The Impact of International and Comparative Law on the Immigration Regime of the United States

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I. The Constitutional Framework of International and Comparative Law

Within the constitutional system of the United States, the role of international and comparative law in shaping and applying immigration policy, law, and decision-making is always a work in progress. The country’s federalist structure, the common law tradition, and the paucity of express constitutional powers in respect of both immigration and international law have all contributed to a complex interrelationship. Even so, the contours of a distinctive transnational legal framework are clear.

Several factors explain the peculiar characteristics of this framework:

• a strong commitment to the “law of nations” and acceptance of a “universal law of society” in the early years of the republic;

• the transplantation of a tradition of nontextual constitutionalism by the English colonizers;

• the recognition of inherent and implied constitutional powers;

• a dualist tradition of distinguishing international from domestic law, which has required doctrinal pronouncements by the courts on the role of international and comparative law;
the necessity of filling gaps in the common law, particularly during the formative years of
the nineteenth century, by incorporating foreign norms and principles; and
a historic hospitality to immigrants, and protection of them, in a “nation of immigrants.”

Also, the open texture of both the United States Constitution and the common law has
enabled courts to apply “phantom norms” of statutory interpretation, derived more from
reasonable expectations and the perceived nature of things than any positive authority, in order to
avoid the pitfalls and indeterminacy of explicit constitutional interpretation. To paraphrase an
observation of the jurist Oliver Wendell Holmes, Jr., the life of international law in its
application to immigration has not always been logic: it has been experience.

Two important dicta by the United States Supreme Court are cornerstones of the
transnational legal framework that partially structures immigration policy, law and decision-
making. In The Charming Betsy, an admiralty case that the Supreme Court decided over two-
hundred years ago, Chief Justice John Marshall declared that “an act of Congress ought never to
be construed to violate the law if nations of any other possible construction remains.”

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2 It should be noted that the United States version of legal dualism lies somewhere between the
monism of some continental European systems, where international law and domestic law are
fully integrated, and English-British Commonwealth dualism, where all international law must be
specifically implemented by legislation. For example, in the United States, some treaties are
self-executing, the President may enter into “executive agreements” without congressional
approval, and a “later in time” canon determines priority between a rule of international law and
a conflicting Act of Congress. See generally James A.R. Nafziger, Treaties, in THE OXFORD
COMPANION TO AMERICAN LAW 809 (Kermit L. Hall ed. 2002); James A.R. Nafziger, Executive
Agreements, id. at 282.

3 Professor Hiroshi Motomura famously developed this idea in Immigration Law After a Century

4 Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804).

5 6 U.S. (2 Cranch) at 118.
“Charming Betsy doctrine” is now enshrined in the Restatement (Third) of Foreign Relations Law. Anchored in general maritime law, the doctrine has weathered the tempests of armed conflict and post-9/11 initiatives of the Bush-Cheney Administration. Courts have bent over backwards to give effect to the doctrine, even misconstruing the obvious intent of Congress to violate international law in at least one instance. In interpreting federal immigration law so as to comply with the country’s obligations under international refugee law, for example, the Supreme Court established that the *Handbook on Procedures and Criteria for Determining Refugee Status* published by the United Nations High Commission for Refugees “provides sufficient guidance . . . It has been widely considered useful in giving content to the obligations that the [refugee law] establishes.” Although the Court has made it clear that the *Handbook* does not constitute binding authority, its acceptance of the *Handbook* as guidance is important both as an example of the Charming Betsy doctrine in practice and as a recognition, in terms of comparative law, that the *Handbook*, in the Court’s words, is “widely considered useful.”

A second jurisprudential cornerstone of the transnational legal framework is the pronouncement by the Supreme Court over a hundred years ago in *The Paquete Habana* that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of

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7 In *United States v. The Palestine Liberation Organization*, 695 F. Supp. 1456 (1988), a federal district court concluded that Congress could not have intended to legislatively bar the Palestinian Liberation Organization from maintaining an office in New York accessible to the United Nations and protected as such by the terms of the Agreement Regarding the Headquarters of the United Nations, 61 Stat. 3416, T.I.A.S. 1676 (1947). In fact, it is apparent that that was exactly the congressional intent.


justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”

Although the Supremacy Clause of the United States Constitution expressly established that the Constitution, laws of the United States, and “Treaties” alone are the supreme law of the land, the Paquete Habana line of cases confirms the supremacy of general international law as well, including, most importantly, international custom.

On the other hand, the endlessly controversial “plenary powers” doctrine, according to which immigration law and decisions of the political branches of the government are largely immune from judicial and even some administrative review, unquestionably constrains a robust application of international and comparative law by the courts. The scope of this constraint should not be exaggerated, however, insofar as the plenary powers doctrine operates essentially in the context of a separation of powers within the federal government and not in the context of dualist tensions between international and domestic authority. Moreover, significant cracks in the aging doctrine of plenary powers are apparent. For example, the Court has cautioned that plenary powers are “subject to important constitutional limitations [and] considerations of public policy and justice which control, more or less, the conduct of all civilized nations.”

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10 *The Paquete Habana*, 175 U.S. 677, 700 (1900).


II. Treaties

By far the most important immigration-related treaty to which the United States is a party is the 1967 Protocol to the 1951 Convention Relating to the Status of Refugees. The 1951 Convention, which is effectively incorporated into the 1967 Protocol, demonstrably governs the definition and treatment of refugees in the United States even though fourteen years lapsed between ratification of the Protocol and congressional implementation of it. To ensure greater conformity with universal norms, federal determinations of refugee status incorporate country studies and other data prepared by the United Nations High Commissioner for Refugees (UNHCR) and other recognized institutions. The United States also participates actively in UNHCR-coordinated resettlement of overseas refugees (as opposed to asylees). The President normally commits the United States to admit between 50,000 and 80,000 overseas refugees each year.

Still, the margins of appreciation in the 1967 Protocol, as it incorporates the 1951 Convention, vest substantial discretion in the federal government. Thus, on the one hand, immigration authorities and the courts have liberally interpreted the bases of discrimination that are listed in the Convention to support refugee relief. The religious basis for asylum, for example, has been interpreted to include a Moslem woman’s refusal to subscribe to her father’s decision the government unsuccessfully appealed in Zavydas, interpreted international human rights law to prohibit indefinite detention of non-citizens subject to final deportation orders).

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religious-based views on the role of women, and the term “social group” has been interpreted to include, for example, female victims of genital mutilation in tribal Africa. On the other hand, the Supreme Court narrowly interpreted the anti-refoulement rule of the 1951 Convention to permit the Coast Guard, patrolling the high seas, to interdict and return Haitian boat people seeking refuge in the United States. Also, in Bertrand v. Sava, a federal court of appeals held that a non-citizen could not use the 1967 Protocol to challenge a denial of parole because the Protocol was deemed to be non-self-executing within the parameters of constitutional dualism.

The United States is a party to several other migration-related instruments, three of which are noteworthy. The Constitution of the Intergovernmental Committee for Migration requires the United States to cooperate in the law-making and implementing work of that organization. Its projects have ranged from legal and other technical assistance in specific countries to broader efforts that encourage equitable redistribution and resettlement of migrants. The United States is also a party to the United Nations Convention against Torture, which, as implemented by Congress, is intended to serve two immigration-related purposes: It defines as torture victims a class of persons eligible for refugee status, and it protects all refugees from refoulement to countries where they may be subjected to torture. Unfortunately, the Bush-Cheney administration redefined torture for a period of time and also engaged in the rendition of persons

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18 684 F.2d 204 (2d Cir. 1982).


20 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, 14 U.N.T.S. 85.
to countries, not necessarily their countries of origin, where they might face torture and other threats to their life or freedom.

Finally, expanding on the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), establishes basic rights of “everyone” to leave any country and to return to their own country. These rights are subject only to restrictions necessary to protect national security, public order, public health or morals, or the rights and freedoms of others consistent with the other rights recognized in the Covenant. United States immigration law, however, does not give lawful permanent residents (LPRs) an unqualified right to return to the country.

The Covenant’s provision for a right to be free of “arbitrary or unlawful interference with one’s family” has proven to be especially instrumental in immigration cases. For example, in Maria v. McElroy, a federal district court granted a writ of habeas corpus to a non-citizen who had been convicted of an aggravated felony. This writ had the effect of requiring an immigration official to provide a non-citizen with a humanitarian hearing to seek discretionary relief from deportation. The decision was premised in the Charming Betsy doctrine, the ICCPR, and customary international law. Although the court noted that the Covenant was not self-executing, it nevertheless held that “it is an international obligation of the United States and constitutes the law of the land.” In therefore applying the Covenant directly, the court found that a retroactive

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23 ICCPR art. 17.
application of a new law that barred relief from deportation would have arbitrarily interfered with the petitioner’s family life. The court’s interpretation relied primarily on a General Comment of the Human Rights Committee established under the Covenant. The court also cited provisions of the ICCPR that bar “cruel, inhuman or degrading treatment” and protect a non-citizen’s right to “submit the reasons against his expulsion.”

It might be noted, finally, that although the United States is not a party to the Convention on Migrant Workers, which has so far been ratified only by essentially migrant-source countries, it is a party to several instruments that overlap the coverage of that convention, such as the side agreement on labor of the North American Free Trade Agreement and child welfare agreements of the International Labor Organization.

III. Customary International Law

In Maria v. McElroy, the court, relying on the Paquete Habana’s confirmation of international law as “part of the law of the United States,” drew on a variety of international human rights instruments as customary international law in order to reinforce its conclusions.

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27 ICCPR art. 7.

28 Id. art. 13.


under the ICCPR. A constitutional law expert has observed that “using international human
rights law as a guide to the interpretation of statutes is also consistent with a general feature of
the court’s immigration law, which has often sought to resolve cases through statutory
construction.”

Also, for over a hundred years customary international law has influenced the normally
generous admission policies and laws of the United States. Accordingly, the United States has
accepted the general practice of a state’s qualified duty to admit aliens when they pose no serious
danger to its public safety, security, general welfare, or essentially institutions. This qualified
openness to migrants reflects an opinion juris of the global community. Within margins of
appreciation, the United States has never in practice adhered to judicial pronouncements of an
unfettered “sovereign” competence to bar immigration. Even the principal Supreme Court
opinions of the late nineteenth century that supported extravagant claims of “sovereign”
authority to bar all immigration are themselves qualified. For example, the Supreme Court’s
pronouncements in the Chinese Exclusion Case in 1889 and Fong Yue Ting in 1893
conditioned the excludability of Chinese nationals on the threat they were said to pose
collectively to the peace and security of the country.

IV. Comparative Law


32 Nwachukwu Okeke & James A.R. Nafziger, United States Migration Law: Essentials for

33 130 U.S. 581 (see discussion, supra note 14).

34 159 U.S. 698 (1893).
After many years of neglect, courts in the United States are again citing and drawing guidance from foreign law, though only modestly and not without controversy. Although the use of foreign law to guide decision-making was taken for granted in the nineteenth century, a comparative perspective largely disappeared during the positivist ascendancy of the common law during the early decades of the twentieth century. In recent years, however, several important decisions on social issues have referred to foreign authority as guidance. For example, the Court’s ruling in *Roper v. Simmons* that the capital punishment of minors is unconstitutional devoted substantial attention to the overwhelming global consensus against that form of punishment. The Court’s appreciation of the guidance provided by foreign law was strongly endorsed by even a dissenting Justice. Although the Supreme Court has seldom employed foreign authority in its scattered opinions on immigration issues, comparative insights offer a useful, if controversial, basis for resolving issues ranging from the definition of a refugee to the detention of non-citizens.

V. Conclusion

The impact of international and comparative law on the evolution of United States immigration policy, law and decisions has been generally constant but specifically unpredictable. In the country’s constitutional system, the cornerstones of the applicable international legal framework are secure, however.


36 543 U.S. at 604 (O’Connor, J., dissenting on other grounds). To be sure, the comparative perspective provoked strong opposition from another dissenting justice, 543 U.S. at 622 (Scalia, J., dissenting), just the role of comparative law generally in United States jurisprudence remains controversial other than as a technique for ascertaining international custom.