



# Outsourcing American Law

---

## Introduction

John Yoo  
American Enterprise Institute

AEI WORKING PAPER #151  
[www.aei.org/paper/100033](http://www.aei.org/paper/100033)

In American policy debates, outsourcing commonly refers to the practice by U.S. corporations of re-locating factories abroad in order to lower costs. The villains in the story, as told by the media, are the low-wage workers of Mexico or China, who are stealing jobs from U.S. But outsourcing simply obeys the law of comparative advantage. The importing country benefits by obtaining goods at lower costs, while the exporting nation, which can produce the good more efficiently, benefits with jobs and economic activity. Criticism arises from displaced workers and different regulatory environments, but most agree that moving productive capacity to more efficient places improves overall economic welfare. Outsourcing, properly understood, is merely a manifestation of international trade, with all of its benefits and side-effects.

Trade, however, occurs not just with manufactured products, but also with non-tangible goods, such as services and ideas. Transfer of ideas, such as sales in intellectual property, industrial design, or business methods, can be just as beneficial as trade of products. It can also extend from the private to the public sector, such as sharing ways to build more effective systems of government, or to design more effective regulatory standards. The spread of ideas in this way seems to be most advanced, not surprisingly, in areas where activity occurs across national borders or has significant impacts beyond a single nation.

Ideas in public administration do not apply universally, however, but must fit the context, just as products made for one market may not easily be sold in another where there is a very different culture and society. Constitutional governments usually impose some form of democratically-accountable method, rather than the forces of supply and demand, to adopt laws. These methods promote values that go beyond the realm of every day policymaking, whether they be the preservation of national sovereignty, the protection of individual rights, a process of democratic decision-making, or decentralized government.

This volume of essays, presented at a conference held at the American Enterprise Institute on February 21, 2006, examines important, controversial issues raised by the spread of ideas about public law beyond national borders. It features a speech by U.S. Supreme Court Justice Antonin Scalia, *Foreign Law in Constitutional Interpretation*, which addresses the most salient development in this area: the recent practice by some federal judges to rely upon the decisions of foreign and international tribunals in their opinions. Nonetheless, in several recent cases, Supreme Court Justices have looked to the decisions of foreign and international courts for guidance in interpreting the American Constitution. This practice has occurred not only in minor instances, but in several important cases on individual rights. *Roper v. Simmons*, which struck down application of the death penalty to offenders who were under 18 when their crimes were committed,<sup>1</sup> *Lawrence v. Texas*, in which the Court struck down a state law that criminalized homosexual sodomy,<sup>2</sup> and *Atkins v. Virginia*, which found unconstitutional the execution of mentally retarded capital defendants,<sup>3</sup> are three of the most prominent recent decisions that have relied in some way on foreign and international precedents.

Justice Scalia is a well-known proponent of the theory that the Constitution's words ought to be interpreted according to the understanding held by its Framers. He argues that the Constitution, properly understood, does not permit the use of foreign legal authority to interpret

---

\* John Yoo is a Professor of Law at the University of California at Berkeley School of Law and Visiting Scholar at the American Enterprise Institute.

<sup>1</sup> 125 S. Ct. 1183 (2005).

<sup>2</sup> 123 S. Ct. 2472 (2003).

<sup>3</sup> 536 U.S. 304 (2002).

our nation's founding document. He allows an exception for the use of legal materials that are contemporaneous with the ratification of a constitutional provision, in keeping with his focus on the intentions of those who approved it. "It is my view that foreign legal materials can never be relevant to an interpretation of the United States Constitution," he writes.<sup>4</sup> If anything, Justice Scalia argues, the Framers wanted the United States to be free to go its own way in constitutional law. "The men who founded our republic did not aspire to emulating Europeans, much less the rest of the world."<sup>5</sup>

The first papers turn to another issue concerning international and foreign influences on American law: whether international law is enforceable within the U.S. legal system. The President and the Senate make international law when the President agrees to, subject to the Senate's consent, treaties on behalf of the United States. But debate remains fierce over whether a different species of international law, customary international law (CIL), has legal force within the United States. Unlike treaties, customary international law is not written and formally adopted. Instead, in the words of the American Law Institute, it "results from a general and consistent practice of states followed by them from a sense of legal obligation."<sup>6</sup> There does not seem to be much disagreement that Congress, under its authority "To define and punish . . . Offences against the Law of Nations," can adopt international legal rules in enacting federal statutes.<sup>7</sup> One of the questions that remain is whether Congress in the 1789 Alien Tort Statute has chosen to incorporate customary international law, and if so, how much of it. It was not until 2004 that the Supreme Court addressed this question in *Sosa v. Alvarez-Machain*.<sup>8</sup> A second question is whether federal courts should recognize customary international law as federal law under the Supremacy Clause in the absence of any statute from Congress.

William Dodge, a professor of law at the University of California, Hastings School of Law, argues that the Alien Tort Statute authorizes the federal courts to apply customary international law. In *After Sosa: The Future of Customary International Law in the United States*, Dodge writes that *Sosa* holds "that the domestic law of the United States recognizes the law of nations."<sup>9</sup> The Court, according to Dodge, specifically rejects the claim made by critics of the Alien Tort Statute that the type of international law adopted by Congress is limited to piracy, attacks on ambassadors, and violations of safe passage promises.<sup>10</sup> Dodge argues that the Alien Tort Statute elevates customary international law to the position of "federal common law" which can be enforced by judges and is binding on the President and the states. He is unwilling to conclude that all modern customary international law has this status, but only claims which "the First Congress might reasonably have expected" or "the current division of responsibility for foreign affairs will reasonably allow."<sup>11</sup>

---

<sup>4</sup> Antonin Scalia, *Foreign Law in Constitutional Interpretation*, 2 (AEI 2009).

<sup>5</sup> Antonin Scalia, *Foreign Law in Constitutional Interpretation*, 5 (AEI 2009).

<sup>6</sup> Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987).

<sup>7</sup> U.S. Const. art. I, § 4, cl.10.

<sup>8</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

<sup>9</sup> William S. Dodge, quoting *Sosa v. Alvarez-Machain*, 542 U.S. 729 (2004), in *After Sosa: The Future of Customary International Law in the United States*, 1 (AEI 2009).

<sup>10</sup> *Id.* at 729.

<sup>11</sup> William S. Dodge, *After Sosa: The Future of Customary International Law in the United States*, 20 (AEI 2009).

David Moore, a professor at the J. Reuben Clark Law School at Brigham Young University, reads *Sosa* very differently. In *Setting the Record Straight, Sosa v. Alvarez and the Debate over Customary International Law*, Moore argues that the Supreme Court did not find that customary international law of its own force constitutes federal law. Rather, the Court found that customary international law became enforceable in court only because Congress had intended to incorporate certain international law norms into the domestic legal system through the Alien Tort Statute. “Congressional intent remained the foundational inquiry in determining whether the federal judiciary could incorporate CIL.”<sup>12</sup> In other words, without any statute explicitly requiring courts to enforce customary international law, federal courts have no authority to do so on their own. Moore argues that this view fits more neatly within the American separation of powers and federalism.

Julian Ku, a professor at Hofstra University School of Law, links the debate over customary international law to the war on terrorism. In *The President’s Power to Interpret Customary International Law*, Ku takes up the challenges to the Bush administration’s terrorism policies as violations of customary international law. Plaintiffs have argued that the detention of terrorists at Guantanamo Bay, Cuba, and their trial by specially-created military commissions, violates customary rules on the laws of war. While the Court in *Sosa* has addressed the status of customary law in federal court, Ku observes, it has failed to examine how the other branches of government should treat it as law within the U.S. legal system. Ku argues that the Constitution is best understood as allowing the President to interpret customary international law on behalf of the United States and that the president is entitled to deference from the courts in such matters. “Recognition of the President’s interpretive power over CIL would resolve many of the CIL-based challenges to aspects of the war on terrorism,” Ku concludes, without requiring “presidential absolutism in the interpretation of CIL.”<sup>13</sup>

Andrew McCarthy and Alykhan Velshi of the Center for Law and Counterterrorism at the Foundation for the Defense of Democracies seek to resolve the legal controversies over the global war on terrorism in a different way. Ku sees a resolution in recognizing the President’s constitutional authority to take the initiative in interpreting and applying international law to the government’s terrorism policies. In *We Need a National Security Court*, McCarthy and Velshi find the solution in the creation of a special federal court that can allow for the detention and prosecution of terrorists without the risks to intelligence sources and methods that would arise in a normal civilian jury trial. McCarthy, one of the federal prosecutors of the first World Trade Center bombing, and Velshi argue that the 1990s policy of using the criminal justice system to stop terrorists was ineffective. The very openness and rights that characterize the federal criminal system give the terrorists advantages in their struggle against the United States. As they put it, “trials in the criminal justice system don’t work for terrorism. They work for terrorists.”<sup>14</sup> The better solution, they argue, would create a national security court that would conduct fair proceedings before a federal judge, but with the ability to keep secret the sensitive intelligence important to ongoing counter-terrorism operations.

---

<sup>12</sup> David H. Moore, *Setting the Record Straight: Sosa v. Alvarez-Machain And the Debate Over Customary International Law*, 8 (AEI 2009).

<sup>13</sup> Julian G. Ku, *The President’s Unexamined Power to Interpret Customary International Law*, 16 (AEI 2009).

<sup>14</sup> Andrew C. McCarthy and Alykhan Velshi, *We Need A National Security Court*, 10 (AEI 2009).

Thomas C. Goldstein, head of the Supreme Court practice at the law firm of Akin, Gump, Strauss, Hauer & Feld in Washington, D.C., and his co-author Cody Harris argue that the debate over the use of foreign law in Supreme Court opinions is really about the proper method to interpret the Constitution and not about foreign law at all. Originalism would not permit the use of foreign law because it would not find many legal sources relevant. But if a “living” Constitution approach is used which draws in more contemporary sources, “then foreign law may well be a valuable tool when interpreting certain constitutional provisions.”<sup>15</sup> They conclude by proposing a presumption against the use of foreign law except “when the question confronting American judges and their foreign counterparts is genuinely the same no matter where on the globe it is arises.”<sup>16</sup>

This volume concludes with an essay by Robert Delahunty, a professor at St. Thomas School of Law, and me on the question of foreign law in the American legal system. In *Against Foreign Law*, we argue that the use of foreign or international law by courts in a manner that does not affect the outcomes of decisions poses no serious threat to the American constitutional system. Indeed, foreign and international law can provide relevant empirical information about the consequences of social policies and can describe original legal arguments. However, use of such materials to actually determine decisional outcomes in constitutional questions, we argue, is illegitimate. *Against Foreign Law* argues that allowing such sources to dictate results is inconsistent with the constitutional basis for judicial review, as set out by the Supreme Court in *Marbury v. Madison*,<sup>17</sup> and would amount to the transfer of federal authority to individuals who sit outside the U.S. governmental system. We also claim that the transplantation of foreign legal sources make little sense due to the very different economic, political, and social conditions of the United States and Europe, from which most of the non-U.S. legal authorities cited by the Supreme Court originate.

All of the essays in this volume grapple with the intersection of the domestic and international legal systems. It is worth asking why these questions have arisen with such force in recent years. Until recently, questions such as the status of customary international law in the U.S. legal system was reserved, despite the acrimony of the debate, to scholarly journals. The same is true of the relationship between the United States Constitution to the constitutions and judicial decisions of other countries, which, it is fair to say, received even less attention. Part of the answer lies with the effects of globalization. Activity that used to take place primarily within the jurisdiction of one country now often occurs across borders, such as industrial production and capital markets. This activity can be both positive, such as in the spread of international trade, and negative, as in the spread of international crime and terrorism. Globalization and its effects have been accelerated by the reduction in transportation costs and the increased speed of communications.

Globalization has placed pressure on the ability of nation-states to protect their sovereign control over activity with their borders. Effective solutions to some problems, such as the environment or drug smuggling, rest outside the powers of an individual nation. At the same time, conduct that usually lies within local or state jurisdictions, in the aggregate, can have

---

<sup>15</sup> Thomas C. Goldstein and Cody S. Harris, *Foreign Law and Constitutional Interpretation: The Debate Behind the Diatribes*, 1 (AEI 2009).

<sup>16</sup> Thomas C. Goldstein and Cody S. Harris, *Foreign Law and Constitutional Interpretation: The Debate Behind the Diatribes*, 2 (AEI 2009).

<sup>17</sup> 5 U.S. (1 Cranch) 137 (1803).

significant impacts at the international level. An increased need for cooperation at the international level will ratchet up the pressure on the U.S. legal system to adopt international and foreign legal standards. A corresponding desire for uniformity among nations that coordinate their policies on international problems seems to explain some of the action by the courts to find American law abroad.

Two cautionary notes should be raised to these developments. First, it remains to be shown that adopting the same legal standards is in fact necessary for international cooperation to succeed. It may be the case, instead, that a diversity of legal and political cultures is not only normatively desirable but also enhances effectiveness of cooperation. International and foreign legal standards simply may not be suitable to a nation like the United States which has a very different political and social culture than Europe. Second, efforts at international cooperation at some point may intrude upon national sovereignty. While a certain harmonization of policies will prove effective for solving international problems, preserving national sovereignty is another important value that must be taken into account. European nations have transferred sovereignty over certain areas to the European Union, but it is questionable whether the United States Constitution permits a similar delegation of authority to foreign or international entities and norms. The authors in this book disagree over whether more or less openness to foreign and international standards is necessary to balance international cooperation with domestic constitutional sovereignty. But they would all agree that the right resolution to this tension is central to the success of American legal and foreign policy in the twenty-first century.