

Use of International Sources in United States Constitutional Interpretation

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The various approaches of United States Supreme Court Justices to the use of international sources in interpretation of the United States Constitution follows the Justices typical approach to other aspects of constitutional interpretation. In general, there are four approaches to interpretation depending on how the Justice answers two basic questions regarding judicial decisionmaking.

The first question concerns the nature of the judicial task: whether law is separable from moral or social value considerations (the law being solely a body of principles about which predictions can be made – law as science/positivism), or whether law is a body of rules testable by reference to some external standard of rightness (some social or moral value – law as normative or prescriptive, not descriptive). The second disagreement concerns the nature of law: whether law is ultimately capable of being represented as a set of logically consistent universal rules (what has been called the analytic assumption), or whether rules are ultimately to be judged not in terms of logical consistency, but as means to an end (the functional attitude). Depending on the answer to these two questions, there are four possible judicial decisionmaking styles:

Styles of Judicial Decisionmaking

<u>Nature of Judicial Task</u> =	Positivism: Judges as Neutral Declarers of the Law	Normativism: Judges as Normative Actors
<u>Nature of Law</u> Law as Logical; Analytic or Conceptualist Attitude; Law as Library Science	Formalism/ Analytic Positivism	Natural Law
Law as Means to Ends; Functional or Pragmatic Approach; Law as Empirical Science	Holmesian/ Functional Positivism	Instrumentalism

Typically, those who think law and morals are separable think laws are ideally formulated as logically consistent universal rules. These are the Formalists. Those who think law is testable by some external standard also tend to see law as a means to the end of that standard. These are

the proponents of Instrumentalism. The two sets of propositions do not necessarily have to co-exist, however, as is illustrated by the jurisprudence of Justice Oliver Wendell Holmes and by the Natural Law philosophic tradition.

Holmes thought that the life of the law was not logic, but experience, and that law therefore must be responsive to social conditions, as a means to that end. However, he also believed that law and morals were separable, that law was a science, and that the most important thing for any law was its certainty and predictability. The role of the law, in Holmes' view, was to permit the majority to do what whatever it wanted. Thus, he hoped, society could avoid violent confrontation. In this sense, Holmes agreed with the formalist view that law cannot be tested by an external standard of moral rightness. Rather, law is merely a reflection of the outcome of the relevant political process. Under this view, legislatures, not courts, are the proper balancers of public policy. Holmes disagreed with the Formalists over whether legal rules were universally true, because he saw that the dominant group in society often changes. Thus law must change to reflect new power relationships and be a means to the end of facilitating that process.

The fourth type of judicial decisionmaking can be described as Natural Law. Natural Law theory agrees with the formalist proposition that law can ultimately be expressed as a system of logically related, universal rules. Law is not just a means to the end of some social value, regardless of what that does to the symmetry of rules. On the other hand, Natural Law theorists disagree with the formalist conclusion that law and morals are separable, believing that law can be tested by an external standard of rightness, the standard of natural law.

Given their focus on positivism and logical elaboration of the law, Formalists tend to believe that the Constitution has a positive, static meaning, fixed at the time of ratification. They rely heavily on literal meaning and specific historical intent. They prefer bright-line rules rather than standards, and prefer doctrine to reflect categorical elements rather than a balancing or factor-weighting approach. This approach was followed by a majority of Justices on the United States Supreme Court from 1873-1937. On the Supreme Court today, Justices Scalia, Thomas, and Alito tend to follow this approach. From this perspective, contemporary international sources are illegitimate to consider, as they do not reflect the intent of the framers and ratifiers of the United States Constitution back in 1787-89 when the Constitution was drafted and ratified, or the intent of the framers and ratifiers of the 14th Amendment Due Process or Equal Protection Clauses in 1868. *See generally The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 Int'l J. Const. L. 519 (2005) (Justice Scalia's view).

As a positivist theory, Holmesians share the formalist emphasis on literal meaning and specific historical intent, but are willing to consider purpose arguments because of the Holmesian focus on the fact that all law has a purpose. Since Holmes also thought that law should reflect the will of the people, he gave considerable deference to legislative, executive, and social practice. Holmes also followed precedents which were settled law or on which persons had substantially relied. The Constitution thus can be a living document, particularly to the extent its

interpretation reflects legislative and executive practice. *See generally* William H. Rehnquist, *The Notion of a Living Constitution*, 54 *Tex. L. Rev.* 693, 694, 699-700 (1976). From this perspective, use of international sources is also illegitimate, as those sources do not reflect legislative and executive practice within the United States. This approach was followed by a majority of Justices on the Supreme Court from 1937-1954. Recent followers of this style of interpretation were Chief Justice Rehnquist, and, on the current Court, Chief Justice Roberts, who replaced Rehnquist in 2005.

Based upon their focus on law as a functional instrument to achieve social ends, Instrumentalists view the Constitution as a living document that should be interpreted to bring about just results. For instrumentalists, all of the sources of constitutional interpretation are relevant in the interpretation process, including consequences considered in terms of policy considerations. Since international sources can aid in determining possible consequences and policy outcomes, international sources are valid to consider in constitutional interpretation. *See generally The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 *Int'l J. Const. L.* 519 (2005) (Justice Breyer's view). This approach was reflected in most Supreme Court decisions between 1954-1986. Influential Instrumentalists on the United States Supreme Court during the heyday of Instrumentalism included Chief Justice Warren, and Justices Douglas, Brennan, Fortas, and Marshall. On today's Court, Justices Stevens, Ginsburg, Breyer, and likely new Justice Sonia Sotomayor, embody a moderate form of Instrumentalism.

From 1789 until 1873, and again in recent key votes since 1986 of Justices Powell, O'Connor, Kennedy, and Souter, the Justices followed the 18th-century natural law tradition of reasoned elaboration of the law in light of the law's purposes and history, with fidelity to precedent and to a considered and consistent legislative, executive, or social practice. Chief Justice John Marshall, and modern natural law Justices, have also considered whether certain consequences of decisions reflect faithful adherence to background principles that are embodied in Constitution, particularly universal natural law principles of justice embedded in the concepts of due process and equal protection, whose meaning can evolve consistent with more enlightened understanding of the content of those principles today. From this perspective, international sources are relevant to the extent they embody the same Enlightenment natural law approach of the framing and ratifying generation in 1787-89 and the framers and ratifiers of the 14th Amendment in 1868. Justices did that during the original Natural Law era from 1789-1873. *See generally* David Fontana, *Refined Comparativism in Constitutional Law*, 49 *UCLA L. Rev.* 539 *UCLA L. Rev.* 539, 575-83 (2001) (discussing judicial practice from 1789 through the Civil War); Sarah H. Cleveland, *Our International Constitution*, 31 *Yale J. Int'l L.* 1 (2006) (discussing cases where the Constitution refers to international law or international law is used as a background principle to identify the territorial scope of the Constitution, the powers of the national government, delineate structural relationships within the federal system, or individual rights cases). This is the approach of Justice Kennedy on the United States Supreme Court today. From this perspective, international sources that can best shed light on an Enlightenment natural law concept would most properly be used, such as European decisions regarding aspects of basic human rights and human dignity. This explains why it was European views

against banning homosexual sodomy, rather than views of other nations around the world, that were used by Justice Kennedy in his opinion in *Lawrence v. Texas*, 539 U.S. 558, 566-72, 575 (2003) (Kennedy, J., opinion for the Court). See generally Rex D. Glensy, *Which Countries Count?: Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 *Vir. J. Int'l L.* 357 (2005).

Complete discussion of these four styles of judicial interpretation – Formalism, Holmesian, Natural Law, and Instrumentalism – in the context of constitutional decisionmaking generally appears in Charles D. Kelso & R. Randall Kelso, *The Path of Constitutional Law* (2007) (a 1600-page E-Book available from www.vandeplaspublishing.com).