

**JOHN ROBERTS: NATIONALISM, CONSERVATISM, AND THE SHIFTING TRENDS ON THE  
CONTEMPORARY SUPREME COURT**

BY  
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**I. INTRODUCTION**

On September 29, 2005 John Roberts was sworn in as the seventeenth Chief Justice of the United States Supreme Court.<sup>1</sup> While he was selected as the Bush Administration's choice nominee because of his record as a solid conservative,<sup>2</sup> Roberts himself has stated that, as a judge, he adheres to a limited role<sup>3</sup> shaped by judicial restraint.<sup>4</sup> He explained that judges should be "ever mindful that they are insulated from democratic pressures precisely because the framers expected them to be discerning law, not shaping policy," and continued: "[t]hat means that judges should not look to their own personal views or preferences in deciding the cases before them. Their commission is no license to impose their preferences from the bench."<sup>5</sup>

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<sup>1</sup> Charles Babington and Peter Baker, *Roberts Confirmed as 17th Chief Justice*, WASH. POST, Sept. 30, 2005, at A1.

<sup>2</sup> See JEFFREY TOOBIN, *THE NINE* 275–80 (2007).

<sup>3</sup> Roberts famously stated during his confirmation hearings that "[j]udges are like umpires. Umpires don't make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire." *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. On the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, nominee to be Chief Justice of the United States) [hereinafter *Roberts's Confirmation Hearing*].

<sup>4</sup> Black's Law Dictionary defines judicial restraint as "[a] philosophy of judicial decision-making whereby judges avoid indulging their personal beliefs about the public good and instead try merely to interpret the law as legislated and according to precedent." BLACK'S LAW DICTIONARY 864 (8th ed. 2004). In the modern Supreme Court, this philosophy is best exemplified by such Justices as Felix Frankfurter and John Marshall Harlan. See e.g., Jack Wade Nowlin, *The Constitutional Illegitimacy of Expansive Judicial Power: A Populist Structural Interpretive Analysis*, 89 KY. L.J. 387, 394–95 (2001).

<sup>5</sup> Todd S. Purdum, Jodi Wilgoren & Pam Belluck, *Court Nominee's Life is Rooted in Faith and Respect for Law*, N.Y. TIMES, July 21, 2005, available at [http://www.nytimes.com/2005/07/21/politics/21nominee.html?\\_r=1&pagewanted=1](http://www.nytimes.com/2005/07/21/politics/21nominee.html?_r=1&pagewanted=1) (citing to Roberts's

Given his stated philosophy, Roberts was not surprisingly skeptical about the transnational tide in the judiciary,<sup>6</sup> which both endorses a limited use of international law as a tool in interpreting issues arising under the United States Constitution and takes a broader view of the Court's role in developing the norms of a global legal system.<sup>7</sup> Rather, Roberts tends to adhere to a nationalist perspective, which focuses on American autonomy and developing a national system, and tends to defer to the Executive in matters involving foreign affairs.<sup>8</sup> With regard to the transnationalist view that foreign and international law can be an important interpretative tool, Roberts explained that using international law in a legal opinion is akin to picking and choosing from a vast array of precedents in order to justify one's own personal view on a politically-charged legal issue.<sup>9</sup> To the second transnationalist proposition, that U.S. courts have a role in

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testimony during his confirmation hearings for judicial appointment to the D.C. Court of Appeals) [hereinafter *Nominee's Life*].

<sup>6</sup> Transnationalism was first coined in 2004 by current Yale Law School Dean Harold Koh. Quoting former Supreme Court Justice Harry Blackmun, Koh explains that transnationalism is the idea that "U.S. courts must look beyond national interest to the 'mutual interests of all nations in a smoothly functioning international legal regime,' and U.S. courts must 'consider if there is a course that furthers, rather than impedes, the development of an ordered international system.'" Harold Hongju Koh, *The Ninth Annual John W. Hager Lecture, The 2004 Term: The Supreme Court Meets International Law*, 12 TULSA J. COMP. & INT'L L. 6 (2004) (citing *Société Nationale Industrielle Aérospatiale v. U. S. Dist. Ct.*, 482 U.S. 522, 555, 567 (1987) (Blackmun, J., concurring in part)). On the current Supreme Court, the transnationalist wing can be said to include Justices Breyer, Ginsberg, Stevens, Souter, and at times, Justice Kennedy. *Id.* at 6. For more on transnationalism as a judicial philosophy, see Harold Hongju Koh, *Why Transnational Law Matters*, 24 PENN ST. INT'L L. REV. 745 (2006).

<sup>7</sup> See Kohn, *supra* note 6, at 6–7.

<sup>8</sup> Harold Koh details what encompasses the nationalist philosophy. He explains:

Simply speaking, the transnationalists tend to believe in interdependence, the political and economical interdependence of the world economy. By contrast, the nationalists are far more focused on American autonomy. The transnationalists believe that there is something called transnational law, which is a blending of the international and the domestic. Nationalists would rigidly divide domestic and foreign law.

Koh, *supra* note 6, at 6. For more comparisons of nationalism with the transnationalist philosophy, see *supra* note 6 and accompanying text.

<sup>9</sup> *Roberts's Confirmation Hearing*, *supra* note 3, at 201. For a detailed analysis of this "cocktail party" analogy, see Donald J. Kochan, *Sovereignty and the American Courts at the Cocktail Party of International Law: The Dangers of Domestic Judicial Invocations of Foreign and International Law*, 29 FORDHAM INT'L L.J. 507, 509–10 (2006). Kochan explains:

normalizing the international legal system, Roberts has been less explicit on his philosophy. But his record on both the D.C. Circuit Court of Appeals and on the Supreme Court thus far places him squarely within the nationalist framework, which advocates the development of a particular-Americanized legal system.<sup>10</sup>

Roberts's response to questions about the role of international law during his Congressional hearings came at a time when the Supreme Court was criticized for its use of foreign and international law in justifying key decisions involving personal rights and liberties.<sup>11</sup> Cases like *Atkins v. Virginia*,<sup>12</sup> *Lawrence v. Texas*,<sup>13</sup> and *Roper v. Simmons*<sup>14</sup> all provoked widespread criticism.<sup>15</sup> In addition to public criticism from the legal academic community, both the House and the Senate introduced legislation and resolutions that would prohibit the judiciary from relying on laws and policies of foreign states and international organizations.<sup>16</sup> No major action has been taken; however, the proposed legislation remains a sign that the tide may be shifting away from any role for international law in the U.S. judiciary.

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To borrow from Judge Harold Leventhal, the use of international sources in judicial decision-making might be described as "the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." When judges are allowed to cherry-pick from laws around the world to define and interpret their laws at home, activism is emboldened and the rule of law is diminished.

*Id.*

<sup>10</sup> See discussion *supra* at 15–30.

<sup>11</sup> See e.g. David T. Hutt, *Divergent Views on the Use of International and Foreign Law: Congress and the Executive Versus the Court*, 33 OHIO N.U. L. REV. 113 (2007); Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006); Andrew R. Dennington, Note, *We are the World? Justifying the U.S. Supreme Court's Use of Contemporary Foreign Legal Practice in Atkins, Lawrence, and Roper*, 29 B.C. INT'L & COMP. L. REV. 269 (2006); Yitzchok Segal, Comment, *The Death Penalty and the Debate Over the U.S. Supreme Court's Citation of Foreign and International Law*, 33 FORDHAM URB. L.J. 1421 (2006); Lisa Sofio, Note, *Recent Developments in the Debate Concerning the Use of Foreign Law in Constitutional Interpretation*, 20 HASTINGS INT'L & COMP. L. REV. 131 (2006); Stephen Arvin, Comment, *Roper v. Simmons and International Law*, 83 DENV. U. L. REV. 209 (2005).

<sup>12</sup> 536 U.S. 304 (2002).

<sup>13</sup> 539 U.S. 588 (2003).

<sup>14</sup> 543 U.S. 551 (2005).

<sup>15</sup> See *supra* note 6.

<sup>16</sup> H.R. Res. 372, 110th Cong. (2007); American Justice for American Citizens Act, H.R. 1658, 109th Cong. (2005). S. Res. 92, 109th Cong. (2005).

Since being appointed Chief Justice of the Supreme Court, Roberts's perspective on both the role of foreign and international law as a tool in judicial interpretation and on expanding the role of U.S. courts within the global arena has come to light in areas ranging from religious freedoms to treaty interpretation. This paper will examine his self-proclaimed philosophy of judicial restraint, analyze how and to what extent it plays out within the nationalist framework and will posit that under Roberts's leadership, the Roberts Court has departed from the more transnationalist-friendly bench that characterized the latter years of the Rehnquist Court.

## II. THE TRANSNATIONALIST RISE DURING THE REHNQUIST YEARS

### A. *Key Rehnquist Court Decisions*

Before Roberts took over the role of Chief Justice, William Rehnquist, a fellow political conservative, presided over the court. Rehnquist's conservative nature, however, did not necessarily transform the court as a whole into a conservative court.<sup>17</sup> In three key decisions, rather, the court overruled past precedent in limiting the scope of the death penalty and in expanding homosexual due process rights.<sup>18</sup> A collateral consequence of these decisions was strong criticism of the Court's use of foreign and international law in interpreting issues arising under the U.S. Constitution. This use was

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<sup>17</sup> Similarly, when President Nixon appointed Warren Burger to the Supreme Court, he hoped for a conservative revolution that would counteract the liberal advances of the Warren Court. However, the mere fact that Warren Burger was a political conservative did not necessitate a conservative Court. To the contrary, as Jeffrey Toobin explained, "...the Court in some respects became more liberal than ever. It was under Burger that the court approved the use of school busing, expanded free speech well beyond *Sullivan*, forced Nixon himself to turn over the Watergate tapes, and even for a time, ended all executions in the United States." TOOBIN, *supra* note 2, at 12. The Burger Court also decided the highly-controversial *Roe v. Wade*. *Id.*

<sup>18</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005); *Lawrence v. Texas*, 543 U.S. 551 (2005).

particularly problematic because, for as recent as 1997, the Court had admonished such comparative analyses.<sup>19</sup>

Yet in 2002 the Court decided *Atkins v. Virginia*, a case challenging the use of the death penalty for a mentally retarded defendant as “cruel and unusual” under the Eighth Amendment.<sup>20</sup> In taking the case, the Court reconsidered its precedent in *Pendry v. Lynaugh*, which held that the execution of mentally retarded defendants convicted of a capital offense is not categorically prohibited by the Eighth Amendment.<sup>21</sup> Justice Stevens’s opinion for the majority proceeded by analyzing execution of the mentally retarded as measured against “evolving standards of decency that mark the progress of a maturing society.”<sup>22</sup> In so doing, Stevens examined state and federal legislative trends since *Pendry*,<sup>23</sup> the presence or lack thereof of a national consensus,<sup>24</sup> and the policy rationales of retribution and deterrence.<sup>25</sup>

In a passing footnote intending to provide additional justification of a national consensus, Stevens wrote, “[m]oreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved...Although these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a national consensus among those who have addressed the issue.”<sup>26</sup> Although this arguably minor

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<sup>19</sup> *Printz v. U.S.*, 521 U.S. 898, 921 n.11 (1997). To such means, Justice Scalia wrote for the majority that “[w]e think such comparative analysis inappropriate to the task of interpreting a constitution....” *Id.*

<sup>20</sup> *Atkins*, 536 U.S. at 307.

<sup>21</sup> *Pendry v. Lynaugh*, 492 U.S. 302, 340 (1989).

<sup>22</sup> *Atkins*, 536 U.S. at 312. This analytical rubric is taken from *Trop v. Dulles* and is applicable to interpretation of the Eighth Amendment. *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958).

<sup>23</sup> *Atkins*, 536 U.S. at 313.

<sup>24</sup> *Id.* at 316.

<sup>25</sup> *Id.* at 319.

<sup>26</sup> *Id.* at 316 n.21.

sentence couched in a footnote was by no means critical to the outcome of the case, the criticism it provoked foreshadowed the greater controversy that reliance on foreign and international law would eventually bring about. In his characteristically scathing fashion, Scalia wrote in dissent, “[b]ut the Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus’ must go to its appeals (deservedly relegated to a footnote) to...members of the so-called ‘world community’...whose notions of justice are (thankfully) not always those of our people.”<sup>27</sup>

Scalia’s concerns were not wholly unfounded; soon after the Spring 2002 term when *Atkins* was decided, Justice Kennedy authored the majority opinion in both *Lawrence v. Texas* and *Roper v. Simmons*, where citations to foreign and international law were no longer tucked away in footnotes. Like the *Atkins* Court, the Court in *Roper v. Simmons* reconsidered a precedent extending imposition of the death penalty, and found instead that “evolving standards of decency” prohibit the imposition of the death penalty on juvenile offenders who were under eighteen when their crimes were committed.<sup>28</sup> Just as Stevens reasoned in his majority opinion in *Atkins*, Kennedy approached the “evolving standards of decency” standard by looking for a national consensus – the number of states that ban juvenile death penalty, the infrequency with

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<sup>27</sup> *Id.* at 347–48 (Scalia, J., dissenting). Scalia cited to his dissent in *Thompson v. Oklahoma*, where he explained:

[w]e must never forget that it is a Constitution *for the United States of America* that we are expounding...[W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of the Court may think them to be, cannot be imposed upon Americans through the Constitution.

*Thompson v. Oklahoma*, 487 U.S. 815, 868–69 n.4 (1988) (emphasis added).

<sup>28</sup> *Roper*, 543 U.S. at 568. The Court overruled *Stanford v. Kentucky*, which held that the Eighth and Fourteenth Amendments did not prohibit imposition of the death penalty on juvenile offenders over 15 but under 18. 492 U.S. 361, 370–71 (1989). Interestingly, Justice Scalia wrote the majority in both *Stanford* and in *Pendry*; he perhaps then not surprisingly dissents so strongly when both are eventually overruled by the Court.

which those states permitting such execution in fact execute juveniles, and the rate of change in states eliminating the death penalty for juveniles through legislation.<sup>29</sup>

After finding a national consensus based on U.S. traditions and American standards of decency, Kennedy looked to international law as an additional confirmation for the legitimacy and correctness of the Court's holding, cautioning, however, that "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."<sup>30</sup> Perhaps anticipating a strong dissent by Justice Scalia, Kennedy stressed the foremost importance of the American heritage in interpreting the American Constitution. He wrote,

Not the least of the reasons we honor the Constitution, then, is because we know it to be our own. It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.<sup>31</sup>

Notwithstanding Kennedy's caveat, dissent Scalia did, writing that "[t]o invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry."<sup>32</sup>

Completing the triad of decisions criticized so strongly for citation to foreign and international law is *Lawrence v. Texas*.<sup>33</sup> In *Lawrence*, the Court reconsidered its *Bowers v. Hardwick* precedent regarding fundamental liberty rights of homosexuals under the due

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<sup>29</sup> *Roper*, 543 U.S. at 564–68.

<sup>30</sup> *Id.* at 578. Kennedy first looked at Article 37 of the United Nations Convention on the Rights of the Child, a treaty signed by every nation except the United States and Somalia, which strictly prohibits capital punishment for juveniles under 18. *Id.* at 576. He also considered that the United Kingdom abolished juvenile death penalty long ago and found additional confirmation in the fact that only seven countries other than the United States have executed juvenile offenders since 1990. *Id.* at 577.

<sup>31</sup> *Id.* at 578.

<sup>32</sup> *Id.* at 627 (Scalia, J., dissenting).

<sup>33</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

process clause of the Fourteenth Amendment.<sup>34</sup> In reaching its conclusion that there is no fundamental right to engage in a homosexual act, the *Bowers* Court surveyed the laws of the fifty states and considered uniquely American history and traditions.<sup>35</sup> It concluded that "...to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."<sup>36</sup>

Justice Kennedy's opinion for the majority in *Lawrence* took great issue with the *Bowers* Court's analysis of history and traditions; instead, his opinion emphasized the evolution of American traditions over the past century and considered the changing legislative trends among the several states, which have abolished same-sex prohibitions.<sup>37</sup> Noting that both *Planned Parenthood v. Casey*<sup>38</sup> and *Romer v. Evans*<sup>39</sup> have since cast doubt on the rationale and holding in *Bowers*, Kennedy stated that "criticism from other sources is of greater significance."<sup>40</sup> He therefore proceeded briefly to examine other nations that took steps consistent with *Lawrence* in affirming certain fundamental rights of homosexuals.<sup>41</sup> Criticism followed from Scalia. He wrote that "[c]onstitutional

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<sup>34</sup> *Bowers v. Hardwick*, decided in 1986, failed to extend to homosexuals a fundamental right with respect to consensual sexual acts. 478 U.S. 186, 191–2 (1986).

<sup>35</sup> *Id.* at 193–94.

<sup>36</sup> *Id.* Importantly, Chief Justice Burger concurred, explaining:

As the Court notes...the proscriptions against sodomy have very "ancient roots." Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards.

*Id.* at 196 (Burger J., concurring).

<sup>37</sup> *Lawrence*, 539 U.S. at 570–72.

<sup>38</sup> 505 U.S. 833 (1992).

<sup>39</sup> 517 U.S. 620 (1996).

<sup>40</sup> *Lawrence*, 539 U.S. at 573–76.

<sup>41</sup> The majority also responded to Chief Justice Burger's concurrence in *Bowers*, which decried same-sex relations as going against the history of Western civilization and Judeo-Christian moral and ethical standards. While dicta, Kennedy cites to rejection of laws punishing homosexual conduct by the British Parliament and additionally to a decision by the European Court of Human Rights interpreting provisions of the European convention on Human Rights. *Id.* at 572–73 (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981)).



entitlements do not spring into existence...as the Court seems to believe, because *foreign nations* decriminalize conduct.” He added that while the majority’s references are “meaningless dicta” they constitute “[d]angerous dicta, however, since ‘this Court...should not impose foreign moods, fads, or fashions on Americans.’”<sup>42</sup>

### C. Congressional Criticism

As discussed *supra*, Justice Scalia was not the sole dissenter when it came to references to foreign and international law. In addition to the general public and the academic community, the United States Congress took note of the controversy.<sup>43</sup> In less than six weeks after the Court announced its decision in *Roper*, legislation was introduced in the House and a resolution was introduced in the Senate expressing the strong view that the United States Supreme Court should not rely on foreign and international policies and judgments when interpreting U.S. law.<sup>44</sup> Most recently, the House again introduced a similar resolution.<sup>45</sup> Moreover, these responses have not been without support – the most recent House resolution had no less than forty-nine co-

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<sup>42</sup> *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting) (internal citations omitted).

<sup>43</sup> For a sampling of the legal criticisms provoked by *Atkins*, *Lawrence*, and *Roper*, see sources cited *supra* note 6.

<sup>44</sup> American Justice for American Citizens Act, H.R. 1658, 109th Cong. (2005). S. Res. 92, 109th Cong. (2005); see also Tom Curry, *A Flap Over Foreign Matters at the Supreme Court: House Members Protest Use of non-US Rulings in Big Cases*, MSNBC.COM, Mar. 11, 2004, available at <http://www.msnbc.msn.com/id/4506232/>. Bill sponsor Tom Feeny went so far as to say: “To the extent [Supreme Court justices] deliberately ignore Congress’ admonishment, they are no longer engaging in ‘good behavior’ in the meaning of the Constitution and they may subject themselves to the ultimate remedy, which would be impeachment.” *Id.*

<sup>45</sup> H. Res. 372, 110th Cong. (2007) (“Expressing the sense of the House of Representatives that judicial determinations regarding the meaning of the Constitution of the United States should not be based on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution of the United States.”).

sponsors.<sup>46</sup> While neither resolution nor the House bill proceeded out of committee hearings, their presence and support make it clear that there was and continues to be a strong movement against the transnational tide.

### III. JOHN ROBERTS AND HIS JUDICIAL PHILOSOPHY

#### A. *John Roberts – Pre-Supreme Court Years*

John Roberts was born on January 27, 1955 in Buffalo, New York.<sup>47</sup> His father was a steel executive and provided the family with a comfortable lifestyle.<sup>48</sup> Roberts later moved to Indiana, where he attended both public and private schools for his primary education.<sup>49</sup> Even from his earliest years, he stood out for his superior intellectual abilities.<sup>50</sup> After graduating from high school, Roberts attended Harvard College where he graduated *summa cum laude* and was elected a member of Phi Beta Kappa.<sup>51</sup> He remained at Harvard for law school, serving as the managing editor of the *Harvard Law Review* and graduating *magna cum laude*.<sup>52</sup> Of his early perspective on the role of the law, Roberts's constitutional law professor, Laurence H. Tribe said, "[h]e's conservative in manner and conservative in approach...He's a person who is cautious and careful,

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<sup>46</sup> The Library of Congress, available at <http://thomas.loc.gov/cgi-bin/bdquery/D?d110:1:./temp/~bdvh0K:@@PI/bss/d110query.html> (last visited Mar. 26, 2009).

<sup>47</sup> *Nominee's Life*, *supra* note 5.

<sup>48</sup> *Id.*

<sup>49</sup> Letter from Thomas Z. Hayward, Jr., Chair, American Bar Association Committee on Federal Judiciary, to the Honorable Arlen Specter, Chair, Committee on the Judiciary, United States Senate 8 (Sept. 14, 2005) available at <http://www.abanet.org/scfedjud/SCpage/Ratingletter-Roberts.pdf> [hereinafter ABA Letter].

<sup>50</sup> *Nominee's Life*, *supra* note 5.

<sup>51</sup> ABA Letter, *supra* note 49, at 8.

<sup>52</sup> *Id.*

that's true. But he is also someone quite deeply immersed in the law, and he loves it. He believes in it as a discipline and pursues it in principle and not by way of politics."<sup>53</sup>

John Roberts's first legal position following his graduation from Harvard was as a law clerk for Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit, a moderate Republican.<sup>54</sup> Following his clerkship with Judge Friendly, Roberts went on to clerk at the Supreme Court for then Associate Justice William Rehnquist.<sup>55</sup> After completing his clerkship, he stayed in Washington, working for the government as a Special Assistant to Attorney General William French Smith, Associate Counsel to President Reagan, Principal Deputy Solicitor General, and, in private practice, becoming partner at Hogan & Hartson LLP.<sup>56</sup> His practice focused on federal appellate litigation with an emphasis on Supreme Court litigation.<sup>57</sup> He argued in various capacities before the Supreme Court no less than thirty-nine times, in addition to arguing before various courts of appeal.<sup>58</sup>

His reputation as a "brilliant" lawyer led to his 2003 nomination to the U.S. Court of Appeals for the D.C. Circuit.<sup>59</sup> Throughout his time on the appellate bench, he earned "an excellent reputation for integrity and character," "the highest rating for his demeanor, temperament and manner of treating people," and "the highest level of professional

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<sup>53</sup> *Nominee's Life*, *supra* note 5.

<sup>54</sup> *Roberts's Confirmation Hearing*, *supra* note 3, at 70 (John Roberts's Questionnaire). Under Judge Friendly's guidance, Roberts developed his belief that judicial restraint is an essential attribute of a judge. Like Roberts, Judge Friendly also studied at Harvard Law School. There Friendly was taught by Justice Frankfurter, the preeminent advocate of judicial restraint. *Nominee's Life*, *supra* note 5; *see also supra* note 4 and accompanying text.

<sup>55</sup> ABA Letter, *supra* note 49, at 8.

<sup>56</sup> *Roberts's Confirmation Hearing*, *supra* note 3, at 70 (John Roberts's Questionnaire).

<sup>57</sup> *Id.* at 71.

<sup>58</sup> *Id.*

<sup>59</sup> Charles Lane, *John G. Roberts*, WASH. POST, July 2, 2005, at A13. Roberts was previously appointed to the D.C. Circuit by George H. W. Bush in 1991 and by George W. Bush in 2001 but did not receive a Senate confirmation vote. ABA Letter, *supra* note 49, at 4.

competence.”<sup>60</sup> After Sandra Day O’Connor submitted her resignation from the Court on July 1, 2005, Roberts’s professional credentials along with his core conservative values led George W. Bush to nominate him to fill O’Connor’s seat on the bench.<sup>61</sup> However, former Chief Justice Rehnquist passed away on August 29<sup>th</sup>, leaving open two seats on the Supreme Court, including that of Chief Justice.<sup>62</sup> President Bush thereafter announced Roberts’s nomination no longer as an Associate Justice, but for Chief Justice of the Supreme Court.<sup>63</sup> Soon after, he was confirmed both by the Senate Judiciary Committee and by the full Senate and thus assumed the role of the seventeenth Chief Justice of the United States.<sup>64</sup>

### B. *Judicial Philosophy*

Having spent only two years on the D.C. Circuit Court of Appeals and just over three years on the Supreme Court, the full picture of Roberts’s jurisprudence is still being shaped. A study undertaken when Roberts was first nominated to the court in 2005 shows his record as an appellate court judge to be a more conservative record than average, especially in the areas of criminal procedure and civil liberties.<sup>65</sup> With respect to his ideology while on the Supreme Court, he has remained a consistent member of the

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<sup>60</sup> ABA Letter, *supra* note 49 at 6, 7, 12.

<sup>61</sup> See TOOBIN, *supra* note 2, at 277. Toobin cites Roberts’s support for the Bush administration’s use of military tribunals for Guantánamo Bay detainees in the D.C. Circuits opinion in *Hamdan v. Rumsfeld* as solidifying his Supreme Court appointment. *Id.*

<sup>62</sup> *Id.* at 279.

<sup>63</sup> *Id.* at 281.

<sup>64</sup> *Id.*

<sup>65</sup> Kenneth L. Manning, *How Right Is He? A Quantitative Analysis of the Ideology of Judge John G. Roberts*, Paper Presented at the 2005 Annual Meeting of the American Political Science Association (Sept. 1–4, 2005), available at [http://www.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/0/6/6/7/3/p66731\\_index.html#citation](http://www.allacademic.com/meta/p_mla_apa_research_citation/0/6/6/7/3/p66731_index.html#citation).

conservative wing of the Court.<sup>66</sup> Judicially, however, Roberts has at least nominally shied away from political ideology, instead insisting his firm belief in judicial restraint.<sup>67</sup>

For example, during his 2005 confirmation hearings, Roberts responded to a written question from then-Senator Joe Biden on the topic of stare decisis by saying,

[The proper role of a judge in our constitutional system of government] focuses on what I regard as essential judicial humility – the humility to appreciate the limited nature of the judicial office, the humility to be open to the considered views of colleagues on the bench, and the humility to appreciate that judges operate within a system of precedent shaped by other judges over the centuries.<sup>68</sup>

No doubt appreciating the “play it safe” nature of a Congressional confirmation hearing, Roberts described his method of constitutional interpretation as encompassing a similarly limited role, guided first by the text of a statute, next by precedent, and finally, if appropriate, “historical practices and understanding, canons of interpretation, and legislative history.”<sup>69</sup>

Notably, his interpretive scheme lacks any indication of a transnationalist approach. To the contrary, Roberts clearly confirmed his belief in the nationalist

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<sup>66</sup> Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1484, 1493 (2007).

<sup>67</sup> During his confirmation hearings, Roberts explained,

Like most people, I resist labels. I have told people when pressed that I prefer to be known as a modest judge, and to me that means some of the things you talked about in [originalist, a strict constructionist, a fundamentalist, perfectionist, a majoritarian or minimalist]. It means an appreciation that the role of the judge is limited, that a judge is to decide the cases before them, they're not to legislate, they're not to execute the laws.

*Roberts's Confirmation Hearing*, *supra* note 3, at 158. Note, however, that not everyone agrees with Roberts's affirmation that he lacks a political agenda. See David J. Garrow, *The Three Rs: Rosen, Roberts, and Restraint*, 47 WASHBURN L.J. 13, 20 (2007) (“But after the conclusion of OT06, there is no question that Roberts's professed lack of any ideological agenda, like his claim of jurisprudential modesty, is now seriously doubted by at least some – and perhaps as many as four – of his fellow Justices.”).

<sup>68</sup> *Roberts's Confirmation Hearing*, *supra* note 3, at 560 (responses of Judge John G. Roberts, Jr. to the Written Questions of Senator Joseph R. Biden, Jr.).

<sup>69</sup> *Id.* at 570 (responses of Judge John G. Roberts, Jr. to the Written Questions of Senator Dianne Feinstein).

perspective later during his confirmation hearings.<sup>70</sup> To Roberts, the use of foreign and international law as a tool in interpreting the U.S. Constitution, absent interpretation of U.S. treaties or foreign contracts, is misplaced for two reasons.<sup>71</sup> First, a judge who wrote a particular foreign precedent is not accountable to the people in the United States through the Democratic process. Yet the respective foreign judge's decision may influence precedent that binds the American people.<sup>72</sup> Second, while domestic precedent and stare decisis confine the discretion of a judge, reliance on foreign precedent work in the opposite direction, rather, expanding a judge's discretion. According to Roberts, "[i]t allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent -- because they're finding precedent in foreign law -- and use that to determine the meaning of the Constitution."<sup>73</sup>

Within other areas of the nationalist/transnationalist debate, such as the scope of U.S. international obligations under existing treaties and the extent to which U.S. courts and obligations in the greater global arena intersect, Roberts has been less explicit. As a practical matter, this is because the issues involved are likely to (and indeed have) come before the Court. For example, when asked about ratified treaties and the Supremacy Clause, Roberts agreed with the well-settled principle that duly ratified treaties become part of the supreme law of the land.<sup>74</sup> After being probed about the application of a particular treaty, the Geneva Convention, Roberts conceded that nevertheless, issues arise about how the conventions apply to particular parties and non-parties involved in a

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<sup>70</sup> Roberts commented directly on this issue in response to a question from Senator Kyl. *See id.* at 200–01. *See also supra* notes 6–7.

<sup>71</sup> International law necessarily comes into play in interpreting treaties to which the United State is a party and in interpreting foreign contracts, which are governed by the laws of another jurisdiction.

<sup>72</sup> *Roberts's Confirmation Hearing, supra* note 3 at 201.

<sup>73</sup> *Id.*

<sup>74</sup> *Roberts's Confirmation Hearing, supra* note 3 (responses of Judge John. G. Roberts, Jr. to Questions of Senator Dianne Feinstein).

case.<sup>75</sup> However, he declined to comment further since cases involving specific application of the Geneva Convention are frequently litigated.<sup>76</sup> While this line of questioning does not give conclusive evidence about Roberts's stance on the relationship between U.S. law and international obligations, his response certainly leaves open the possibility that judicial interpretation of treaties can limit the scope of underlying U.S. international obligations. Moreover, Roberts's track record on the bench, more than any direct comment on the subject matter, better demonstrates his adherence to the nationalist commitment to develop a particularized American framework of domestic law.<sup>77</sup>

### C. *Record on the D.C. Circuit*

Indeed, Roberts's confirmation hearing testimony was not merely rhetoric. Returning to the nationalist/transnationalist dichotomy, his record confirms his belief that foreign and international law should play an extremely limited role in a judge's interpretive toolbox. In addition, several key decisions illustrate how Roberts tends to look not at mutual interests serving the global community but at the preservation of American legal autonomy.<sup>78</sup> In 2005, Roberts joined the D.C. Circuit Court's opinion in *TMR Energy Ltd. v. State Property Fund of Ukraine*.<sup>79</sup> The case itself involves a complex set of facts and party transactions that essentially boils down to a contract dispute between two foreign parties that went to arbitration.<sup>80</sup> The party awarded damages in the proceeding filed a petition in the United States for confirmation of the

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<sup>75</sup>

*Id.*

<sup>76</sup>

*Id.*

<sup>77</sup>

See discussion *infra* at 15–29.

<sup>78</sup>

See *supra* notes 6–8 and accompanying text.

<sup>79</sup>

411 F.3d 296 (2005). D.C. Circuit Chief Justice Ginsburg wrote the opinion for the majority.

<sup>80</sup>

*Id.* at 298–99.

award.<sup>81</sup> The key issue before the court was personal jurisdiction and whether or not the Ukrainian-owned state property fund (“SPF”) could assert a “minimum contacts” defense to U.S. jurisdiction over the case.<sup>82</sup>

After the Court held that the relevant statute could not be read to allow a foreign entity to assert such a defense,<sup>83</sup> the SPF argued in the alternative that nevertheless, minimum contacts within the forum jurisdiction are required under customary international law.<sup>84</sup> The majority opinion refused to consider the argument, noting that “[c]ustomary international law comes into play only ‘where there is no treaty, and no controlling executive or legislative act or judicial decision.’”<sup>85</sup> It continued to find that “[n]ever does customary international law prevail over a contrary federal statute.”<sup>86</sup> Admittedly, this is a case where even a strong transnationalist most likely would have felt bound by the federal statute. However, the strong tone of the majority indicates an absolute unwillingness to look to overarching customary international law as a resource in addressing the ultimate outcome of a U.S. issue.

More complex, but perhaps more instructive, is the well-known detainee-treatment case *Hamdan v. Rumsfeld*.<sup>87</sup> In this case, Osama Bin Laden’s driver was captured by U.S. troops and brought to Guantánamo Bay.<sup>88</sup> Hamdan was charged with several criminal offenses, determined by a tribunal to have “enemy combatant” status, and scheduled to have a trial before a military commission.<sup>89</sup> He filed a habeas corpus

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<sup>81</sup> *Id.* at 299.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 300.

<sup>84</sup> *Id.* at 302.

<sup>85</sup> *TMR Energy Ltd.*, 411 F.3d at 302(internal citations omitted).

<sup>86</sup> *Id.*

<sup>87</sup> 415 F.3d 33 (D.C. Cir. 2005), *rev'd* 548 U.S. 557 (2006).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 36.



petition and the District Court granted it in part, holding that he could not be tried by a military commission unless a tribunal first determined that he was not a prisoner of war under the Geneva Convention.<sup>90</sup>

In reversing the District Court's judgment, the Court of Appeals held both that Congress authorized the military commission established to try prisoners such as Hamdan and that the Geneva Convention does not provide for judicially enforceable individual rights.<sup>91</sup> The Court of Appeals broadly interpreted alleged Congressional authorization for the military tribunals and narrowly construed the United States' obligations under the Geneva Convention. This analytical approach was in large part the basis for the Supreme Court's 2006 reversal of the Court of Appeal's decision.<sup>92</sup> Justice Stevens's majority opinion first found Congressional authorization for trial by military commission lacking.<sup>93</sup> Rather, the Court held that Congress authorized proceedings in accordance with the Uniform Code of Military Justice, where Article 21 sanctions military tribunals only to the extent that they comply with the laws of war.<sup>94</sup> The majority read "laws of war" broader than the Court of Appeals, and found Common Article 3 of the Geneva Convention to be applicable to U.S. administration of military tribunals.<sup>95</sup> So reasoning, the Court held the military tribunals without power to proceed in so far as they fail to comply with the basic requirements of Common Article 3.<sup>96</sup>

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<sup>90</sup> *Id.* The Court then enjoined the military from conducting any further proceedings. *Id.*

<sup>91</sup> *Id.* at 38–40. In holding that Congress authorized the military commissions, the Court also found that there was no separation of powers issue when the President issued his Military Order of November 2001. *Id.* at 38.

<sup>92</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

<sup>93</sup> *See id.* at 613.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 629.

<sup>96</sup> *Id.* at 635.

The Supreme Court also criticized the Court of Appeal's reliance on a footnote in *Johnson v. Eisentrager*,<sup>97</sup> which "suggest[s] that the Court lack[s] power even to consider the merits of the Geneva Convention argument."<sup>98</sup> Rather Stevens's opinion looked at the overarching legislative scheme of the Geneva Convention and found the *Eisentrager* suggestion to be utterly uncontrolling, if indeed it has any continued validity at all.<sup>99</sup> In effect, it appears that what the Court of Appeals tried to accomplish was to expand Executive Powers to authorize military tribunals. As a legal rational, it did so by focusing not on Congressionally-authorized actions during times of war, but rather on minute details of domestic law, that footnoted suggestion in *Eisentrager* that U.S. courts lack jurisdiction to hear individual claims.<sup>100</sup>

While exceedingly complex, the interplay between the Court of Appeal's decision and that of the Supreme Court illustrates the workings of the transnationalist/nationalist dichotomy and offers a criticism regarding the ultimate limitations of a strict nationalist approach. The opinion joined by Roberts follows a nationalist approach; it seeks to justify executive action by scouring domestic law for relevant precedent.<sup>101</sup> However, by restraining itself from using international law in interpreting domestic obligations, the majority failed to consider the case where Congressional action not only requires a Court to use such law in interpreting a U.S. obligation, but in fact *mandates actual adherence* to

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<sup>97</sup> 339 U.S. 763 (1950).

<sup>98</sup> *Hamdan*, 548 U.S. at 627. The opinion for the D.C. Circuit cited to a footnote in *Eisentrager*, reasoning, "[t]he Supreme Court, speaking through Justice Jackson, wrote in an alternative holding that the Convention was not judicially enforceable: the Convention specifies rights of prisoners of war, but 'responsibility for observance and enforcement of these rights is upon political and military authorities.'" *Hamdan*, 415 F.3d at 39 (quoting *Eisentrager*, 339 U.S. at 789 n.14).

<sup>99</sup> *Hamdan*, 548 U.S. at 627.

<sup>100</sup> While not directly addressing whether or not a prisoner has such a right of action under the Convention, Stevens found for the majority that overriding statutory authorizations require compliance with the minimal protections of Common Article 3 offered to prisoners of "conflict not of an international character." *Hamdan*, 548 U.S. at 631-2.

<sup>101</sup> The relevant precedent referred to here includes, *inter alia*, the President's Military Order, the Authorization of Use of Military Force, passed by Congress in 2001, and *Eisentrager*.

international law. In so reasoning, the opinion for the Court of Appeals failed to consider the most basic transnational principle, which ultimately governs in this case, “consider[ing] if there is a course that furthers, rather than impedes, the development of an ordered international system.”<sup>102</sup> Here, Stevens’s opinion looked at the issue of military tribunals with a broader lens, finding Common Article 3 to be part of “an ordered international system” and applicable to the Executive by means of Congressionally-mandated adherence to the law of war.<sup>103</sup>

#### IV. TRANSFORMATION OF TRANSNATIONALISM UNDER THE ROBERTS COURT

##### A. *A Shifting Court*

Despite the Supreme Court’s reversal in *Hamdan*, in many ways the Roberts Court has cut back on the transnationalist tide that began to surge forward in the latter years of the Rehnquist Court.<sup>104</sup> In some part, this is because the personnel of the Court changed. Roberts replaced Rehnquist – a fellow nationalist.<sup>105</sup> However, Alito replaced O’Connor<sup>106</sup> who, like Kennedy, to a certain extent follows the transnationalist principles.<sup>107</sup> Thus the current Court has a 4–4 split, with the margin left to Kennedy’s swing vote. After all of the criticism directed against Kennedy’s use of foreign and international law in both *Roper* and in *Lawrence*, it is arguable that a combination of this

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<sup>102</sup> See *supra* note 6.

<sup>103</sup> *Hamdan*, 548 U.S. at 635.

<sup>104</sup> Although *Hamdan* is technically a Roberts Court case, the Chief Justice did not participate in the decision since he was a member of the D.C. Court of Appeals at the time that the appellate court heard *Hamdan*’s case. In many ways, though, this case belongs more to the Rehnquist/transnationalist era than to the Roberts Court since it represents fundamental transnational values rather than a cutting back, which typifies many Roberts Court cases.

<sup>105</sup> See *supra* at 1.

<sup>106</sup> TOOBIN, *supra* note 2, at 300.

<sup>107</sup> Koh, *supra* note 6, at 6.

criticism along with more nationalist and conservative influences on the court has led Kennedy now to fall more often with the nationalists.

It is also at least possible that Roberts's pro-nationalist stance along with his influence as Chief Justice may be a contributing factor to the Court's shift. In any case, the analysis of several Roberts Court cases contrasts starkly with the approach taken by the Court in *Atkins*, *Roper*, *Lawrence*, and, to a certain extent, *Hamdan*. Moreover, Chief Justice Roberts himself has often been the driving force behind the majority opinions. The ultimate effect has been to cut back on the use of foreign and international law as an interpretative tool and to solidify the dividing line between domestic law on one hand and international law and U.S. obligations on the other.

#### B. *Case Law Illustration of the Nationalist Shift*

During the Rehnquist years, both *Atkins* and *Roper* involved judicial interpretation of the Eighth Amendment, and both were criticized for citing to foreign and international law as additional evidence of "evolving standards of decency that mark the progress of a maturing society."<sup>108</sup> In 2008, the Roberts Court tackled the Eighth Amendment when it decided the highly-controversial case of *Kennedy v. Louisiana*.<sup>109</sup> Justice Kennedy wrote the majority for the court, holding that the Eighth Amendment prohibits the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the death of the victim.<sup>110</sup> As in *Atkins* and *Roper*, Kennedy analyzed the issue by looking for evidence of a national consensus, changes in direction among the state legislatures regarding the death penalty for child rapists, and any social

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<sup>108</sup> See *supra* note 6.

<sup>109</sup> 128 S.Ct. 2641 (2008).

<sup>110</sup> *Kennedy*, 128 S.Ct. at 2646.

consensus against the death penalty under such circumstances.<sup>111</sup> The majority concluded that “the death penalty is not a proportional punishment for the rape of a child.”<sup>112</sup>

Also like *Atkins* and *Roper*, the effect of the decision is to cut back on the scope of the death penalty.<sup>113</sup> Notably, however, Kennedy’s opinion nowhere looks outside, to foreign or international law, despite an amicus brief filed by Leading British Law Associations, Scholars, Queen’s Counsel and Former Law Lords urging the Court to follow trends in both the United Kingdom and in the international community at large, which counsel against the application of the death penalty for the crime of child rape.<sup>114</sup> In this way, Kennedy’s opinion responds to past criticisms of judicial citation to foreign and international law, and the opinion is decided completely within domestic precedent and the American social framework.<sup>115</sup>

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<sup>111</sup> *Id.* at 2651–58.

<sup>112</sup> *Id.* at 2664.

<sup>113</sup> *Furman v. Georgia* was decided in 1972 and invalidated most state statutes permitting a state to impose the death penalty on a defendant convicted of rape. 408 U.S. 238 (1972). Since *Furman*, only six states have passed legislation authorizing the death penalty for rape of a child. *Kennedy*, 128 S.Ct. at 2651. The Court’s decision in *Kennedy* cuts back on the scope of the death penalty to the extent that it invalidates these six state statutes.

<sup>114</sup> Brief Amici Curiae of Leading British Law Associations, Scholars, Queen’s Counsel and Former Law Lords in Support of Petitioner Patrick Kennedy, *Kennedy v. Louisiana*, 128 S.Ct. 2641 (2008) (No. 07-343). Amici concluded their brief by stating:

The vast majority of the world’s nations have concluded that the death penalty is an excessive punishment for any form of rape that does not result in death. It would be a great disservice to the world community if the United States, long a leader in promoting and advocating human rights, permitted its local governments to expand the death penalty to the crime of child rape.

*Id.*

<sup>115</sup> Roberts joined Justice Alito’s dissent in *Kennedy*. The dissent argues that the majority misinterprets the inference it makes regarding state legislative developments and misinterprets statistics implying a national consensus. *Kennedy*, 128 S.Ct. at 2669. To these ends, during his confirmation hearings, Roberts acknowledged the deep divide on the Court regarding Eighth Amendment jurisprudence. Citing *Coker v. Georgia*, Roberts stated, “[i]t is important in this area, as elsewhere, that a judge be ever mindful of the limited role of the judge: ‘Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices.’” *Roberts’s Confirmation Hearing*, *supra* note 3, at 557 (responses of Judge John G. Roberts, Jr. to the Written Questions of Senator Sam Brownback) (citing *Coker v. Georgia*, 433 U.S. 302 (1989)).

Outside of Eighth Amendment jurisprudence, in 2006, the Court decided *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*.<sup>116</sup> The case involves a religious sect that uses a controlled substance, DMT, in its communion rite.<sup>117</sup> However, because the Controlled Substances Act bars the use of all hallucinogens, including DMT, the government sought to block the sect from engaging in its practice.<sup>118</sup> The sect moved for a preliminary injunction under the Religious Freedom Restoration Action of 1993 (“RFRA”) against the government’s ban.<sup>119</sup> Chief Justice Roberts wrote the opinion for an 8-0 unanimous Court.<sup>120</sup> The rule directly applicable to this case states that “under RFRA, the Federal Government may not, as a statutory matter, substantially burden a person’s exercise of religion ‘even if the burden results from a rule of general applicability.’”<sup>121</sup> This is the case unless the government can demonstrate that the application of the burden is “in furtherance of a compelling governmental interest” and is “the least restrictive means of furthering that interest.”<sup>122</sup>

Of particular interest here, the government argued, *inter alia*, that it has a compelling interest in upholding its international obligations by complying with the 1971 United Nations Convention on Psychotropic Substances, which calls on signatory nations to prohibit the use of hallucinogens such as DMT.<sup>123</sup> The Court held that a general interest in complying with international law and in maintaining a leadership role in the

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<sup>116</sup> 546 U.S. 418 (2006).

<sup>117</sup> *O Centro Espirita*, 546 U.S. at 423.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 422. Justice Alito had not yet been confirmed as the ninth member of the Court when *O Centro Espirita* was decided.

<sup>121</sup> *Id.* at 424.

<sup>122</sup> *Id.*

<sup>123</sup> *O Centro Espirita*, 546 U.S. at 437. The government also argued that at the preliminary injunction level, the plaintiff bears the burden of proof of demonstrating a likelihood of success on the merits, and that here, the plaintiff failed to meet that burden. *Id.* at 428. It additionally argued that uniform application of the Controlled Substance Act requires it to find no exception to DMT to accommodate the plaintiff’s religious sect. *Id.* at 430.

international war on drugs is not enough to demonstrate a compelling interest.<sup>124</sup> In so much that the facts and circumstances led even the transnationalist wing of the Court to find compliance with international law alone insufficient to meet the “compelling interest” standard required by the government under RFRA, this case is similar to the argument involving international law rejected by the D.C. Court in *TMR Energy*. What is left up to speculation after the addition of Roberts and Alito to the bench, however, is the outcome of a case where the government could put forth facts arguably evidencing a compelling interest based on international justifications.

Finally, the shift toward the nationalist framework has become obvious in a pair of cases involving judicial interpretation of the Vienna Convention, where the Court has failed to find existing international obligations sufficient to overcome federalism issues involving state criminal procedure laws. These cases, authored by Chief Justice Roberts, declined to find binding U.S. international obligations even though the obligations arose under a longstanding treaty. Thus in this area, the Roberts Court as a whole has effectuated major cutbacks in the rights of foreign detainees.

In 2006, the Court decided *Sanchez-Llamas v. Oregon*.<sup>125</sup> Involved was a consolidation of two cases where a Mexican national and Honduran national were not given consular notification upon their arrests, as required by the Vienna Convention on Consular Relations (“VCCR” or “Vienna Convention” or “the Convention”).<sup>126</sup>

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<sup>124</sup> *Id.* at 438. Here, the government put forth no evidence, save two affidavits from the State Department stating the importance of following international obligations. *Id.*

<sup>125</sup> 548 U.S. 331 (2006).

<sup>126</sup> *Sanchez-Llamas*, 548 U.S. at 337. Under the treaty, signatory nations are required to inform foreign national detainees of their right to inform their own consulate of their detention. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 101 T.I.A.S. No. 6820, 596 U.N.T.S. 261. The relevant sections, sections (1) (b) and (c) of Article 36, provide that:

Petitioner Sanchez-Llamas was arrested after a shooting with the police and was subsequently interrogated without first receiving his consular notification rights.<sup>127</sup> At trial, he argued that statements taken during his interrogation should be suppressed under the exclusionary rule as a remedy for the state's violation of the Vienna Convention.<sup>128</sup> The Oregon Supreme Court affirmed his conviction, holding in part that the Vienna Convention does not create judicially enforceable rights.<sup>129</sup> In the second case, Petitioner Bustillo was convicted of murder.<sup>130</sup> He later filed a habeas corpus petition and argued that if he had been advised of his right to consular notification, he would have exercised it and as a result, the Honduran consulate would have been able to assist him in finding a key suspect who fled to Honduras the day after the murder in question.<sup>131</sup> The state court found that this claim was procedurally defaulted since Bustillo did not first raise the issue at trial or on appeal.<sup>132</sup>

Roberts's opinion for the majority upheld both state court decisions.<sup>133</sup> In limiting the scope of the Vienna Convention's application to domestic law, Roberts stated, "[a]lthough these cases involve the delicate question of the application of an international treaty, the issues in many ways turn on established principles of domestic

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(b) if [a detained person] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay.

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation....

*Id.*

<sup>127</sup> *Sanchez-Llamas*, 548 U.S. at 339–40.

<sup>128</sup> *Id.* at 340.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 341.

<sup>132</sup> *Id.*

<sup>133</sup> *Sanchez-Llamas*, 548 U.S. at 337.



law.”<sup>134</sup> In Sanchez-Llamas’s case, Roberts looked to the treaty itself to first determine whether or not the court had any authority to create a judicial remedy.<sup>135</sup> Using principles of treaty interpretation,<sup>136</sup> Roberts looked to the intent of other signatory nations and found that the Convention cannot possibly be read to require suppression since the exclusionary rule is rejected in many of the countries that signed the Vienna Convention.<sup>137</sup> Showing judicial restraint, Roberts reasoned that “...where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own.”<sup>138</sup>

Roberts’s treatment of Bastillo’s procedural default claim highlights other aspects of his nationalist philosophy. To these ends, petitioner argued that notwithstanding a contrary U.S. precedent in *Breard v. Greene*,<sup>139</sup> a decision by the International Court of Justice (“ICJ”) interpreted U.S. procedural default rules to fall outside the requirements and protections of Article 36.<sup>140</sup> However, Roberts held that “[a]lthough the ICJ’s interpretation deserves ‘respectful consideration,’ we conclude that it does not compel us to reconsider our understanding of the Convention in *Breard*.”<sup>141</sup> Thus despite claims that the U.S. is either bound by decisions of the ICJ or that the U.S. has, in the past,

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<sup>134</sup> *Id.* at 360.

<sup>135</sup> *Id.* at 346.

<sup>136</sup> *See id.* at 346 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 325(1) (1986) (“An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.”)).

<sup>137</sup> *Id.* at 344.

<sup>138</sup> *Id.* at 347.

<sup>139</sup> 523 U.S. 371 (1998) (*per curiam*).

<sup>140</sup> *Sanchez-Llamas*, 548 U.S. at 352.

<sup>141</sup> *Id.* at 353.

extensively looked to ICJ decisions for guidance,<sup>142</sup> Roberts decided *Sanchez-Llamas* purely under “established principles of domestic law.”<sup>143</sup>

Roberts continued to expand on Supreme Court jurisprudence interpreting U.S. obligations under the Vienna Convention in *Medellín v. Texas*.<sup>144</sup> While the facts and procedural posture of the case are exceedingly complex, the key issue again turned on the petitioner’s claim that the state first violated his consular notification rights.<sup>145</sup> What distinguished *Medellín*’s case from those factual circumstances arising in *Sanchez-Llamas* was a decision by the ICJ and a memorandum issued by President George W. Bush.

In a case brought by Mexico against the United States, the ICJ concluded that the U.S. had violated its obligations under Article 36 of the VCCR by failing to notify certain Mexican nationals, named in the case, of their consular rights.<sup>146</sup> To remedy this breach of the convention, the ICJ further held that the U.S. must provide each named Mexican national with “review and reconsideration” to determine if he or she had been biased by a

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<sup>142</sup> *Id.* Justice Roberts makes reference to the vast litany of cases cited in Justice Breyer’s dissent, finding, however, that it is “less impressive” than it seems at first glance. *Id.* at note 5.

<sup>143</sup> *See id.* at 360; *see also supra* at note 129. Professor Melissa A. Waters has argued that in *Sanchez-Llamas*, Justice Roberts has shifted the transnational approach in a nationalistic way. Melissa A. Waters, *Treaty Dialogue in Sanchez-Llamas: Is Chief Justice Roberts a Transnationalist, After All?*, 11 LEWIS & CLARK L. REV. 89 (2007). She explained:

First, he took part in a very “direct” kind of dialogue with the International Court of Justice (ICJ) itself, considering and responding to a prior ICJ ruling on the issue of procedural default. Second, and less obviously, Roberts engaged in a kind of “indirect” dialogue with foreign courts and legal systems around the world in considering whether suppression of evidence was a required remedy for Vienna Convention violations.

*Id.* at 91. She went on to explain that in a conservative alternative view to treaty dialogue cites “...uniformity in treaty interpretation is an important goal.” She continued to explain, “[t]hus judicial dialogue with our treaty partners is not only permissible, but actually encouraged, precisely because it promotes uniformity in treaty interpretation...” *Id.* at 92.

<sup>144</sup> 128 S.Ct. 1346 (2008); *see also supra* note 123. For more on *Medellín* and its implications see Alicia J. Surdyk, *The Remedy Not Granted: Why the Medellín Court Erred by not Recalling its Mandate* (Dec. 2008) (unpublished comment, on file with the author).

<sup>145</sup> *Medellín*, 128 S.Ct. at 1354–55.

<sup>146</sup> Case Concerning *Avena and Other Mexican Nationals* (Mexico v. United States), 2004 I.C.J. 12, 71 (Mar. 31) [hereinafter “*Avena*”].

lack of consular assistance.<sup>147</sup> Moreover, President George W. Bush issued a written memorandum to the Attorney General determining that state courts must provide the review and reconsideration required by the *Avena* decision, notwithstanding any state procedural rules that may otherwise bar such a review.<sup>148</sup>

Medellín filed a habeas corpus petition relying on the President's Memorandum and the ICJ's decision in *Avena*.<sup>149</sup> The U.S. Supreme Court granted certiorari on two questions: whether the ICJ's *Avena* judgment is law directly enforceable on state courts and whether President Bush's memorandum superseded state procedural default rules in independently requiring review and reconsideration of the claims of those 51 Mexican nationals named in the *Avena* decision.<sup>150</sup>

Chief Justice Roberts held for the majority that although the *Avena* decision constitutes an *international* obligation of the United States, it does not alone become binding *domestic* law on state courts that preempts state procedural rules.<sup>151</sup>

Furthermore, the majority found that the VCCR was not self-executing – rather Congress

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<sup>147</sup> *Id.* at 23. The ICJ rejected Mexico's request that for each named national, his respective conviction and death sentence be vacated in favor of "review and reconsideration" by the U.S. courts. *Id.*

<sup>148</sup> Press Release, George W. Bush, Memorandum for the Attorney General, <http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html>. The memorandum stated in full:

The United States is a party to the Vienna Convention on Consular Relations (the "Convention") and the Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol), which gives the International Court of Justice (ICJ) jurisdiction to decide disputes concerning the "interpretation and application" of the Convention.

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its inter-national obligations under the decision of the International Court of Justice in the Case Concerning *Avena* and Other Mexican Nationals (*Mexico v. United States of America*) (*Avena*), 2004 ICJ 128 (Mar. 31), by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.

*Id.*

<sup>149</sup> *Medellín*, 128 S.Ct. at 1356.

<sup>150</sup> *Id.* at 1346, 1353 (order granting certiorari at 127 S.Ct. 2129 (2007) (mem.) (No. 06-984)).

<sup>151</sup> *Id.* at 1367. "In sum, while the ICJ's judgment in *Avena* creates an international obligation on the part of the United States, it does not of its own force constitute binding federal law that pre-empts state restrictions on the filing of successive habeas petitions." *Id.*

would need to act to implement the treaty.<sup>152</sup> Using Justice Jackson's tripartite framework,<sup>153</sup> Chief Justice Roberts also held for the majority that the President's Memorandum alone could not go so far as to "unilaterally execute a non-self-executing treaty by giving it domestic effect."<sup>154</sup> That is, without stronger Congressional acquiescence or legislative action, the Executive was without power to make a non-self-executing treaty binding law on the states.<sup>155</sup>

Like *Sanchez-Llamas*, Roberts's majority opinion in *Medellín* falls somewhere within a modified nationalist framework. In so much as it decides the case within a particularized American system despite contrary decisions by the ICJ, Roberts adheres to a strict nationalistic conceptualization of the role of the Court.<sup>156</sup> In addition, while not without a strong argument from the dissent,<sup>157</sup> Roberts reads the VCCR narrowly to find that it is not self-executing.<sup>158</sup> Thus one could argue that both a strict interpretation of the treaty and judicial restraint led Roberts to minimize the effect of international obligations on the part of the U.S. However, it is of note to mention that under the traditionalist nationalist framework, the general philosophy would find a judge more likely to defer to

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<sup>152</sup> *Id.* at 1368–9.

<sup>153</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952). First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." Secondly, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." And finally, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.*

<sup>154</sup> *Id.* at 1371.

<sup>155</sup> *Medellín*, 128 S.Ct. at 1368.

<sup>156</sup> *See supra* note 6.

<sup>157</sup> Justice Breyer passionately dissented in the case. *Medellín*, 129 S.Ct. at 1381–82 (Breyer J., dissenting) ("In a word, for present purposes, the absence or presence of language in a treaty about a provision's self-execution proves nothing at all. At best the Court is hunting the snark. At worst it erects legalistic hurdles that can threaten the application of provisions in many existing commercial and other treaties and make it more difficult to negotiate new ones.").

<sup>158</sup> *Id.* at 1368–9.

the Executive, especially in matters involving foreign affairs.<sup>159</sup> Here, however, the majority used *Youngstown* to restrict, rather than to expand, the President's executive powers.<sup>160</sup>

## V. CONCLUSION

Whatever can be said of the early years of the Roberts Court as a general matter, these key decisions show that the transnational years of *Atkins*, *Roper*, and *Lawrence* have, at least for now, passed. What remains up for great speculation is the relationship that the Court will have with President Barack Obama's new administration and its more global-friendly foreign policy. Moreover, despite the shift in the Court, the transnationalist wing has not conceded its philosophy. Most recently, Ruth Bader Ginsberg renewed her defense of foreign law citations. In a speech given during a symposium at the Ohio State University's Moritz College of Law she stated, "There is perhaps a misunderstanding that when you refer to a decision of [foreign courts] that you are using those as binding precedent... Why shouldn't we look to the wisdom of a judge from abroad with at least as much ease as we would read a law review article from a professor?"<sup>161</sup> Similarly in the transnationalist spotlight have been the Scalia/Breyer debate and certain remarks by former Associate Justice Sandra Day O'Connor.<sup>162</sup> Yet for

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<sup>159</sup> See *supra* note 6.

<sup>160</sup> This is notable especially because the conservative wing of the Court came out against the conservative President. One may argue that this shows extreme judicial restraint. However, one may posit somewhat cynically that Roberts's majority opinion here used "judicial restraint" as a means to come to a more politically-conservative end, since President Bush's memo was a departure from the administration's traditional conservative stance on foreign policy.

<sup>161</sup> Joe Murray, *Ginsberg Renews Defense of Foreign Law Citations*, THE BULLETIN, Apr. 13, 2009, available at

[http://thebulletin.us/articles/2009/04/13/top\\_stories/bullet\\_points/doc49e2d03384018737542843.txt](http://thebulletin.us/articles/2009/04/13/top_stories/bullet_points/doc49e2d03384018737542843.txt).

<sup>162</sup> Justices Scalia and Breyer debated Constitutional issues in Washington D.C. Jan Crawford Greenburg, *Justices Scalia and Breyer: Little in Common, Much to Debate*, ABC NEWS, Dec. 6, 2006,

now, it is Roberts and the Roberts Court's majority that "call the balls and strikes" of the transnational/national debate.<sup>163</sup>

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*available at* <http://abcnews.go.com/Politics/story?id=2704898&page=1>. Justice O'Connor gave her remarks at the Southern Center for International Studies. Sandra Day O'Connor, Former Associate Justice of the United States Supreme Court, Remarks at the Southern Center for International Studies (Oct. 28, 2003), *available at* [http://www.southerncenter.org/OConnor\\_transcript.pdf](http://www.southerncenter.org/OConnor_transcript.pdf). She explained:

I suspect that with time, we will rely increasingly on international and foreign law in resolving what now appear to be domestic issues, as we both appreciate more fully the ways in which domestic issues have international dimension, and recognize the rich resources available to us in the decisions of foreign courts. *Id.*

<sup>163</sup>

*See supra* note 3.