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Source: *The American Journal of International Law*, Vol. 98, No. 1, (Jan., 2004), pp. 82-90

Published by: American Society of International Law

Stable URL: <http://www.jstor.org/stable/3139258>

Accessed: 03/07/2008 14:05

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In sum, commitment to the guidelines suggested in this essay will likely make the project unworkable in its broader applications. Universal practice is too hard to establish; mixed practice is too hard to use in a principled manner to decide cases; and in any event the rights-restricting applications of international materials are likely to be much greater than the rights-enhancing ones, which is likely to make principled application unpalatable.

This is not to say that international materials must be treated as irrelevant. *Lawrence* shows how they can be used to challenge abstract claims of universality. But *Atkins* shows how they can be abused to support conclusions reached for other reasons, and examination of what is necessary for a rigorous project suggests that further abuse can be expected. Unless handled carefully and modestly, the project threatens to undermine the integrity of both constitutional law and comparative law.

THE USES OF INTERNATIONAL LAW IN CONSTITUTIONAL INTERPRETATION

*By Gerald L. Neuman**

Is international law “irrelevant” to constitutional interpretation in the United States? How could that be? The arguments for categorical ignorance of international law in constitutional adjudication play on exaggerated fears: fear of foreign domination, fear of judicial activism, fear of the unknown. The claim of irrelevance depends on a false dichotomy between excluding international law from judicial consideration and allowing foreign institutions to control constitutional meaning. The more sensible inquiry would ask how international law has informed constitutional interpretation in the past, and how it should be used in the future.

I. INTERNATIONAL LAW AS A RESOURCE OF CONSTITUTIONAL INTERPRETATION

Examples quickly illustrate that international law cannot be and has not been irrelevant to constitutional interpretation. First of all, several clauses in the U.S. Constitution make open reference to institutions of international law. For example, the Constitution authorizes Congress to “declare war,” to “grant letters of marque and reprisal,” and to “define offenses against the law of nations”; it authorizes the president to “receive ambassadors” and to “make treaties”; it extends the judicial power to cases involving “ambassadors” and “consuls,” and to certain cases involving “foreign states” or their “citizens or subjects.” All of these references assume an international law background, which does not provide an exclusive source for the meaning of the constitutional text but does provide an essential resource for construing it.

Textual references to international law do not incorporate and make constitutionally binding as such the entire bodies of international norms to which they relate. Thus, the Treaty Clause has neither frozen the eighteenth-century law of treaties as permanently obligatory for the United States nor given constitutional status to the evolving international law of treaties as it exists from time to time. Rather, sound constitutional interpretation combines other constitutional principles and structures with conceptions derived from contemporary international practice in order to determine the scope and effect of the treaty power and the place of treaties within the U.S. constitutional system. In the twentieth century, the treaty power enabled the United States to create and join international organizations, and to enter into agreements *with* international organizations, facilitating forms of international cooperation that were unimagined in the eighteenth century.

In the late nineteenth and early twentieth centuries, after the Civil War had vindicated the Union’s claim to nationhood, the Supreme Court repeatedly invoked international law

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doctrines and writers in support of its elaboration of powers inherent in national sovereignty.¹ The Court rationalized some of these inherent powers as interpretations of enumerated powers but implied others structurally as freestanding powers. The latter included the power to acquire new territory by discovery and occupation,² the power to control the entry and residence of aliens,³ and the power to require citizens residing abroad to return.⁴ To the extent that these arguments relied on older publicists such as Vattel, they may be construed as imputing earlier international law doctrines to the framers; to the extent that they relied on current authors and later instances of state practice, their claims of necessary sovereign powers addressed the international regime of their own period.

Inherent sovereign powers construed as ancillary to enumerated powers included the power to govern overseas territories acquired by treaty as colonies,⁵ the power to conscript soldiers,⁶ the federal power of eminent domain,⁷ and even the federal power to make paper money legal tender.⁸ In some of these cases, no international obligation or relationship was implicated, and the publicists served less as guides to genuinely international law than as theorists of sovereignty and compilers of general principles of public law common to “civilized nations.” Such usage blurs the distinction between employing international law as an interpretive aid and employing foreign law, but those two categories can be difficult to separate, given that patterns of state practice provide evidence of international law.

Foreign law played a well-known role in the debates over the relationship between the Bill of Rights and the Fourteenth Amendment, often illustrated by *Palko v. Connecticut*.⁹ It might be useful to quote from the Court’s praise of the adaptability of due process in *Hurtado v. California*:

[W]hile we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. . . . There is nothing in *Magna Charta*, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted.¹⁰

¹ See generally Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002) (critically surveying this history). Justice George Sutherland raised this technique of interpretation to another level in his opinion in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1937), which offered a historical and structural justification for extraconstitutional foreign affairs powers vested in the federal government. That much-criticized opinion goes too far in decoupling international law from the other resources of constitutional interpretation.

² *Jones v. United States*, 137 U.S. 202, 212 (1890). Acquisition by discovery differed from acquisitions by treaty or conquest, which bore closer relation to enumerated powers.

³ *Chae Chan Ping v. United States*, 130 U.S. 581, 604–05 (1889) (upholding inherent power to exclude); *Fong Yue Ting v. United States*, 149 U.S. 698, 707–11 (1893) (upholding inherent power to deport). The Court could have relied on enumerated powers like foreign commerce, but deliberately staked out wider ground.

⁴ *Blackmer v. United States*, 284 U.S. 421, 437–38 (1932).

⁵ *Downes v. Bidwell*, 182 U.S. 244, 306, 310–11 (1901) (White, J., concurring). To the extent that the power also applied to territory acquired by discovery, *id.* at 306, it was apparently freestanding.

⁶ *Arver v. United States*, 245 U.S. 366, 378 & n.1 (1918) (construing the power to raise armies in light of Vattel and broad survey of current foreign practice, as well as other sources).

⁷ *Kohl v. United States*, 91 U.S. 367, 371–72 (1876) (citing Vattel and Bynkershoek, along with Kent and Cooley). The Court reconciled the eminent domain power with the constitutional structure by limiting its application to takings for public uses within the other powers of the federal government. *Id.* at 372; *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668, 679 (1896).

⁸ *Juilliard v. Greenman*, 110 U.S. 421, 447–48 (1884) (interpreting the scope of the power to borrow money in light of past and contemporary European practice); *Knox v. Lee*, 79 U.S. (12 Wall.) 457, 556, 560 (1872) (Bradley, J., concurring) (finding power inherent in sovereignty).

⁹ 302 U.S. 319, 325–26 & n.3 (1937) (upholding new trial after prosecutor’s appeal as consistent with due process).

¹⁰ *Hurtado v. California*, 110 U.S. 516, 531 (1884) (upholding commencement of murder prosecution by information rather than indictment as consistent with due process).

Even if it were true, as Justice Antonin Scalia has argued, that the role of foreign law in interpreting due process should be exclusively negative—to rebut an appearance of fundamentality¹¹—that would still confirm the propriety of external influence on constitutional interpretation.

The Supreme Court has also invoked international and foreign sources in construing other constitutional amendments, including the Thirteenth Amendment,¹² the Eighteenth Amendment,¹³ and (as Harold Koh emphasizes) the Eighth Amendment.¹⁴ Although the Court had held in *MacKenzie v. Hare*¹⁵ that inherent powers of national sovereignty included the authority to regulate loss of nationality, the Court restricted that power half a century later in a series of cases beginning with *Trop v. Dulles*.¹⁶ The plurality in *Trop* concluded that denationalization as a penalty for crime amounted to cruel and unusual punishment violating the Eighth Amendment. The plurality expressly considered denationalization in light of contemporary international understandings, warning of the extreme peril associated with statelessness, “a condition deplored in the international community of democracies.”¹⁷ It examined both international and foreign national sources. The *Trop* opinion is also notable for its identification of the “dignity of man” as the underlying concept of the Eighth Amendment, apparently in response to the postwar international emphasis on the principle of human dignity.¹⁸

II. HUMAN RIGHTS AND CONSTITUTIONAL RIGHTS

The postwar development of international human rights law has widened the field for interaction between international law and constitutional interpretation, just as the spread of rights-based constitutionalism has increased the opportunity for comparative use of foreign constitutional law. That is not to say that international human rights treaties *mandate* implementation through cooperative constitutional interpretation. To the contrary, the treaties require legal implementation but leave the choice of means of implementation to the different national legal systems. Legislative enforcement of the treaties would be sufficient, as long as it was effective.

Nonetheless, the advent of the international human rights system has changed the conditions of constitutional adjudication, for the United States as for other countries. The coexistence of two positive legal systems for the articulation and protection of the fundamental rights of individuals may result in cooperation or conflict. But inevitably they will affect each other.

In analyzing the relationship between international human rights law and constitutional interpretation, it is useful to distinguish three aspects of legal rights: their consensual, supra-positive, and institutional characteristics.¹⁹ The *consensual* aspect reflects the positive basis of the right in the consent of the relevant political actors. The *supra-positive* aspect reflects the claim of the right to normative recognition independent of its embodiment in positive law. The *institutional* aspect of the right reflects its articulation as a structured legal rule in a manner

¹¹ *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989).

¹² *Robertson v. Baldwin*, 165 U.S. 275, 283–86 (1897) (citing historical and contemporary practice of other nations in support of specific enforcement of seamen’s employment contracts).

¹³ *Cunard S.S. v. Mellon*, 262 U.S. 100, 122–24 (1923) (construing the geographical scope of the Eighteenth Amendment in light of international law).

¹⁴ Harold Hongju Koh, *International Law as Part of Our Law*, 98 AJIL 43 (2004); see also Joan F. Hartman, “Unusual” Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty, 52 U. CIN. L. REV. 655 (1983).

¹⁵ 239 U.S. 299, 311 (1915) (upholding involuntary expatriation of a citizen who married a foreign husband).

¹⁶ 356 U.S. 86 (1958); see also *Afroyim v. Rusk*, 387 U.S. 253 (1967); *Schneider v. Rusk*, 377 U.S. 163 (1964).

¹⁷ *Trop*, 356 U.S. at 102.

¹⁸ *Id.* at 100; see Gerald L. Neuman, *Human Dignity in United States Constitutional Law*, in ZUR AUTONOMIE DES INDIVIDUUMS: LIBER AMICORUM SPIROS SIMITIS 249, 255–58 (Dieter Simon & Manfred Weiss eds., 2000).

¹⁹ For fuller discussion, see Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863 (2003).

that facilitates compliance and enforcement within the relevant legal system. These three aspects are familiar in U.S. constitutional theory (although the terminology used here may not be), and it is well-known that they may exert competing influences on constitutional interpretation. The same process operates within the international human rights system.

Juxtaposing the constitutional and international systems with regard to a right that they both protect (such as freedom of expression, or fair trial) multiplies the possibilities for competing influences on the interpretation of the right. The national and international communities may have agreed to different positive embodiments of a right, or the normatively based interpretation of the right in one system may contradict the consensually limited contours of the right in the other system, or the pragmatic institutional accommodations adopted in one system may be inappropriate in the other, and so forth.

In some cases, such divergence represents the normal variation one might expect from parallel efforts in two legal systems to give positive legal force to the same normative principle. In other cases, divergence may exhibit the serious normative inadequacy of one of the positive norms. The normative critique can flow in either direction: comparison with national constitutional law may suggest that the internationally adopted version of the right is insufficient, or comparison with the international human right may suggest that the constitutional version of the right is normatively defective. The central purpose of international human rights law is to call into question positive legal practices that fail to respect universal values. The prominence of this suprapositive aspect distinguishes human rights law from many other fields of positive international law.

Other countries have adjusted their constitutional methodologies in various ways in response to the challenge of international human rights standards. Some countries, including Austria and Argentina, have incorporated particular human rights treaties to which they are parties directly into their constitutions.²⁰ Others, including Spain, Colombia, and Romania, have adopted constitutional provisions requiring that national constitutional rights be interpreted in accordance with the international treaties they have ratified.²¹ The Constitution of South Africa expressly requires the courts to take international standards into account when interpreting its bill of rights.²²

Such constitutional arrangements serve consensually to align constitutional interpretation with the international human rights system. They may also be justified by institutional factors. For new constitutions in fledgling democracies, anchoring constitutional rights in the jurisprudence of more established systems supplies a body of precedent and decreases the likelihood of repressive interpretations. For more mature liberal democracies participating in human rights regimes with stronger compliance mechanisms (as in Europe), such arrangements enhance cooperation and coherence in the legal protection of individual rights. It should be recalled, however, that international human rights treaties do not demand this higher degree of cooperation. Statute-based enforcement rather than constitutionalized enforcement of human rights would be sufficient, so long as the rights are effectively enforced. The treaties' main concern about the constitution is that it should not obstruct compliance with human rights obligations.²³

²⁰ CONSTITUCIÓN ARGENTINA Art. 75(22); THEO ÖHLINGER, VERFASSUNGSRECHT 23–25, 79 (4th ed. 1999) (discussing constitutional status of the European human rights convention in Austria).

²¹ CONSTITUCIÓN Art. 10(2) (Spain); CONSTITUCIÓN POLÍTICA Art. 93(2) (Colom.); CONSTITUTIA ROMANIEI Art. 20(1).

²² S. AFR. CONST. §39(1). The South African Constitutional Court has construed this direction as including international human rights law that does not bind South Africa, such as unratified treaties and decisions from the European and inter-American regional systems. Government of the Republic of South Africa v. Grootboom, 2001 (1) SALR 46, 63–64 (CC). The provision also authorizes (without requiring) the courts to consider foreign law (e.g., United States constitutional doctrines).

²³ Human rights treaties often contain savings clauses emphasizing that the treaties set forth minimum standards and are not meant to impair national provisions more favorable to the protected rights. See, e.g., International Covenant on Civil and Political Rights, Dec. 16, 1966, Art. 5(2), 999 UNTS 171 [hereinafter ICCPR]; Neuman, *supra* note 19, at 1886–87. To the extent that protected rights may conflict, these savings clauses are not fully effective. *Id.* The

In other countries, constitutional courts voluntarily consider international human rights norms in interpreting constitutional rights. For example, the German Constitutional Court, a domestically powerful and externally influential national court, takes interpretations of the European Convention on the Protection of Human Rights and Fundamental Freedoms into account in construing its own national constitutional rights, to the extent that the level of protection would not be decreased.²⁴ Closer to home, the Supreme Court of Canada looks broadly to international human rights law, whether binding on Canada or not, as persuasive authority in construing rights in the Canadian Charter of Rights and Freedoms.²⁵

Under current circumstances, the U.S. Supreme Court has fewer reasons to take international interpretations of human rights into account in constitutional adjudication—not none, but fewer. In consensual terms, the U.S. Constitution, unlike some twentieth-century constitutions, does not express a textual preference for alignment of its rights provisions with the positive law of the modern international human rights regime. To the extent that the Bill of Rights reflects a natural law philosophy of individual rights, it may favor interpretation in accordance with universal moral principles, but it does not articulate a judgment that positive human rights treaties or their international interpretations accurately embody such principles. The long tradition of reference to general principles of public law in constitutional interpretation may also provide some consensual support for consideration of certain human rights norms. Thus, the purely consensual foundation for taking international human rights into account in construing constitutional rights is fairly weak.

Turning to the institutional aspect, the less intense engagement of the United States in the international human rights regime currently results in fewer institutional benefits from coordination. The United States does not participate in a process of regional integration and harmonization like the European Union. Nor has it submitted to a regional human rights regime with an international court authorized to issue binding decisions like the European Court of Human Rights (in particular, the United States has not ratified the American Convention on Human Rights, and has not consented to the jurisdiction of the Inter-American Court of Human Rights). The United States has ratified some global human rights treaties with treaty bodies that are not authorized to issue binding decisions, and even then it has not agreed to the procedures that enable individuals to file petitions. For several human rights treaties, the United States has accompanied its ratification with a declaration of non-self-executing character, thereby limiting the role of the domestic courts in treaty enforcement.²⁶ As a result of this limited participation, U.S. courts can contribute less to human rights enforcement, and international tribunals have less ability to bolster the enforcement of U.S. constitutional rights. Unlike European courts, the U.S. Supreme Court rarely sees a definitive interpretation of a human rights treaty that the country has ratified, and rarely faces the possibility

U.S. Senate has generally responded to the possibility of conflict between treaty rights and constitutional rights by conditioning its consent to human rights treaties on the supremacy of constitutional rights.

²⁴ Judgment of Mar. 26, 1987, BVerfGE 74, 358 (370); Paul Kirchhof, *Verfassungrechtlicher und internationaler Schutz der Menschenrechte: Konkurrenz oder Ergänzung?* 21 EUROPAISCHE GRUNDRICHTE ZEITSCHRIFT 16, 31–32 (1994).

²⁵ See Gérard V. La Forest, *The Expanding Role of the Supreme Court of Canada in International Law Issues*, 1996 CAN. Y.B. INT'L L. 89, 97–98; Suresh v. Canada (Minister of Citizenship & Immigration), [2002] 1 S.C.R. 3, 31–32, 38; see also Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT'L L. & POL. 50 (2000) (defending “comparative” use of international law in Canada).

²⁶ Such declarations were made with respect to the Convention Against Torture, 136 CONG. REC. 36,194 (1990); the ICCPR, 138 CONG. REC. 8068 (1992); the International Convention on the Elimination of All Forms of Racial Discrimination, 140 CONG. REC. 14,326 (1994); and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 148 CONG. REC. S5717 (daily ed. June 18, 2002); but not with respect to the Protocol to the Refugee Convention, 114 CONG. REC. 29,607 (1968); the Genocide Convention, 132 CONG. REC. 2350 (1986); or the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 148 CONG. REC. S5716 (daily ed. June 18, 2002). It would be an error to claim that the Senate always attaches non-self-executing declarations to human rights treaties.

Both the desirability and the effect of such declarations have been disputed, but in my opinion they can prevent a treaty provision from being self-executing for the United States.

of open conflict between its interpretation of a constitutional right and an international tribunal's binding interpretation of a human rights obligation.

Nonetheless, consideration of international human rights norms and their interpretations does already offer some potential institutional benefit to U.S. constitutional adjudication. The primary institutional benefit is empirical, the opportunity to observe how a proposed rule operates in other legal systems. There are limits to the lessons that can be drawn from such functional comparisons,²⁷ but they can be more informative than armchair speculation. Particularly clear advantages may arise where other regions have previously confronted the human rights implications of technological or social developments that are new for the United States. Sometimes the most persuasive functional conclusion will be that a particular rule works well in another legal system precisely because of features that distinguish it from the United States. However, the doctrines of regional human rights systems, and especially of the global human rights system, are less likely to depend on the individual characteristics of foreign legal systems. On other occasions the functional conclusion may be that the rule does not work well even in its own context, perhaps because it embodies a consensual political compromise, or too rigidly implements a normative assumption. Such comparisons may shed light on whether a rule already being applied elsewhere would prove workable in the United States, with or without adjustment.

Another, subtler institutional benefit relates to the question whether the Supreme Court will respectfully engage in normative dialogue with the human rights tribunals and constitutional courts of an increasingly interdependent world. The Supreme Court has been a prestigious source of individual rights doctrines and argumentation in the global community. But if the Court insists on the exceptional character of its rights conceptions, labeling them as idiosyncratic American values or limiting itself to literalist and eighteenth-century sources of interpretation, then it will undermine the bases of its influence. Justices who declare the world irrelevant to our Constitution make our Constitution appear irrelevant to the world.²⁸ Such isolation not only would weaken the human rights system, but would impair the promotion of U.S. constitutional values for U.S. citizens. In a world of massive international trade, travel, communication, and cooperative law enforcement, the effective enjoyment of liberties often depends on the overlapping laws of several countries.

From the suprapositive perspective, the interpretive value of international human rights norms and decisions derives from the normative insight that they provide. The interpreter should carefully examine whether the international conception of the right (or the feature at issue) rests primarily on consensual or institutional factors rather than on normative considerations,²⁹ and whether its normative foundations are compatible with the basic assumptions of the U.S. constitutional system. The international human rights regime challenges states to reexamine the justifiability of their practices. In the United States, such reexamination may be especially beneficial where doctrinal structures preserve vestiges of long-vanished historical conditions.

If constitutional adjudication in the United States had no moral dimension, and consisted solely in accurate reproduction of specific eighteenth-century practices, then the suprapositive aspect of international human rights would have nothing to contribute. Fortunately, however,

²⁷ See Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1265–69 (1999).

²⁸ See Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 33–34, 37–39 (1998).

²⁹ For example, savings clauses, see note 23 *supra*, attempt to accommodate the possibility that positive treaty norms may not express the full content of a human right. The jurisprudence of the European Court of Human Rights also includes an institutional doctrine known as the “margin of appreciation,” which grants varying degrees of deference to the national authorities’ evaluation of how a convention right applies in particular circumstances. See JACOBS AND WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 210–15 (Clare Ovey & Robin C. A. White eds., 3d ed. 2002); Neuman, *supra* note 19, at 1884. As a result, decisions of that court upholding a national practice against a human rights challenge do not necessarily express an ultimate conclusion about the compatibility of the practice with the right.

few Justices employ so starkly originalist a methodology, and no Justice does so consistently. Normative comparisons with human rights law may therefore prove fruitful.

For use in suprapositive critique, the arguments made in support of an international tribunal's decisions are as important as the tribunal's ultimate conclusion. That observation may raise the question why reference to positive human rights norms and decisions should be needed at all. Most likely, the normative arguments asserted by human rights institutions have also been made by philosophers, social activists, politicians, and legal scholars; and most likely, some version of these arguments has been made in the United States as well as abroad.³⁰ True enough—and courts sometimes maintain discreet silence about the foreign origins of the arguments that they employ. Nonetheless, courts may give less consideration to an argument, knowing only that it was drawn from the vast sea of normative speculation and self-serving advocacy, than to an argument that has already proven persuasive to an impartial body responsible for striking a balance between the claims of order and liberty.

Normative reasoning borrowed from international human rights sources will not necessarily prevail in the process of constitutional interpretation. Other normative considerations omitted there may be relevant, and consensual and institutional factors may also come into play. The Court may conclude that the normatively compelling interpretation of a right cannot be adopted at the constitutional level but, rather, should await political implementation. I emphasize again that the international human rights regime does not call for implementation at the constitutional level, only compliance.

Thus, the Supreme Court has reason to examine international human rights norms and decisions interpreting them for the normative and functional insights that they may provide on analogous issues of constitutional right. They certainly cannot control constitutional interpretation, but they may inform it.

The use of human rights treaties as an aid in construing constitutional rights might seem superficially in tension with the Supreme Court's reassurance in *Reid v. Covert* that the treaty power cannot be employed to violate constitutional rights.³¹ That appearance should dissolve on closer examination. The treaty makers cannot override constitutional norms, and they cannot order the Supreme Court to alter its interpretation of a constitutional provision.³² But treaties, like legislation, can contribute to a shift in the factual, institutional, and normative environment within which the Court carries on its task of constitutional interpretation. The resulting doctrinal evolution is unavoidable in any candid account of U.S. constitutional history. Nothing in *Reid v. Covert* and its progeny precludes this indirect influence of treaty making on constitutional law. Treaties and the case law arising under them thus become data available for the Court's consideration in elaborating the contemporary meaning of constitutional norms. The political branches can neither require the Court to follow international or foreign law in interpreting the Constitution nor prohibit the Court from considering international or foreign law.

Under current circumstances, the Supreme Court correctly does *not* engage in the practice, pursued by some other constitutional courts, of construing constitutional rights *for the purpose* of judicially implementing the positive international obligations of the nation under human rights treaties. The positive effect of treaty norms differs from the moral or functional insight that they may provide. Human rights treaties do not require implementation at the constitutional level, and in the U.S. legal system Congress retains ultimate control over the means of implementing—or breaching—a treaty. Entrenching positive human rights standards as

³⁰ See Seth Kreimer, *Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing*, 1 U. PA. J. CONST. L. 640, 647–48 (1999).

³¹ *Reid v. Covert*, 354 U.S. 1, 16–17 (1957) (plurality opinion of Black, J.); see also *Boos v. Barry*, 485 U.S. 312, 324 (1988) (O'Connor, J.) (citing *Reid v. Covert*).

³² Cf. *City of Boerne v. Flores*, 521 U.S. 507 (1997) (rejecting the idea that Congress has power under Section 5 of the Fourteenth Amendment to alter the meaning of constitutional rights).

constitutional interpretation, for the purpose of ensuring compliance with the treaty as such, would deprive the political branches of their authority to choose methods of treaty implementation, and would not be consistent with current constitutional understandings.³³

III. THE *LAWRENCE* DECISION

Against this background, the Supreme Court's invocation of human rights law in *Lawrence v. Texas*³⁴ represents a rather modest use of international law in aid of constitutional interpretation. First, in evaluating the Court's earlier reasoning in *Bowers v. Hardwick*,³⁵ Justice Anthony Kennedy observed that the Court had ignored the *Dudgeon* decision of the European Court of Human Rights.³⁶ Attention to that decision would have undermined both Chief Justice Warren Burger's claim that homosexual conduct was antithetical to the values of Western civilization and Justice Byron White's dismissive treatment of the argument that the autonomy of same-sex couples was "implicit in the concept of ordered liberty."³⁷ Second, after describing other objections to the reasoning in *Bowers*, Kennedy added another passage short enough to be quoted here:

To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom*. Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. See Brief for Mary Robinson, et al. as *Amici Curiae* 11–12. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.³⁸

Essentially, the majority in *Lawrence* addressed regional human rights law as foreign law, testimony from other societies that the guarantee of sexual autonomy should also extend to same-sex relationships. The Court did not expressly examine the status of same-sex intimacy as a form of "privacy" protected by Article 17 of the International Covenant on Civil and Political Rights,³⁹ or the United Nations Human Rights Committee's interpretation of Article 17 as protecting same-sex intimacy, although that interpretation had been brought to the Court's notice.⁴⁰ At most, the Court referred obliquely to Australia's compliance with the Committee's views, as an instance of national action.⁴¹ The Court thereby avoided any discussion of the

³³ I repeat the word "current," because these understandings themselves derive from constitutional interpretation, and are subject to constitutional amendment, or conceivably to doctrinal evolution in the face of transnational regimes that the United States might choose to create in the future.

³⁴ 123 S.Ct. 2472 (2003).

³⁵ 478 U.S. 186 (1986).

³⁶ 123 S.Ct. at 2481 (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981) (holding that Northern Ireland law criminalizing consensual adult sodomy violated the right to respect for private life under Article 8 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 UNTS 221)).

³⁷ *Lawrence*, 123 S.Ct. at 2481; *Bowers*, 478 U.S. at 196–97 (Burger, C.J., concurring); *id.* at 194 (White, J.) (characterizing that argument as "at best, facetious").

³⁸ 123 S.Ct. at 2483 (citations omitted).

³⁹ ICCPR, *supra* note 23, Art. 17. The United States ratified the ICCPR without any reservation addressing Article 17.

⁴⁰ Brief for Mary Robinson et al., amici curiae, at 11–12 & nn.15, 16, *Lawrence v. Texas*, 123 S.Ct. 2472 (2003) (No. 02-102) [hereinafter Brief], available in 2003 WL 164151 (citing *Toonen v. Australia*, Communication No. 488/1992, UN Doc. CCPR/C/50/D/488/1992 (1994); Concluding Observations of the Human Rights Committee: United States of America, UN Doc. CCPR/C/79/Add.50; A/50/40 [paras. 266–304], para. 287 (1995)).

⁴¹ The very pages of the amicus brief cited by the Court in the passage quoted in the text at note 38 *supra* refer to the Human Rights Committee's views in *Toonen*, Australia's responsive action, and the Human Rights Committee's criticism of U.S. sodomy laws, before turning (on page 12) to other countries (including Canada, New Zealand, Israel, and South Africa).

content or even the existence of U.S. obligations under the Covenant, or of the persuasive value of the Human Rights Committee's conclusions.

The Court's use of foreign data appears primarily normative rather than institutional.⁴² Widespread recognition of the right to homosexual intimacy in other liberal democracies reinforced the Court's own reasons for affording constitutional protection, and added to the objective character of the Court's decision.⁴³ The majority set forth no extended functional analysis, noting only the absence of a showing of more "urgent" government interest here than in other countries. The Court did not repeat the functional argument of the amicus brief, which had rebutted the hypothesis of a slippery slope from decriminalization of homosexual intimacy to decriminalization of incest and other forms of sexual exploitation.⁴⁴ Instead, it was Justice Scalia's dissent that offered an alternative functional comparison, invoking a recent Canadian case to show that the Court's reasoning would lead to a constitutional right to same-sex marriage.⁴⁵ Moreover, the majority opinion, which is somewhat ambiguous regarding the standard of review that it applies, appears not to have borrowed in detail any foreign doctrinal framework, such as that employed by the European Court of Human Rights for analyzing the justifiability of interference with the right to respect for private life.

The *Lawrence* decision leaves to the future a number of methodological questions. It does not speak to the use of international human rights norms that are binding on the United States, or to the resolution of uncertainty about the interpretation of those norms, or to the interpretive value of norms to which the United States has taken reservations.⁴⁶ The Department of Justice did not participate in the *Lawrence* case, and it also remains to be seen how positions taken by the executive on the significance of a human rights norm may affect its use in constitutional interpretation.

IV. CONCLUSION

The *Lawrence* decision provides yet another illustration of the appropriate use of international law as merely one element of a complex inquiry into constitutional meaning. That kind of inquiry creates no danger that foreign powers will dictate constitutional law to the United States, or that the political branches can manipulate the content of the Bill of Rights by entering into a treaty. The reaffirmation of international and foreign law as interpretive aids may increase the resources available to judicial discretion, but proscribing their use would hardly have prevented judicial activism, of either the liberal or the conservative variety.

⁴² The *Dudgeon* decision itself primarily expressed a contemporary suprapositive interpretation of a broadly phrased Convention right. Consensual factors underlying the decision include the adoption of the generalized guarantee of respect for "private and family life" in the European Convention, the protection of that right by a high standard of justification ("necessary in a democratic society," which the European Court of Human Rights has interpreted in terms of proportionality), and perhaps the Court's reference to decriminalization of homosexual practices in most member states (*Dudgeon, supra* note 36, para. 60). The Convention did not specifically address homosexuality. Suprapositive factors include the Court's identification of consensual homosexual activity as involving "a most intimate aspect of private life" that elevated the level of justification required (para. 52), the Court's usual interpretation of "democratic society" as characterized by "tolerance and broadmindedness" (para. 53), and the Court's reliance on a contemporary "better understanding, and in consequence an increased tolerance, of homosexual behaviour" (para. 60). Institutional factors included the wider margin of appreciation that the Court affords to national regulation for the protection of morals (para. 52), and the delicate political situation in Northern Ireland (paras. 57–59); these factors favored the government but were outweighed by the intensity of the intrusion on private life.

⁴³ *Cf. Bowers v. Hardwick*, 478 U.S. at 191 (emphasizing the Court's need in substantive due process cases to "assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values").

⁴⁴ Brief, *supra* note 40, at 16–18.

⁴⁵ 123 S.Ct. at 2497–98 (Scalia, J., dissenting).

⁴⁶ On the latter point, presumably the positive action of the treaty makers cannot preclude the Court from deriving normative or functional insight from international human rights norms, if only as a kind of foreign law. The Court should also take into account the reasons for the political branches' dissent from the norm.