



Outsourcing American Law

Conclusion

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Outsourcing in American law is proceeding. Foreign law has made its controversial appearance in the Supreme Court's decisions on individual rights. Some customary international law has become a part of federal law through the 1789 Alien Tort Statute. The laws of war have provided the rules of decision for the cases on the Bush administration's policies in the war on terrorism. Advocates of these developments would like to see even more use of foreign and international law in U.S. judicial decisions and the American legal system more broadly.

The essays here have debated the legitimacy of these developments. This is probably the most important issue about the growing pressure toward the use of international and foreign law in the United States. In this conclusion, I would like to fill in other parts of the story: why these issues have arisen now, and what their consequences might be.

Contrary to the argument made by Thomas Goldstein and Cody Harris, the controversy over the use of foreign law, it seems to me, is not really a proxy over the continuing debate on the Supreme Court over constitutional interpretation. Debate over the best way to interpret the Constitution has existed since the beginnings of the Republic, as has, obviously, foreign and international law. It is only recently that the Court, however, has cited foreign law and international law as authority in interpreting the Constitution. If reliance on foreign law is naturally allied with a "living" Constitution approach to interpretation, why has it not occurred during other historical periods? The open-ended language of the Fourth and Eighth Amendment have been part of the constitutional text since ratification of the Bill of Rights. But the practice of using foreign and international sources to interpret it only seriously began in the last decade.

A similar question arises with the other issues taken up in this book. The Alien Tort Statute has been on the books since 1789, but the first federal judicial decision to rely upon it did not occur until 1980. The Supreme Court did not take up the meaning of the statute until 2004. There have been several cases about the laws of war in American courts over the years. But usually they were resolved through a constitutional analysis that provided the political branches with significant deference. Appeals to international law in wartime cases did not become so significant until *Hamdan v. Rumsfeld*, decided in 2006.

Two things could have changed, either those using foreign and international law or the circumstances in which it has arisen. Commentators have sometimes pointed to a third factor, the changing nature of international law itself, as a possible reason. There is little doubt that international law itself has changed. It was once state-centered, with individuals having no standing in the international legal system, and left most areas of life to state regulation. Today, international law attempts to regulate many matters once thought domestic, such as the environment and political, economic, and social rights. Individuals, not just states, have become subjects of the law. Just because international law has changed, however, does not tell us why certain elements of the American legal system have become sympathetic to adopting it. International law could change all it wants, but it would not matter for the issues raised in this volume if decisionmakers did not believe it was a relevant source of authority.

If we assume for the moment that the legitimacy of further incorporation of foreign and international law is indeterminate, then the question becomes why decisionmakers now have chosen to accept these sources of law, when before they did not. It seems apparent that the decisionmakers at issue are the Justices of the Supreme Court. Use of foreign and international law in Supreme Court decisions has not arisen because of groundswell in the lower federal

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courts, and the number of Alien Tort Statute cases before *Sosa* remained relatively few in number. In the terrorism cases, the Bush administration had for the most part prevailed in the lower courts. It does not seem any great movement within the judiciary or the legal profession has risen up pressing for more reliance on international law.

Some have suggested that behavioral or cultural influences explain the new interest among the Justices. Commentators have noted that several Justices have attended conferences in Europe with other judges, who seem much more comfortable citing the opinions of other nations. American Justices may feel they are merely tipping their hat to their foreign brethren. Or they might witness the growing integration of European law and believe that there is a great deal to learn from other countries and their legal systems. Justices in favor of the practice have been citing European legal sources almost exclusively when looking to foreign law. While an entertaining thesis, it is difficult to conclude that the personal trips of Supreme Court Justices has produced the turn toward international law. American judges no doubt have traveled to Europe for many decades. In the past, our judges may well have known more about foreign legal systems. It may even be the case that American judges had greater cultural affinities with Europe in the past than today.

I suggest that the turn to foreign and international law has occurred because of a desire by a limited set of Justices of the Supreme Court to place greater checks on what they perceive to be minority policies. Citations to foreign law, for example, have occurred in cases where five or six Justices believe that a state follows a policy that is out of step with a majority of the nation. In *Virginia v. Atkins* and *Roper v. Simmons*, a majority of the Court concluded that state operation of the death penalty violated the Due Process norms that prevailed in the rest of the country. Its numeric approach to determining state practice can be seen as a fairly rough way to determine majority views. In *Lawrence v. Texas*, a similar majority seemed to view Texas' prohibition of homosexual sodomy as inconsistent with national norms. In all of these cases, however, the Court is on shaky ground. It cannot appeal to any clear expression of the national view. None of these issues saw any congressional statute or presidential order supporting the Court's direction. If anything, the political branches had signaled in the death penalty cases their wish that international law not influence domestic affairs. Nor does it seem, unlike the Warren Court Revolution, that a discrete geographic minority was using its leverage in the political process to block laws that would pass in a straight up or down vote in Congress. Appeal to foreign and international law is a way for the Court to lay claim to some support that it is carrying out the majority's views, not just of the nation but of the world.

The problem with this view, if it indeed explains the thinking of the Court, is that it fails to take account of the way that international law is formed. International law is not made in a manner that approaches the democratic process. To be sure, the American domestic lawmaking system is not perfectly majoritarian. The Senate represents states on an equal basis, and judicial review allows unelected judges to block acts of Congress. Many have bemoaned the lack of transparency and accountability for the administrative state. But the formation of international law suffers from much graver problems. Customary international law still continues to provide many of international law's rules. In its classical definition, customary international law recognized a rule only after it had been widely followed by states out of a sense of legal obligation.² International law does not consider relevant the population of the nations whose practice gives rise to the rule. Nor does it ask whether the policies of those nations have been adopted through a democratic process. A large number of autocratic nations will smaller

² Restatement (Third) of the Foreign Relations Law of the United States 102 (1987).

populations could create a rule of international law. Or a small number of autocratic nations with large populations could claim that their policies represent international law. There is no systematic analysis for determining whether policies that qualify as customary international law meet any test for representing the views of the majority of human beings on the planet. Even if this definition of customary international law had democratic roots, it would still be susceptible to significant problems. Customary international law is never reduced to writing and subject to a formal process of adoption.

More academic theories of international law have even less connections to any democratic process. Some modern commentators have sought to bypass the requirement of a consensus by state practice in formulating customary international law. Instead of determining whether nations have reached a broad consensus through both practice and a sense of legal obligation, these scholars argue that other indicia should count toward a new rule, such as acts by international organizations such as the U.N. General Assembly, decisions by international and domestic courts, unratified multilateral treaties, and even statements by international law professors.

These sources have little connection to a process governed by democratic accountability. In the U.N. General Assembly, for example, each nation has a single vote, regardless of their population or economic size. Officials of international organizations, such as international court judges, are often picked by formula designed to ensure geographic balance, not popular representation. Usually there is no attention paid to the nature of the regime of the nations that take their seats in the General Assembly or international organizations. While multilateral treaties may have many state parties, many of those states are not democracies and may have little intention of obeying the terms. The case for allowing multilateral treaties to assume the status of customary international law has even less democratic basis when a nation, such as the United States, has refused to ratify the treaty or has only done so with significant reservations (as it has done with most human rights treaties).

The non-democratic nature of international law does not necessarily argue against the system of international rules as such. Rather, it only demonstrates that the Supreme Court is mistaken to rely on international law as an expression of popular or majoritarian views worldwide. Suppose the majority in *Lawrence* or *Roper* is correct that the process for interpreting open-ended phrases like due process or cruel and unusual can take account of the views of the broader world community, rather than just those of American citizens. Still, international law could not represent broadly-held opinion with any reliability because its making does not involve significant and consistent democratic input.

A second problem with the increasing efforts to integrate international and foreign law into the American legal system is that there has been no careful analysis of whether its use would actually enhance social welfare. Comparison to the American system of federalism is instructive. One justification for leaving the regulation of certain subject to the states, rather than the federal government, is that it allows for experimentation in social policy. Diversity of policy allows for the creation of information about the consequences of different solutions for social problems. Enforcing uniform policies internationally would reduce the ability of individual nations to experiment and develop better public policies. A second justification for federalism is it that it functions as a market in which citizens can choose to live in the jurisdictions that offer their desired mixture of policies. Citizens can leave jurisdictions that are less responsive or enforces policies that do not strike the tradeoff that a majority wants.

These instrumental benefits should appear in international affairs as well. Nations can pursue different public policies to solve common problems. The United States, for example, can benefit from data on different approaches of fighting different types of crime, just as other countries can learn from American data. If international law imposes a common policy on all nations, then the information that might be generated from different solutions will not be created. Nations also strike different tradeoffs in their policies which gives individuals the ability to vote with their feet. Some countries spend more on social welfare programs and have higher taxes, while others may offer lower taxes and less social welfare. Welfare is increased when individuals can move to other nations with their desired mixture of policies. Although this argument has less force internationally than domestically, there are still significant levels of immigration into the United States.

A last problem with integrating international and foreign law into domestic law is that it might hamper the ability of the United States to provide international public goods. As I have argued elsewhere, the United States currently enforces the rules of the international system, much in the way that Great Britain did in the 19th Century.³ The United States, for example, has provided security to Western Europe and East Asia since the end of World War II. It has fought for the principle of the freedom of navigation in the seas and the air. It has even intervened to end civil wars and stop humanitarian disasters where the United States had little direct strategic interest.⁴ Collective action problems predict that no nation is likely to provide the public good of international stability and peace. The only reason that the United States provides those goods is that it captures a sufficient benefit from them, though certainly not all or perhaps not even a majority of the benefit, which outweighs their cost. If the United States were bound domestically by international law designed to reduce its freedom of action, the costs of providing the goods might increase enough to convince the United States from providing them. The international system would be worse off.

A good example of this is the Kosovo war. American intervention in 1999 to stop Serbian efforts to drive the Muslim population out of Kosovo violated the United Nations Charter. The Charter prohibits nations from using force except in their self-defense or when authorized by the United Nations Security Council. The United States could not, and did not, claim self-defense for the Kosovo war and the Security Council did not pass an authorization for the use of force. Yet, the war advanced humanitarian norms by preventing the ethnic cleansing of Kosovo and successfully stabilized the former Yugoslavia, whose ethnic fighting was producing spillovers beyond the Balkans. The United States and its NATO allies provided an international public good by preventing the Balkans, which had been the tinderbox that started World War I, from becoming the source of a broader conflict in Europe. If international law were directly integrated into domestic law, it would have been a violation of U.S. law for President Clinton to have ordered the bombing campaign against Kosovo. No constitutional challenges to the war succeeded, even though Congress did not authorize the use of force or declare war. A separation of domestic and foreign or international law in this case preserved the ability of the United States to intervene, which restored international peace and stability to that region.

Outsourcing of American law is only in its early stages. It still appears to be the work of a handful of lawyers, judges, and academics, rather than a reflection of a broader movement in the political and legal systems. Globalization, for all of its benefits for trade, economic growth,

³ See John Yoo, *Using Force*, 71 U. Chi. L. Rev. 729 (2004).

⁴ John Yoo, *The Powers of War and Peace* 143-81 (2005).

and standards of living, need not require that all nations adopt the same universal policies of regulation. The essays in this volume will give those on both sides of these debates more questions and issues to think about before the United States moves farther along the road toward receiving international and foreign norms into its own law.