicial monstrosity that gains nothing when the Court reaches a just result merely because of its identification with underdog litigants.").

158. See Rosen, *supra* note 37, at 11 ("For the Court to invoke this treaty as purported support for its own contrary judgment about American values is perverse—and should give liberals, who believe in democratic principles, no reason to cheer.").

159. See Kochan, *supra* note 11, at 182-87; see, e.g., Rusk, *supra* note 79, at 313 ("The simple fact is that the [Universal] Declaration [of Human Rights] was not drafted or proclaimed to serve as law."); *id.* (citing U.S. Dep't of State, *Bull. No. 494*, 19 DEP'T ST. BULL. 749, 751 (1948), which quoted Eleanor Roosevelt, Chairman of the Commission on Human Rights, who stated when presenting the Declaration to the U.N. General Assembly, that "[i]t is not and does not purport to be a statement of law or of legal obligation. [It is] a common standard of achievement . . ."). Despite this, courts in cases like *Filartiga* and *Kadic* relied on the Universal Declaration of Human Rights and other customary international law outputs crafted under similar means and with intentions.



tomary international law obligations and liabilities or as authority for the interpretation of U.S. law, courts mangle and inappropriately manipulate their purpose and character.<sup>160</sup> Indeed, allowing judges to use elusive and diffuse principles of human rights to discover applicable international law is beyond their capacity and beyond the power committed to them by the Constitution.

Finally, in terms of activism, reliance on extraterritorial "law" is a run around Congress's ability, prerogative, and responsibility to define U.S. law.<sup>161</sup> Indeed, some cases have relied on certain international or foreign "laws" despite direct evidence of Congress's intent that such documents *not* create legal obligations or liabilities and are not drafted as "law."<sup>162</sup> When courts have discretion to look beyond the United States for the foundations of their decisions, serious dangers arise to the rule of law

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160. In *Tel-Oren*, Judge Bork stated that "[a]djudication of those claims would require the analysis of international legal principles that are anything but clearly defined and that are the subject of controversy touching 'sharply on national nerves.'" *Hanoch v. Tel-Oren*, 726 F.2d 774, 805 (D.C. Cir. 1984) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1963)).

161. See, e.g., Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1255 (1988) ("[T]he Constitution indicates that it expects the members of Congress to behave as legislators . . . . A judicial effort, not grounded in the Constitution, to require a particular legislative outcome amounts to depriving officials of discretion vested in them by the Constitution.").

162. For First Lady Eleanor Roosevelt's comments regarding the Universal Declaration of Human Rights, see *supra* note 159. Rusk further contends that this was the understanding of Congress, the Executive, and even the United States delegates to the United Nations:

As one of the authors of the instruction that Mrs. Roosevelt received from her government on this point, I can report that there was no question in Washington or in New York that the Universal Declaration was not intended to operate as law. There was no serious consultation with the appropriate committees or Congress, as would have been essential had there been any expectation that law was coming into being. Indeed, Mrs. Roosevelt was given great leeway in her part in the drafting of the Declaration partly because it was understood that law was not being created.

Rusk, *supra* note 79, at 314. This conclusion, that universal declarations are not meant to act as controlling law, is strengthened by an examination of the bodies creating these documents. Realizing that the United Nations is to have no sovereign authority, Rusk articulates the nature of its "power" as understood by member States:

The [UN] Charter . . . did not contemplate that the General Assembly would be a legislative body in the field of international law generally . . . . There is little doubt that a general legislative power vested in the General Assembly would have prompted the Senate of the United States to refuse advice and consent to the Charter.

*Id.*

and the sanctity of the concept that the law is known and ascertainable by persons subject to it. Congress has failed to ratify the vast majority of human rights treaties sponsored by the United Nations.<sup>163</sup> This record indicates a general unwillingness on the part of the United States to recognize broad principles of human rights as controlling legal authority.<sup>164</sup> For the courts to ignore this reality and insist that these documents form a foundation for ascertaining the applicable law in the United States demonstrates disdain for recognized lawmaking processes.<sup>165</sup>

#### D. Democracy Concerns

Related to sovereignty and the rule of law are democracy concerns. Lawmaking power, in democracies, lies with the lawmakers as selected and directed by the people.<sup>166</sup> Judges do not fit that role in the United States.<sup>167</sup> Many scholars have

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163. See Jacobsen, *supra* note 79, at 834, 847-48 (describing the "amorphous law of nations," arguing that the application of the ATCA is "restricted . . . by difficulty in defining when an act is governed by the law of nations," and noting that "the Senate has been unwilling to extend international law to encompass the protection of human rights").

164. See *id.* at 849. Jacobsen states:

The Senate has refrained thus far from ratifying . . . numerous . . . human rights treaties, thereby expressing an unwillingness to create any internationally recognized legal protections for human rights. The Senate's primary concern has been that the treaty provisions might intrude upon the sovereignty of nations and of the United States in particular.

*Id.*; accord *id.* at 847-48 ("[T]he Senate has been unwilling to extend international law to encompass the protection of human rights."); see also Bradley & Goldsmith, *supra* note 8, at 869 ("Far from authorizing the application of the new CIL [customary international law] as domestic federal law, the political branches have made clear that they do not want the new CIL to have domestic law status").

165. Professors Bradley and Goldsmith present a well-detailed argument that, "in the absence of political branch authorization, [customary international law] is not a source of federal law." Bradley & Goldsmith, *supra* note 8, at 870.

166. As one author commented:

But perhaps most remarkable in this most remarkable opinion [in *Roper*] is that the Court nowhere cites a treaty or convention which the United States actually *has* ratified, assented to, and drawn into its domestic law without relevant reservation. Rather, it has chosen to cite treaties that the United States has quite deliberately refused to join or has joined only with reservations on the very point at issue. *So much for the paradigmatic constitutional doctrine that binding the United States by treaty in the community of nations is a function belonging to the political branches of government.*

Anderson, *supra* note 57, at 36 (emphasis added).

167. See Aleinikoff, *supra* note 149, at 1991 ("To impose foreign law in the United States is, in effect, to enfranchise nonresident non-citizens. It is lawmaking outside the box.").

noted the tendency of international law to erode sovereignty, to the detriment of democratic lawmaking.<sup>168</sup>

Thus, resort to international or foreign laws is uniquely un-American and un-democratic. It runs completely afoul of the observations by Alexis de Tocqueville regarding the primacy of the “sovereignty of the people” in the United States<sup>169</sup>:

At the present day the principle of the sovereignty of the people has acquired in the United States all the practical development that the imagination can conceive. It is unencumbered by those fictions that are thrown over it in other countries, and it appears in every possible form, according to the exigency of the occasion. Sometimes the laws are made by the people in a body, as at Athens; and sometimes its representatives, chosen by universal suffrage, transact business in its name and under its immediate supervision.<sup>170</sup>

Tocqueville continues to describe how U.S. democracy looks internally for the source of its laws—not outside, as some today advocate. He articulates positively that laws foreign to the U.S. system are non-controlling:

*In some countries a power exists which, though it is in a degree foreign to the social body, directs it, and forces it to pursue a certain track. . . . But nothing of the kind is to be seen in the United States; there society governs itself for itself. All power centers in its bosom, and scarcely an individual is to be met with who would venture to conceive or, still less, to express the idea of seeking it elsewhere. The nation participates in the making of its laws by the choice of its legislators, and in the execution of them by the choice of the agents of the executive government; it may almost be said to govern itself, so feeble and restricted is the share left to the*

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168. See, e.g., David B. Rivkin, Jr. & Lee A. Casey, *The Rocky Shoals of International Law*, NAT'L INT., Winter 2000-2001, at 35; Paul B. Stephan, *International Governance and American Democracy*, 1 CHI. J. INT'L L. 237 (2000).

169. As Alexis de Tocqueville explained:

In America the principle of the sovereignty of the people is neither barren nor concealed, as it is with some other nations; it is recognized by the customs and proclaimed by the laws; it spreads freely, and arrives without impediment at its most remote consequences. If there is a country in the world where the doctrine of the sovereignty of the people can be fairly appreciated, where it can be studied in its application to the affairs of society, and where its dangers and advantages may be judged, that country is assuredly America.

ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 55 (Phillips Bradley ed., Vintage Classics 1990) (1840).

170. *Id.* at 57.

administration, so little do the authorities forget their popular origin and the power from which they emanate. The people reign in the American political world . . . . They are the cause and the aim of all things; everything comes from them, and everything is absorbed in them.<sup>171</sup>

These historical references underscore the idea that democracy demands that the people be the masters of their own domain. Judicial injection of foreign and supposed international law violates this principle and denigrates the reverence many have had for the uniqueness of the U.S. system.

Federal judges are largely unaccountable to democratic controls.<sup>172</sup> Thus, the allowance for judges to adopt or import foreign laws presents them with un-democratic lawmaking power. The foundation of democratic governance lies in the people's ability, responsibility, and power to create law or control the mechanisms by which law is created.<sup>173</sup> Democratic control is lost when sources outside the domestic political processes serve as the bases of decision. Kenneth Anderson accurately opines that the government in the United States receives its consent from the people and should be constrained by their expressed judgment as to what laws should and should not exist:

Without fidelity to the principle of democratic, self-governing provenance over substantive content in the utilization of constitutional adjudicatory materials, a court becomes merely a purveyor of its own view of best policy. Yet this is not solely an issue of an unconstrained Court. It is, more importantly, a violation of the compact between government and governed, free people who choose to give up a measure of their liberties

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171. *Id.* at 57-58 (emphasis added).

172. See Connell, *supra* note 2, at 71 ("By invoking foreign authority to trump state law, the Court has explicitly ceded American sovereignty to foreign institutions that are not accountable to the American people."); see also Schlafly, *supra* note 60, at A13 ("The effort to import international law . . . aims to change our Constitution without approval from the American people via the amendment process.").

173. As Rabkin states:

The traditional constitutional perspective starts with a premise so elementary that contemporary public law finds it impossible to take seriously. It is that judges cannot be responsible for public policy, because they are, quite literally, not responsible. The traditional constitutional view was that public policy must be left to the individuals who are responsible because they are accountable to the public.

JEREMY A. RABKIN, *JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY* 7 (1989).

in return for the benefits of government—a particular pact with a particular community, in which the materials used in the countermajoritarian act of judging them nonetheless have, in some fashion, even indirectly, democratic provenance and consent.<sup>174</sup>

As such, recent cases discussed herein demonstrate an antidemocratic trend.<sup>175</sup> Some have characterized such imposition as judicial activism and arrogance against accepted lawmaking processes.<sup>176</sup>

Moreover, the possibility of circumventing domestic lawmaking processes by injecting foreign or international law is an enticing prospect for interest groups and others incapable of influencing the law through elected processes.<sup>177</sup> If courts are willing to adopt extraterritorial “laws,” plaintiffs, NGOs, other policy groups, and defendants have an incentive to press principles not expressly adopted through normal U.S. lawmaking procedures to advance their self-interested goals.

Individuals should not be willing to surrender their democratic control over applicable law to unelected judges and outside sources.<sup>178</sup> Controlling the lawmakers and the lawmaking process is a fundamental tenet of democracy. The invocation of laws, statements, or edicts from international or foreign institutions to which domestic citizens have no such control has no place in domestic jurisprudence.

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174. Anderson, *supra* note 57, at 49.

175. See Connell, *supra* note 2, at 75 (“Justice Kennedy’s opinion for the majority in *Lawrence* further illustrates the antidemocratic effects of the Court’s reliance on foreign law.”).

176. Citing “foreign law as authority is to . . . suppose fantastically that the world’s judges constitute a single, elite community of wisdom and conscience.” Richard A. Posner, *No Thanks, We Already Have Our Own Laws*, *LEGAL AFF.*, July-Aug. 2004, at 40, 42.

177. See Connell, *supra* note 2, at 68 (“The key point to understand is that the Court’s recent tendency to cite and defer to foreign authorities and values is not accidental, but is the product of a concerted effort by people and organizations that see the courts as the only practical way of imposing their values upon the American people.”). See generally Kochan, *supra* note 61 (predicting that the increasing influence of foreign law will encourage interest groups to shape the development of customary international law).

178. See Rabkin, *supra* note 44, at 452 (“The American Founders assumed that sovereignty was crucial to liberty and order at home, as also to security from external threats. That is why they took pains to ‘perfect’ the sovereignty of the federal government.”); see also *id.* at 459 (“The rights of individuals can be made more secure by establishing sovereign authority.”).

### E. *Foreign Policy Concerns*

When the judiciary involves itself in foreign or international law, there are also problematic concerns involving foreign policy and control over national security.<sup>179</sup> It is the province of the elected branches to adopt or reduce into domestic law foreign concerns.

When the judiciary itself chooses to adopt such standards or allows private plaintiffs to present causes of action based on the same, judicial decisions necessarily make pronouncements regarding the appropriate behavior of our own and foreign countries. In so acting, the judiciary risks embroiling the U.S. elected branches in unwanted controversy. It potentially removes the discretion and choice normally reserved to the elected branches to determine U.S. acceptance or non-acceptance of extraterritorial mandates or advice.

### F. *Development Concerns*

Finally, economic development and its concomitant contribution to the advancement of human rights and democracy can be threatened when the judiciary meddles in foreign and international law.<sup>180</sup> If corporate investment is chilled because of potential international "law" liability, then economic development, democracy, and the enhancement of human rights are chilled as well. If courts have free reign to adopt foreign and international laws, the certainty and predictability of law are unsettled and thus may cause detrimental concerns. After all, people need to know the rules they are playing by in order to be fully willing and able to play the game. That effort is much easier if there is a corpus of law that is identifiable. It is identifiable when companies or individuals know the source of lawmaking authority—at home and abroad. Recognizing that judges might invoke precedents from extraterritorial sources makes this process difficult

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179. See Donald J. Kochan, *After Burma*, *LEGAL TIMES*, Aug. 21, 2000, at 54; see also Donald J. Kochan, *Foreign Policy, Freelanced: Suits Brought Under Alien Tort Claims Act Undermine Federal Government's Authority*, *THE RECORDER (Cal.)*, Aug. 23, 2000, at 5; Donald J. Kochan, *Rein In the Alien Tort Claims Act: Reconstituted Law of Nations Standard Needs Defining by Congress*, *FULTON COUNTY DAILY REP. (Ga.)*, Aug. 24, 2000.

180. See, e.g., MARC A. MILES ET AL., *2005 INDEX OF ECONOMIC FREEDOM (2005)* (arguing and documenting that market-based investment is directly correlated with the advancement of economic freedom and other human rights).

and indeterminate, necessarily creating investment risks that will affect market and development activities.

For example, when private companies become subject to ATS suits, such suits threaten to discourage the very overseas investment and development that help expand individual liberty, human rights, and democracy abroad. New liabilities will discourage foreign investment, handicapping the advancement of human rights in developing countries. The uncertainties of applicable law that arise when judges intonate that they can look outside our borders when deciding cases have the same effect on investment predictability both within and outside the walls of the United States.

### CONCLUSION

Friends, strangers, and enemies exist. But when it comes to legal interpretation, none of that should matter. A judge's friend should be the source of his or her authority, not the opinions of outsiders. A judge's authority should be based on sovereign power and the limitations of jurisdiction designated by the Constitution. The ability to invoke foreign or international sources that have extra-constitutional origins is simply dangerous, activist, and ultra vires.