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The Justices at Home Abroad

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The overarching theme of the Supreme Court's decisions of the 2003–2004 term is jurisdiction—the allocation of decision-making authority and, in particular, the power of the federal courts to decide conflicts between the laws of competing sovereigns. From superintending a cultural war (which the Court itself helped to bring about), the justices have moved on to superintending U.S. foreign relations and an actual war.

Rights and Jurisdiction

The Supreme Court in its 2003–2004 term took a break from its familiar project of supervising race relations and sexual practices in the name of constitutional rights. With one arguable exception (*Ashcroft v. ACLU*, where a 5 to 4 majority remanded a constitutional challenge to a federal internet porn statute for yet another trial), the justices refrained from coining new rights. They actually curtailed First Amendment rights in two cases: *Locke v. Davey*, where the Court sustained a state exclusion of religious students from a state-funded scholarship program; and *McConnell v. Federal Election Commission*, where it upheld federal campaign finance restrictions. Taken together, the three cases consolidate the Court's settled doctrine that the First Amendment protects sexual freedom above all: the government may aggressively regulate political speech and religious association but do little or nothing to regulate kiddie porn.

The dominant theme of the 2003–2004 term was the question of who gets to decide what, under whose law. These jurisdictional cases range from the momentous to the arcane, from the "terror trifecta" to the question of whether a litigating party's post-filing change in citizenship can cure a lack of subject-matter jurisdiction at the time of filing. (The fact that this last case, *Grupo Dataflux v. Atlas Global Group*, was taken up at all, and then produced a 5 to 4 division, suggests that the Court's renewed preoccupation with jurisdictional issues is to some extent a deliberate choice, rather than a result of the ebb and flow of certiorari petitions.) The cases involve civil law and criminal law; domestic and, to an unprecedented extent, international questions—the conduct of U.S. wars and foreign relations and the interplay between American, foreign, and international law.

All federal nations (but not all unitary nations) have an independent Supreme Court because the coexistence of (partially) autonomous sovereigns demands a body with the authority to decide what belongs to whom. In that sense, the shift from inventing rights to ascertaining jurisdiction marks a welcome return to the Supreme Court's essential business. Alas, the justices are re-entering these more traditional, and suddenly turbulent, waters in the condition they acquired on their individual rights voyages: vacation-brained and having lost their constitutional rudder.

Domestic Disputes

In *Elk Grove Unified School District v. Newdow*, a 5 to 3 majority (with Justice Scalia not participating)

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held that Mr. Newdow, father of a California school child, had no standing to challenge his daughter's exposure to the recitation of the Pledge of Allegiance—including its suspicious "under God" language—in the Elk Grove public schools. "Standing" is a jurisdictional doctrine: it is supposed to distinguish legal "cases and controversies," which the Supreme Court may and must entertain under the Constitution, from non-justiciable quarrels in legal drag. The Supreme Court dismissed Newdow's case because there were some questions about the scope of the plaintiff's custody rights under California law, and the child's mother perceived no harm to her daughter's exposure to patriotic fare; the Court did not wish to decide a weighty constitutional issue when "standing to sue is founded on family law rights that are in dispute."

As Chief Justice Rehnquist observed in dissent, the Supreme Court had never found a lack of standing on remotely comparable grounds. Nor will it ever cite *Newdow* as a precedent, least of all in an establishment of religion case: any malcontent who strolls past a crèche on public property during Sparkling Season will continue to have standing. The *Newdow* majority merely invented a jurisdictional argument to evade the logic of its Establishment cases, which would have compelled an unpopular—to most ordinary folks, astounding—finding that the Pledge of Allegiance is unconstitutional.

For confirmation, look no farther than *Hibbs v. Winn*, one of the term's four decisions on the federal courts' authority to allocate powers between states and the federal government. (The states lost all four cases, suggesting that the Court may have tired of the federalism theme.)[1] *Hibbs* asked whether the federal Tax Injunction Act, which bars federal courts from restraining "the assessment, levy or collection of any tax under State law," precludes a taxpayer's federal lawsuit over a state's tax *exemption*. Arizona granted an exemption of up to $500 to taxpayers who contribute money to private "school tuition organizations," which in turn grant scholarships to students enrolled in private schools, most of them parochial. Some Arizona taxpayers challenged this school choice scheme as an "establishment" of religion. After the Arizona Supreme Court rejected that challenge, the plaintiffs turned to the federal courts.

Why may taxpayers who contest state exemptions for other taxpayers—and whose own tax liabilities will remain unaffected by the outcome of their lawsuit—invoke the federal courts' authority, even while Mr. Newdow may not? Never mind. Without remarking on the standing issue, the Supreme Court interpreted the Tax Injunction Act, which plainly forbids federal courts from meddling with state tax assessments. But, Justice Ginsburg declared, the point of that injunction is to avert federal interference with state efforts to collect *more* revenue. Here, Arizona defends a tax exemption with a revenue-*depleting* effect, and so the act does not apply! To justify that presumed-purpose-against-plain-text reading, Justice Ginsburg waved the bloody shirt of *Brown v. Board*. In the aftermath of *Brown*, states granted tax exemptions for private "segregation academies," which the federal courts then dismantled. To be sure, the Tax Injunction Act was not adjudicated in those cases. But *if* it had it been at issue, and *if* the federal courts had declined jurisdiction and left the matter to state courts, then—why, we cannot even think of it.

To put this non sequitur in perspective, recall Justice Ginsburg's opinion in *Bush v. Gore*, which castigated the chief justice for an undue distrust of the Florida Supreme Court (which had amply earned it). Yes, she conceded, state judges had proven recalcitrant during the civil rights era, and federal courts were justified in overriding the state courts' interpretation of state laws. But that was then. Generally, federal courts should respect state courts as equal partners in a cooperative legal venture—except, it now transpires, on matters of school choice.

The defining moment of the term came when Mr. Newdow, to the ACLU crowd's horror, insisted on representing himself in the Supreme Court. The professional wall-of-separationists' fear was misplaced, both because Newdow proved an able constitutional advocate and because it no longer matters. Constitutional law is like *LA Law*, where a sentiment beats an argument any day of the week. Descending from the stratosphere of rights into the mundane world of jurisdiction, one hopes to find some rules, some rigor, some responsibility, some *law*. What one finds instead is what Newdow found: legal technicalities in the service of political agendas.

Will the Court, in an era of globalization and international conflict, display the same attitude in that broader theater? It has done so already.

Antitrust[2]

In two important cases, the Supreme Court addressed some of the messy jurisdictional problems in international antitrust disputes. Unfortunately, only one of the justices—Stephen Breyer—took a sensible and coherent view of the matter.

F. Hoffman-LaRoche v. Empagran construed the misnamed Foreign Trade Antitrust Improvements Act. Enacted in 1982 during a fit of industrial-policy enthusiasm and anti-Japan hysteria, the act legalizes U.S. export cartels—price agreements and output restrictions that would earn their practitioners ten years in Leavenworth if targeted at American consumers. The act, however, denies the exemption to conspiracies that have a "direct, substantial, and reasonably foreseeable effect" on American consumers. *Empagran* asked whether foreign parties could sue in U.S. courts for harms suffered in foreign countries, so long as the defendants had arguably committed parallel antitrust violations against other, nonlitigating parties within the United States.

Speaking for a unanimous Supreme Court, Justice Breyer answered that question—which had split the circuits—in the negative. Opening the U.S. courts to these sorts of disputes, Breyer reasoned, would turn them into havens for litigating other countries' problems. Enterprising American judges could exacerbate international tensions by condemning practices that foreign countries have decided to tolerate, or even promote. Breyer referred to highly persuasive amicus briefs by Canada, Japan, and Germany, which insisted that their efforts to combat international cartels—by offering leniency to corporate "turncoats" who report hard-to-detect cartel arrangements—would be compromised if the volunteers were to face lawsuits in the United States.

Empagran's basic message is clear: let foreign countries take care of their antitrust problems, and we shall take care of ours. International mega-mergers and other global transactions will often present vexing conflicts, and many hard cases lack a clean jurisdictional solution. Precisely *because* that is so, we should compartmentalize antitrust enforcement along national lines whenever possible.

It took the justices only one week to muddy that salutary message. In *Intel Corp. v. Advanced Micro Devices*, the Court construed a federal comity provision that allows U.S. courts to order, at the request of "any interested party," the production of documents "for use in a foreign or international tribunal." Here, the "tribunal" was the European Commission (EC), where AMD (a U.S. company) had complained that Intel (another U.S. company) had committed various antitrust violations, including loyalty discounts and price discrimination. AMD then turned to American courts to compel the disclosure of documents that would be discoverable *neither in a U.S. antitrust proceeding nor in Europe, under the EC's procedures*. Cherry-picking legal doctrines here and there, AMD cobbled together an antitrust case that no individual jurisdiction in the world would permit.

The EC, in an amicus brief, insisted that it does not constitute a "tribunal" at all but rather a prosecutorial body. Even a literal-minded justice could have deflected the dispute by accepting that contention, as it matches the dictionary definition of a tribunal as a "judicial body." That approach would have avoided a collision with the EC, which insisted that the "assistance" of U.S. courts would gravely compromise its policies, including its leniency program. Unfortunately, Justice Ginsburg's majority opinion in *Intel* roundly rejected these protestations. The commission, Ginsburg averred, had simply mischaracterized its institutional status. And the EC's fears of interference could be met by U.S. district courts using their discretion on a case-by-case basis to trim discovery requests that are designed to circumvent the procedures of foreign jurisdictions.

It takes willful blindness to ignore the enormous potential for abuse here. Why, Justice Breyer asked in his powerful *Intel* dissent, should we invite international friction by providing "assistance" to foreign authorities *over their objections*? We should adopt a per se rule against discovery requests that exceed the parties' procedural rights under foreign law and, in analogous circumstances, under U.S. law. That argument precisely tracks the principle of *Empagran*: just as U.S. courts should refrain from needlessly adjudicating the world's antitrust disputes, so the European Commission should not have to entertain international litigants who peddle the harvest of U.S. discovery expeditions in Brussels.

Yet no other justice joined Breyer's *Intel* dissent. Why then did those justices follow his lead in *Empagran*? (Justice O'Connor did not participate in either case.) One likely explanation is that *Empagran* may not have decided very much. The bar to U.S. court jurisdiction applies only when the foreign injury is "independent"—that is, unconnected to the domestic (U.S.) effects of the allegedly unlawful conduct. Lower courts must now decide, in case after case, what counts as an "independent" injury. Since multinational corporate transactions and their effects cannot be easily broken into "domestic" and "foreign" components, *Empagran*'s promise of comity and compartmentalization may prove nearly empty.

The Terror Trifecta

In three cases, the Supreme Court dealt with the scope of executive power in the war against terror and, more

specifically, with the federal courts' principal instrument to check executive power—their habeas corpus jurisdiction.

The federal habeas statute provides that federal district courts shall entertain habeas petitions "within their respective jurisdictions." In *Rumsfeld v. Padilla*, a 5 to 4 majority (conservatives versus liberals) held that Padilla, a U.S. citizen held as an enemy combatant on a Navy brig in South Carolina, had to file his habeas petition in that district (rather than the Southern District of New York, where the U.S. government temporarily held him as a material witness for September 11). In *Rasul v. Bush*, the Court dealt with the habeas rights of foreigners held in U.S. custody but outside U.S. territory at Guantanamo Bay. The U.S. Department of Justice argued that this precise question had been decided in the 1950 *Johnson v. Eisentrager* case, where the Court ruled that German war criminals held in a U.S. prison in Landsberg, Germany, could not avail themselves of the federal courts' habeas jurisdiction. The Supreme Court, however, with Justice Stevens writing for a 6 to 3 majority, allowed the Guantanamo detainees to file a habeas petition in some federal court. What court exactly, Justice Stevens did not say. Nor did he bother to explain whether *Eisentrager* has been distinguished or overruled.

Padilla and *Rasul*, decided on the same day, illustrate the Court's willingness to embrace inconsistency. Under *Rasul*, *any* federal court may entertain habeas petitions by foreigners from areas outside the jurisdiction of any ordinary U.S. court. Under *Padilla*, federal courts *lack* jurisdiction over habeas petitions by U.S. citizens, on U.S. territory, when those petitions could and should have been filed in some other district that plainly did have jurisdiction. Alien detainees can forum-shop, whereas U.S. citizens cannot.

The third terror case, *Hamdi v. Rumsfeld*, was brought by another U.S. citizen held as an enemy combatant on the same Navy brig as Padilla. The U.S. government insisted that the president possesses inherent executive authority to designate and detain enemy combatants and that Congress had in any event authorized the detention. The question was whether Hamdi may invoke habeas jurisdiction to contest his designation as an enemy combatant and if so, on what terms.

The case produced a curious division of opinions. Justice Thomas agreed with the government. Justice Scalia, joined by Justice Stevens, argued that under the Constitution, the government either had to release Hamdi and indict him in a regular court or else, suspend habeas corpus. Justices Souter and Ginsburg thought that the Congress had not in fact authorized Hamdi's executive detention, and they would have ordered his release on those grounds. Justice O'Connor, joined by Chief Justice Rehnquist and by Justices Kennedy and Breyer, argued that Hamdi deserved access to a lawyer and some kind of neutral hearing on his status, though not the full machinery of our ordinary courts.

What, pray tell, is the holding of the Court in *Hamdi*? The plurality and Justice Thomas agreed that we are indeed at war and, moreover, that the government may detain enemy combatants, including U.S. citizens, so long as they get a hearing that reassures the justices. But do the plurality opinion and Justice Thomas's *dissent* add up to a common holding? Or is it that with four votes for springing Hamdi and four votes for giving him a due process–ish hearing, he should have received neither and remained on his brig? Perhaps to avoid that bizarre result, Souter and Ginsburg agreed to give Hamdi the plurality's due process, even while insisting on more. The precise contours of the remedy are not described in *Hamdi*.

Brother, Can You Paradigm?

The plaintiff-respondent in *Sosa v. Alvarez-Machain* was a Mexican doctor suspected of aiding in the torture of an officer of the U.S. Drug Enforcement Agency. With the assistance of Mexican nationals (including Sosa), the Drug Enforcement Agency seized Alvarez in Mexico and transported him to the United States for indictment. Following a dismissal of the case and his return to Mexico, Alvarez sued the United States government and various others under the Federal Tort Claims Act (FTCA), which authorizes private suits for personal injuries committed by U.S. officials while acting within the scope of their employment. He sued Sosa under the Alien Tort Statute (ATS), which gives federal district courts "original jurisdiction of any civil action for a tort only, committed in violation of the law of nations." The Ninth Circuit had ruled for Alvarez on both counts. The Supreme Court reversed on both.

The Court easily and unanimously dismissed the FTCA count, on the grounds that the act does not cover injuries perpetrated outside the United States. (Justices Ginsburg and Breyer disagreed with the majority's reasoning but not the result.) The ATS claim proved far trickier. The question is whether the statute, originally enacted as part of the 1789 Judiciary Act, merely authorizes federal courts to hear a certain set of cases or also creates a "cause

of action"—that is, whether it authorizes, without further and explicit congressional action, plaintiffs to bring those cases and to obtain relief.

Roundly rejecting human rights advocates' argument that the Alien Tort Statute creates causes of action for violations of "customary" international law, all justices agreed that the statute is purely jurisdictional and that Alvarez's claims of false arrest and detention should be dismissed. Still, the justices disagreed on whether some other international law claims might be recognizable. Justice Souter's opinion for the majority argued that the door should be left open. The Congress that enacted the ATS, he observed, quite probably meant to recognize well-established claims under the customary law of nations—those arising over piracy, violations of safe conduct, and infringement on the rights of ambassadors. Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, agreed with that analysis (and with much else in Souter's opinion). He objected, however, that the recognition of those claims is a species of "federal common law"—that is, law that can be divined by federal courts under a mere grant of jurisdiction, as distinct from a specific congressional enactment. That understanding, Scalia argued, was conclusively rejected in *Erie Railroad v. Tompkins* (1938). That landmark decision reflected the legal positivism of its time, encapsulated in Justice Holmes's famous, overwrought dictum that the common law is no "brooding omnipresence in the sky" but the will of a sovereign with the authority to decree it. A mere grant of jurisdiction does not constitute such authority. That is the holding of *Erie*, and Justice Scalia wants to hold the Court to it.

Justice Souter countered that the Court of the post-*Erie* era has occasionally created some "new" federal common law, which differs from the "old" common law in that the courts no longer "find" law but self-consciously make it. Because the courts' authority to do so is doubtful, they ought to tread carefully. With respect to the ATS, they should limit recognizable international law claims to those that "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the eighteenth-century paradigms." In that fashion, Souter's opinion purports to cabin the recognition of international causes of action.

Those markers, however, may not be worth a whole lot in the Ninth Circuit Court of Appeals or in some enterprising district court—or for that matter in the next ATS case before the United States Supreme Court. Under *Sosa*, torture is the sort of "paradigmatic" claim that is litigable under the ATS. Put that holding next to the *Padilla* dissent, signed by four members of the *Sosa* majority (Stevens, Souter, Ginsburg, Breyer); that opinion specifically designates "incommunicado detention for months on end" as—*torture*.[3] In that light, the *Sosa* limitations may be mere "finger-wagging" at the lower courts (as Justice Scalia charged), calculated to bring Kennedy and O'Connor into the fold. And even with respect to those two justices, one must doubt whether the lines drawn in *Sosa* will hold. While O'Connor and Kennedy did not sign the expansive *Padilla* dissent, they are among the first to look to international and foreign law as a source of "evolving standards of decency."[4]

Sovereign Jurisdiction versus Selective Inspiration

It is tempting to reduce the international law question to a single dimension: liberals fer, conservatives agin. But that is an oversimplification. In this year's *Olympic Airways v. Husain* decision, for example, Justice Scalia emphatically insisted on following the decisions of foreign courts in construing an international treaty to which the United States and those foreign countries are signatories (the Warsaw Convention, which governs air carrier liability). The liberal internationalists (such as Justice Ginsburg and Justice Souter) signed Justice Thomas's majority opinion, which departed from the foreign precedents and caused Justice Scalia to marvel at "the Court's new abstemiousness to foreign fare." Conversely, Justice Ginsburg—whose opinions and speeches have made a fetish of paying a "decent respect" to international opinion[5]—declared in *Intel* that the European Commission's legal views on its own institutional status merited *zero* deference and respect in a U.S. court. The disagreement here is not a matter of "yea or nay." It has to do with the purpose of legal rules and international arrangements.

On the traditional view—a distinct minority position in the academy but ably and amply represented at AEI[6]—the interplay of domestic and foreign law is a problem of jurisdiction. When the laws of sovereign nations collide, the courts' task is to decide what belongs to whom and to develop rules of comity and reciprocity that will permit nations to live in peace. On the Court, Justice Breyer champions this understanding (within limits), as does Justice Scalia. Justice Thomas probably also falls into this camp.

For Justices O'Connor and Kennedy, in contrast, international law is about internationalism as an inspiration,

which implies hostility to sovereignty and sorting. (If we found that some inspiring international law did not apply in the United States, we could no longer act on the inspiration.) On civil rights matters, for example, we might create some clarity at the international front by observing the elementary distinction between U.S. citizens and foreigners, which carries particular significance in the war against terror. But as noted, *Rasul* and *Padilla*, with the votes of Kennedy and O'Connor, actually grant foreigners broader habeas rights than U.S. citizens.

Justice O'Connor's *Hamdi* opinion briefly adverts to "the privilege that is American citizenship," only to empty it of all content—on the one hand, by extolling its transcendental appeal in the world, on the other hand, by "balancing" the supposed privilege with "competing concerns." More ominously, O'Connor and Kennedy have elsewhere invoked foreign and international norms in adjudicating the rights of American women, homosexuals, and death row inmates under American law in American courts. In seeking instruction abroad, these justices have looked to international conventions, as opposed to the actual practices of, say, the Muslim nations that signed those conventions. For the selection criteria, consult a forthcoming Supreme Court case.

The conflict between jurisdiction and inspiration, between sovereignty and internationalism, is still clearer in the writings of Justice Ginsburg, who has intimated that jurists who fail to hear the cosmopolitan music are latter-day apostles of *Dred Scott*.[7] How does her internationalist enthusiasm square with the affirmative abrogation of comity rules in *Intel*? Once those rules have been displaced, we can no longer ensure international harmony by agreeing that Zimbabwe will have its rules and we will have ours. We will have to "harmonize" our law with that of Angola, Zimbabwe, and every other country. In a world of comity and reciprocity, America's supposedly archaic institutions might survive, in their own domain. In a global commons and at UN confabs, they will not. It may be unfair to suggest that this is the point of Justice Ginsburg's vision. But it is difficult to see what else the point and effect could be.

On the Supreme Court, inspirational internationalism will prevail. It has the votes, and the traditionalists suffer from self-imposed limitations. The Court's domestic meaning-of-life jurisprudence is going global.

Justice Breyer's sensible view of the international world mirrors the limitations of his domestic jurisprudence. He has been the go-to guy for American business in regulatory and economic cases, both because he comprehends those complicated cases and because he understands that we cannot hand the nation's economy to the trial lawyers. In contrast, in cases involving social issues (from abortion to civil rights), Justice Breyer has never written a memorable opinion, but has simply played the role of a reliable liberal vote. Likewise, Breyer has in international cases articulated an admirably coherent framework for economic cases (*Empagran* and the *Intel* dissent) while voting with the liberals on human rights cases. The hard case for Justice Breyer is the one that could fall into either category. The hard case, in other words, is *Sosa*, where human rights enthusiasms threaten to expose global corporations to unilateral attacks in plaintiff-picked forums. Lo and behold, Justice Breyer submitted a lone concurrence that tried to balance recognition of human rights claims with an emphasis on the need for international reciprocity.

Antonin Scalia more and more resembles Alexander Hamilton, his true constitutional hero. The resemblances are everywhere—in substance (for a ready example, see Scalia's discussion in *Hamdi* of Hamilton's famous defense of the habeas writ), in the combative prose, and in personal style. Arguably the best constitutional lawyer of his generation and certainly the theorist with the deepest affection for the constitutional scheme, Hamilton responded to his fall from power and to the demagogic passions of his day with astounding energy and with a torrent of writings, marred by occasional churlishness and a resort to tactical arguments when the actual arguments had lost purchase. That, in substance, is Justice Scalia. Contrary to what a superficial reading of his *Sosa* dissent suggests, Scalia is not *really* a legal positivist and realist—a mode of thought that is completely at odds with his insistence on rules and formalisms. If this great jurist increasingly sounds like the grossly overrated Holmes, that is because he has come to view *Erie*-style positivism as a last line of defense against wholesale judicial imperialism.

Justice Scalia is right to fear judicial imperialism. But positivism is neither an attractive doctrine nor a tenable one. *Erie* did not prevent the invention of a domestic "new" federal common law. Nor will it hold at the international front.

At the Improv

In the *Wall Street Journal*, the omnipresent Laurence Tribe has celebrated what he takes to be the central message of the terror cases: "Even a wartime president must obey the law."[8] This is an absurd abstraction: the "law" whereof

Tribe speaks consists of the Supreme Court's edicts. Yes, the executive improvised rules for conducting an unprecedented war—admittedly, with occasional missteps and a distressing failure to communicate its reasons and intentions. By its own lights, though, the Supreme Court is *also* improvising. Now that the U.S. military is improvising to implement the justices' improvisation, does that really improve our confidence in constitutional government?

"The legal category of enemy combatant," Justice O'Connor's plurality opinion in *Hamdi* declares, "has not been elaborated upon in great detail. The permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them." The passive voice captures the disembodied nature of the Supreme Court's "law." No one in particular does the "elaborating," "defining," or "presenting." The only actors appear to be the lower courts. They will decide who is or is not an enemy combatant and what process is due to those characters (*Hamdi*). The lower courts will decide which among them is a proper venue for alien habeas petitioners and whether the *Rasul* decision applies only to Guantanamo or even to the ends of the earth. They will decide what constitutes an actionable international law claim in U.S. courts (*Sosa*). They will decide what constitutes an "independent" antitrust injury (*Empagran*) and whether they should grant assistance to foreign regulatory authorities that don't want it (*Intel*). The lower courts may also do your laundry, if you ask nicely.

To put the point in the only language the Court still understands: this is *Brown* all over. The Supreme Court declared a right to racial integration and, later, to the elimination of the vestiges of segregation, "root and branch." When the time came to make good on those promises, the Court first prodded the lower courts, then left them to their own devices, and, when the exercise turned into a disaster, washed its hands of the whole affair. But in the Court's imagination, the havoc it wreaked in the lower courts and in urban school districts is a mere footnote to its lofty aspirations—just as the quoted language on the absolutely crucial question of designating enemy combatants is, literally, a footnote in Justice O'Connor's *Hamdi* opinion.

The explicit precedent for *Hamdi* is *Mathews v. Eldridge* (1976). There, the Supreme Court held that disability benefits, while not exactly "property," were important to the beneficiaries, and so the denial of such benefits should require, not actual due process, but a three-pronged Supreme Court test, commensurate with the competing interests at stake. Justice Scalia's *Hamdi* dissent noted the incongruity between doing rough justice in disabilities cases and fighting a war. What Scalia did not say is that the *Eldridge* formula proved a mess on the ground, both for the disabled and for agencies that try to steer scarce resources to the most deserving clients.[9] A fact-sensitive multi-pronged balancing test does not automatically translate into sensible institutional practices.

Unable to comprehend this basic lesson, the Supreme Court believes that it can fine-tune and finagle anything, for the greater good. The dangers of this "never say never" jurisprudence (in Justice Scalia's apt phrase) are exacerbated in the international arena, where much more is at stake, where a paucity of recent precedents creates additional room for judicial error and manipulation, and where the Court lacks strategic coherence.

Since Justice Breyer's appointment in 1994, the Rehnquist Court has sat in its current composition for a longer time than any Supreme Court in American history. Consequently, the justices have become very good at predicting each others' votes. As Tom Merrill has argued, that fact, rather than any coherent jurisprudence, has shaped the Rehnquist Court's decisions.[10] Think of a closely divided legislative committee: it will decide what it absolutely must decide; make incremental rulings on the biggest questions (a centrist legislator wields enormous power); and find unanimous consent for naming bridges. That, in substance, is the Rehnquist Court: a declining caseload; many unanimous decisions in marginal cases; narrow 5 to 4 decisions where a broader rationale would endanger the majority; and a paucity of plurality opinions (which imply that someone "miscounted" the votes when agreeing to hear the case).

But in the new international cases, the justices' votes defy easy prediction. Without a constitutional norm to restrict the range of outcomes, all bets are off. The question of how one should add up the varying votes and opinions in the "terror trifecta," on what issues and for what propositions, is already a matter of intense debate among legal experts. Presumably, we will get the answers, along with all other answers, from the district courts. Good luck: amid shifting coalitions, the justices' votes may cycle even over a small set of cases. We have no assurance that the outcomes satisfy minimal criteria of rationality. We are sailing uncharted waters without rudder, without anchor, and with a querulous crew. Bon voyage.

Notes

1. In addition to *Hibbs*, the Supreme Court decided three Eleventh Amendment cases: *Tennessee v. Lane*, *Frew v. Hawkins*, and *Tennessee Student Assistance Corp. v. Hood.*

2. A slightly different version of this section, coauthored by Richard A. Epstein, appeared in the *National Law Journal* on July 12 under the title "Foreign Headaches." On the larger dilemmas of antitrust jurisdiction, see Richard A. Epstein and Michael S. Greve, *Competition Laws in Conflict* (AEI Press, 2004); for more information, visit www.aei.org/book770.

3. Professor Viet Dinh noted this point at the 2004 AEI Federalism Project Supreme Court round-up, "Terror, Torts, and Telecom." The transcript is available at www.aei.org/eventtranscript845.

4. See, e.g., Sandra Day O'Connor, Keynote Address before the Ninety-Sixth Annual Meeting of the American Society of International Law (March 16, 2002), 96 *American Society of International Law Proceedings* 348 (2002). Justice Kennedy made his position clear in *Lawrence v. Texas*, noting with approval a case in the European Court of Human Rights that contradicted U.S. precedent on the right to sodomy. 123 S.Ct. 2472, 2481 (2003).

5. For the justice's view and citations to opinions, see Ruth Bader Ginsburg, "Looking beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication," 40 *Idaho Law Review* 1 (2003).

6. See, e.g., Jeremy Rabkin, *Why Sovereignty Matters* (AEI Press, 1998) and *The Case for Sovereignty: Why the World Should Welcome American Independence* (AEI Press, 2004); John Yoo, "Globalism and the Constitution," 99 *Columbia Law Review* 1955 (1999); and Robert H. Bork, *Coercing Virtue* (AEI Press, 2003).

7. Ginsburg, "Looking beyond Our Borders" at 4.

8. Laurence H. Tribe, "Supreme Constraint," *Wall Street Journal*, July 1, 2004, p. A14.

9. See, e.g., Jerry L. Mashaw, "The Supreme Court's Due Process Calculus for Administrative Adjudication in *Mathews v. Eldridge*: Three Factors in Search of a Theory of Value," 44 *University of Chicago Law Review* 28 (1976).

10. Thomas Merrill, "The Making of the Second Rehnquist Court," 47 *St. Louis University Law Journal* 569 (2003).