



BRILL
NIJHOFF

TILBURG LAW REVIEW 20 (2015) 142-160


Tilburg
Law Review
brill.com/tilr

Interpretation Methods in the US Supreme Court: Study of Obamacare, Abortion Cases and Alien Torts Statute Cases

Siel Demeyere

PhD Candidate at KU Leuven

Siel.Demeyere@kuleuven-kulak.be

Joris Beke

Attorney the Brussels Bar, Quinz, Vilvoorde

Renate Dietvorst

PhD Candidate at Maastricht University

Abstract

In this article, the interpretation methods used by the United States Supreme Court are studied. We will discuss the interpretation methods used by the Court in the Obamacare case, in abortion cases and in Alien Torts Statute cases. This analysis concludes by asserting the Court is very eclectic in the interpretation methods it uses, although consequential reasoning is most often relied upon.

Keywords

us Supreme Court – Interpretation methods – Obamacare – Abortion cases – Alien Torts Statute

1 Introduction

A case that reaches the US Supreme Court typically is a hard case, *i.e.* a case without a predetermined outcome and with room for interpretation.¹ This is why the methods of interpretation used by the Supreme Court are important.² But does the Court actually pay much attention to the way in which it interprets a case? Moreover, is there any consistency in the interpretive methods applied by the Court? By looking at these questions, this paper investigates the following: *Which interpretation methods does the US Supreme Court use in hard cases in different fields of law?* To this end, we will study and compare the interpretation methods³ used in the Obamacare case, abortion cases and Alien Torts Statute cases.

Federal courts have never awarded precedential value to statements on an interpretive method, so there never is a methodological commitment when a certain method is used.⁴ The inconsistency in the interpretive methods might, however, arise the perception that statutory interpretation is done *ad hoc* or in such a way to suit the court's own preferences.⁵ Still, interpretive methods play a crucial role because the Court derives its ultimate power from its credibility. That credibility is derived from the Court's ability to convince the audience that its decisions are legally sound.⁶ Interpretive methods are thus an important tool for a court to sustain its credibility. However, an interpretation method is, not bound to the validity of a decision. For instance, good interpretive methods can be found in dissenting or concurring opinions, or in a case that has been overruled.⁷

1 MC Dorf and TW Morrison, *Constitutional law* (Oxford University Press 2010) 67.

2 We will not distinguish constitutional interpretation from constitutional construction. On this difference, see LB Solum, 'Originalism and Constitutional Construction' (2013) 82 *Fordham Law Review* 453.

3 These articles and books were used to study the interpretation methods: A Amar, 'Intertextualism' (1997) 112 *Harvard Law Review* 747; LH Bloom, *Methods of Interpretation: How the Supreme Court Reads the Constitution* (Oxford University Press 2009) xxv, 556; P Bobbitt 'Constitutional fate' (1980) 58 *Texas Law Review* 695; D Evans 'What Would Congress Want? If We Want to Know, Why Not Ask?' (2013) 81 *University of Cincinnati Law Review* 119; MH Lemos, 'The Politics Statutory Interpretation – reviewing A Scalia and B Garner, *Reading Law: The Interpretation of Legal Texts* (2012)' (2013) 89 *Notre Dame Law Review* 849 (hereafter; LB Solum, 'Originalism and Constitutional Construction' (2013); Solum (n 2); JC Yoo, 'Marchall's Plan: The Early Supreme Court and Statutory Interpretation' (1992) 101 *Yale Law Journal* 1607.

4 Lemos (n 3) 856.

5 Evans (n 3) 1192, 1196.

6 Bloom (n 3) xix.

7 *Ibid* xviii.

2 Obamacare

2.1 Introduction

The *Independent Business v. Sebelius* case,⁸ also known as the Obamacare case, was seen as a victory for the Obama-administration, allowing the Obamacare-reforms to continue. On March 23, 2010, President Barack Obama officially signed the Patient Protection and Affordable Care Act (ACA).⁹ The goal of the ACA is to change the health care landscape in the United States and to preserve, at the same time, the reliance on the private sector to fund medical services.¹⁰ Before the enactment of the ACA, the health care landscape in the United States was characterised by complex arrangements between federal and state governments, private insurance companies and individuals.¹¹ The ACA has two starting points: (i) the individual mandate and (ii) the expansion of the older Medicaid program, under strict conditions for the States.¹² In brief, the ACA compels every American under the age of 65 to purchase private health care insurance if they can afford it (the individual mandate). If these individuals, however, refuse to purchase private health care insurance, they will have to pay a penalty on their income taxes. Those who cannot afford a private health care insurance will be covered by the extended Medicaid program, which can be compared to (medical) social assistance in Europe. When States do not comply with the strict Medicaid conditions, they would risk losing all funding. The ACA, which was a rather controversial instrument, was rapidly challenged by several US states. The US Supreme Court was asked to make a decision in the *Independent Business v. Sebelius* case.¹³ The Court, under the presidency of Chief Justice Roberts, had to solve whether (i) the federal government has the power to impose a penalty on citizens who refuse to purchase health insurance; and, (ii) whether the federal government has the right to withhold all Medicaid reimbursements from States that do not participate in the expanded Medicaid program.¹⁴ The Court decided – by means of a five against four ruling – to uphold the individual mandate under the Taxing and Spending Clause,¹⁵ but not to uphold the expansion of the Medicaid program, because it was contrary to the same Taxing and Spending Clause.

8 *National Federation v Sebelius*, 132 S Ct 2600 (2012).

9 Patient Protection and Affordable Care Act, Pub.L. 111–148, 124 Stat. 119 codified as amended at scattered sections of the Internal Revenue Code and in 42 USC.

10 H Melkonian, ‘Case notes on: National Federation of Independent Business V Sebelius, Secretary of Health and Human Services’ (2012) 10 Macquarie Law Journal 121.

11 Ibid 122.

12 Ibid 123.

13 Which is also referred to as the ‘NFIB-case’ or the ‘Obamacare-case’.

14 Melkonian (n 10) 123.

15 Article 1, section 8, clause 1 of the United States Constitution.

2.2 *Interpretation Methods Used by the Court*

In the Obamacare case, the US Supreme Court had to interpret several clauses of the Constitution. The following subsections elaborate upon the interpretation of Chief Justice Roberts, which was approved by the four liberal Justices.

2.2.1 The Individual Mandate

For the validation of the individual mandate of the Affordable Care Act, the Court had to interpret the Commerce Clause, the Necessary and Proper Clause and the Taxing and Spending Clause of the US Constitution.

2.2.1.1 *The Commerce Clause*

Firstly, the Court interpreted the Commerce Clause. In order to do this, it started from **originalism**.¹⁶ The Court referred to the personal characteristics of the Framers of the Constitution which, according to the Court, were not theorists but rather practical men. Starting from these - rather conservative - arguments, the Court made use of additional interpretation methods to clarify the meaning of the Commerce Clause in a second phase of constitutional interpretation. Secondly, the Court made use of **textualism**.¹⁷ It looked at the text of the Commerce Clause and emphasised that the text mentioned the power of Congress to *regulate* commerce in the United States, but that it did not mention the power of Congress to *compel* or *create* several forms of commerce.¹⁸ In connection with this line of reasoning, the Court also used **intertextualism**¹⁹ to make clear that Congress only has the power to *regulate* commerce.²⁰ The Court stated that many of the provisions of the Constitution would be superfluous if the power to *regulate* commerce also included the power to *create* or *compel* it:

16 The interpretive method of originalism denotes that 'the Constitution today means what it meant when it was originally ratified.' Originalism can include 'original understanding' and 'original intent'.

17 Textualism can be defined as 'the attempt to discern the meaning of constitutional provisions through a close reading of the specific language of the document.' Textualism does not per se lead to conservative outcomes, but is flexible enough to do so. Despite the criticism on textualism, there is agreement that all interpretation should start with the relevant text and if the text is clear, the interpretation should end with it as well.

18 *Sebelius* (n 8) 30.

19 Intertextualism can be seen as a specific method of textualism, which looks at other parts of the Constitution to define the meaning of a certain word. In brief, this method can be described as 'using the text to read the text.'

20 *Sebelius* (n 8) 30.

[...] *the Constitution gives Congress the power to ‘coin Money,’ in addition to the power to ‘regulate the Value thereof.[...]’ And it gives Congress the power to ‘raise and support Armies’ and to ‘provide and maintain a Navy,’ in addition to the power to ‘make Rules for the Government and Regulation of the land and naval Forces.’ [..]. If the power to regulate the armed forces or the value of money included the power to bring the subject of the regulation into existence, the specific grant of such powers would have been unnecessary.*²¹

In a third and final phase, the Court used **consequential reasoning**²² to interpret the Commerce Clause of the Constitution and to make clear this clause does not support the validity of the individual mandate. Allowing Congress to justify its acts in this way under the Commerce Clause would allow Congress to regulate every decision an individual could potentially make. Whenever an individual does something that the Government does not want them to do, the Government could have the power under the Commerce Clause to compel citizens to act as the Government wants them to act.²³ The Court concluded that this possible extension of power should be considered a bad consequence of an interpretation of this clause when it would validate the individual mandate.

2.2.1.2 *The Necessary and Proper Clause*

Secondly, the Court had to interpret the validity of the Individual Mandate under the Necessary and Proper Clause. Just as with the interpretation of the Commerce Clause, the Court made use of several phases to come to a final interpretation of the Necessary and Proper Clause. In a first phase, the Court started with a **structural interpretation**.²⁴ It therefore referred to a previous ruling in the *Gonzalez v. Raich* case.²⁵ In this soft-drugs case, the Federal Government was able to regulate purely interstate commerce and personal possession and consumption of Marihuana.²⁶ The specific structure of the United States made it necessary for the Federal Government to regulate interstate personal possession and behaviour. Otherwise, the regulation of

21 Ibid 25.

22 Consequential reasoning entails that the Court addresses the bad consequences that will occur when they take a certain course of action. It is however not always certain that decisions will create bad consequences for the ones relying on it.

23 *Sebelius* (n 8) 25.

24 Structural reasoning derives the meaning of constitutional words or phrases from the structure of the Constitution itself *and* the structure of the government and this along with the obvious purposes of the Constitution and government.

25 *Gonzalez v Raich*, 545 US 1 (2005).

26 *Sebelius* (n 8) 36.

intrastate commerce of Marihuana would not be possible within the US federal structure. However, in the second phase, the Court again made use of **consequential reasoning**. The Court made clear that the interpretation of the Necessary and Proper clause in *Gonzalez v. Raich* was not appropriate in the Obamacare case, because such interpretation would result in a substantial expansion of federal authority. This was seen as a bad consequence that does not compensate for the advantage(s) it brings about.²⁷

2.2.1.3 *Taxing and Spending Clause*

Finally, the validity of the Individual Mandate under the Taxing and Spending Clause of the Constitution was examined. Surprisingly, legal scholars in the US perceived this as a less plausible argument of the Federal Government.²⁸ Again, the Court made use of several interpretation methods to come to a decision.

In a first phase, the Court made use of textualism and intertextualism. **Textualism** was used to emphasise that a word, in this case the word 'penalty', used in the individual mandate, has more than one possible meaning. This was necessary because the penalty of the individual mandate had to be characterised as a tax in order to fall under the Taxing and Spending Clause. The textual approach of the Court made clear that the penalty could indeed be qualified as a tax and therefore potentially fall within the scope of the Taxing and Spending Clause.²⁹

The Court made use of **intertextualism** to decide whether the penalty, or tax, imposed by the Individual Mandate was in accordance with other provisions of the Constitution. Article 1, §9, clause 4 of the US Constitution indeed states that any direct Federal Tax must be apportioned so that each State pays in proportion to its population.³⁰ However, the Court did not qualify the penalty of the Individual Mandate as a 'direct tax', and as such not covered by Article 1, §9, clause 4.³¹

In a second phase, the Court made use of **consequential reasoning** to uphold the individual mandate under the Taxing and Spending Clause. The Court emphasised that it is well-established case law that '[e]very reasonable construction must be resorted to, in order to save a statute from

²⁷ Ibid 36.

²⁸ A Shapiro, 'Like Eastwood Talking to a Chair: The Good, The Bad, and The Ugly of The Obamacare Ruling' (2013) 17 *Texas Review of Law & Politics* 1, 10.

²⁹ *Sebelius* (n 8) 37.

³⁰ Ibid 46.

³¹ Ibid 47.

unconstitutionality.³² For the Court, preference should be given to an interpretation of the mandate that is *fairly possible*.³³ Since it is fairly possible that the individual mandate is a tax under the Taxing and Spending Clause, preference should be given to this interpretation. Otherwise, the act would be deemed unconstitutional, what is arguably a bad consequence in the theory of consequential reasoning.

2.2.2 The Medicaid Expansion

Because the Federal Government only defended the expansion of its competences with the use of the Taxing and Spending clause of the Constitution, the Court only had to discuss this specific Clause. Hence, the main question before the Court was whether the financial inducement, offered by Congress because of the Medicaid expansion, was ‘*so coercive as to pass a point at which pressure turns into compulsion*’.³⁴

Again, the Supreme Court made use of several phases to interpret the Taxing and Spending Clause. In a first phase, the Court used **structuralism**. While doing this, it focused upon political accountability, which is key to the American federal system: ‘[W]here the Federal Government directs the States to regulate, it maybe state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.’³⁵

The Court further emphasised that the danger of political unaccountability is even higher when Congress acts under the Taxing and Spending Clause. Under this clause, Congress can make use of *conditional grants*³⁶ to implement federal policies that do not normally fall within the competence of Congress: ‘*Indeed, this danger is heightened when Congress acts under the Spending Clause, because Congress can use that power to implement federal policy it could not impose directly under its enumerated powers.*’³⁷

In a second phase, the Court made use of **textualism** to abrogate the Medicaid expansion. However, this time the Court used textualism to compare the Medicaid expansion with a financial inducement allowed under the Taxing and Spending Clause in the *Dole* case.³⁸ The Court compared the inducement

32 Ibid 3 (syllabus).

33 Ibid 38.

34 Ibid 56.

35 Ibid 54.

36 D Baake, ‘Federalism in the Air: Is the Clean Air Act’s ‘My Way or No Highway’ Provision Constitutional after *Nfib v. Sebelius*’ (2012) 37 Harvard Environmental Law Review Online 1, 2.

37 Ibid (n 8) 54.

38 *South Dakota v Dole*, 483 US 203, 207 (1987).

related to the Medicaid expansion with the – constitutionally allowed – inducement in the *Dole* case and came to the following conclusion: *'In this case, the financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement'—it is a gun to the head.'*³⁹

2.3 *Conclusion on Obamacare*

The Affordable Care Act (ACA) certainly introduced the most extensive health care reform in the history of the United States. As is often the case with such reforms, the ACA was challenged before the US Supreme Court. The constitutionality of both the individual mandate and the Medicaid expansion – two important provisions of the act – was questioned. In a five against four decision, the Court upheld the ACA and heralded a victory for the Obama-administration. However, some legal scholars have argued that this victory could be a Trojan horse for Congress due to the strict interpretation of the Commerce Clause.⁴⁰

In the Obamacare case, the Supreme Court uses different methods of interpretation per constitutional clause it considers. However, the final interpretation method the Court relies upon is each time consequential reasoning. Textualism, intertextualism, originalism and structural reasoning are all applied to support the final decision based on consequential reasoning.

3 Abortion Cases

3.1 *Introduction*

Abortion has always been a controversial topic in the U.S. The foundation of the abortion cases is *Roe v. Wade*.⁴¹ In order to compare interpretation methods, the following subsections review other landmark cases in the series of abortion cases.⁴² The article then focuses on the joint opinion of the Court.

3.2 *Roe v. Wade*

In *Roe v. Wade*, a single, pregnant woman (Roe) sought a declaratory judgment on the unconstitutionality of the Texan criminal abortion statutes.⁴³ For the first time, the Court concluded that the right of personal privacy includes the abortion decision.

39 Ibid (n 8) 57.

40 G.H. Reynolds & B.P. Denning, "National Federation of Independent Business v. Sebelius: Five Takes", (2012–2013) *Hastings Const. L.Q.*, 808.

41 *Roe v. Wade*, 410 US 113 (1973).

42 *Gonzales v. Carhart*, 550 US 124 (2007).

43 *Roe* (n 39) 120.

In *Roe*, the argument was made by the appellee that the foetus is a 'person' within the language of the 14th Amendment. The Court uses the method of **intertextualism** to define the word 'person'.⁴⁴ The Court uses the Due Process Clause, the Equal Protection Clause and other clauses to interpret the word 'person'. Based on these references to other clauses and texts, the Court concludes that the word 'person' does not include the unborn.⁴⁵ Furthermore, this part of the decision also focuses on the history of abortion in the 19th century and on abortion regulation and abortion practices.⁴⁶ Thus, one can say that the Court shows that the prohibition on abortion was not as strict in the past as it had become from the 19th century on.⁴⁷ We can therefore conclude that this falls under the interpretation method of **textual purpose**.⁴⁸

Moreover, it can be argued that the Court in *Roe* used **ethical arguments**⁴⁹ in its decision. Underneath the reasoning of the Court lies a conception of what is acceptable within the American ethos.⁵⁰ The emphasis upon medical and legal history - and what history reveals about man's attitudes towards the abortion procedure over the centuries -, exposes, in our opinion, the underlying American ethos on the issue of abortion.

3.3 *Planned Parenthood v. Casey*⁵¹

Planned Parenthood v. Casey changed the way the courts reviewed abortion laws in the United States.⁵² In this case, the Court was asked to overrule *Roe v. Wade*. The court decided to reaffirm the central holding of *Roe*, but replaced the trimester framework with the undue burden standard.⁵³

44 *Roe* (n 39) 157.

45 *Roe* (n 39) 158.

46 *Roe* (n 39) part VI and 158.

47 Bloom (n 3) 151. According to Bloom, the point of this history was also to show that prohibition of abortion was to protect the health of the mother, rather than the life of the foetus.

48 Textual purpose entails that the Court looks at the purpose of the Constitution and its clauses to determine the meaning of its text.

49 An ethical argument is an argument that 'relies on a characterization of American institutions and the role within them of the American people.' The guideline for the interpretation of, for instance, 'cruel and unusual punishment' (8th Amendment) is what is acceptable within the American ethos.

50 Bloom (n 3) 394.

51 *Planned Parenthood v Casey*, 505 US 833 (1992).

52 MF Moses, 'Casey and Its Impact on Abortion Regulation' (2004) 31 Fordham Urban Law Journal 805.

53 A State has legitimate interests in protecting the health of the woman and protecting the potentiality of human life. Each of these interests grow and reach compelling points, at

According to the Court, the controlling word in abortion cases is the word 'liberty', which is a part of the Due Process clause. In *Casey*, the Court commences by using the **textual interpretation method**, as it applies a literal reading of the Clause. It states that, although a literal reading might suggest that it governs only the procedure by which a state may deprive persons of liberty, the clause has been understood to contain a substantive component as well as matters of procedure.⁵⁴ The Court restrained from declaring that the Due Process Clause covers only those practices that already were protected against government interference by the time the 14th Amendment was ratified. Here, the Court uses **originalism**. Nevertheless, the textual and the originalism interpretation method did not completely satisfy the Court. Hence, the Court states: '*Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.*'⁵⁵

We furthermore think that the Court possibly relied on **ethical arguments**. The concept of 'liberty', which is reflected in the Constitution, implies the idea of a limited government. Important personal decisions lay in the private sphere.⁵⁶ The Court is attempting to find the American ethos in its reasoning for defining the concept of liberty. By focusing on the protection of personal decisions, the Court states that '*Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code.*'⁵⁷

Exceptional and important in *Casey* is that a large extent of the reasoning of the joint opinion of the Court focuses on precedents (**the doctrine of stare decisis**),⁵⁸ using these precedents in the reasoning.⁵⁹ The Court states that

which the state may regulate abortion, at the various stages of the woman's pregnancy. The Court divided the woman's approach to term in three stages (trimesters). In *Casey*, the Court decided to protect the central right as recognised in *Roe v Wade* while at the same time protecting the states' interest in potential life by employing an undue burden standard. In *Casey* the undue burden is defined as: 'An undue burden exists when the purpose is to place substantial obstacles in the path of a woman seeing an abortion before the fetus attains viability.'

54 *Casey* (n 50) 846.

55 *Ibid* 848.

56 L Kermit and others, *The Oxford Companion to the Supreme Court of the United States* (Oxford University Press 2005) 216.

57 *Casey* (n 50) 850.

58 The doctrine of stare decisis, also known as the doctrine of precedent, treats the principles from prior decisions as normative.

59 Bloom (n 3) 222. Bloom states that in *Casey*, precedent (*Roe*) is preserved by significantly narrowing it.

within the bounds of stare decisis analysis, the stronger argument is for affirming *Roe*'s central holding and not for overruling it.⁶⁰ Because of the significance of *Casey*, the Court decided not to stop at this point in analysing the stare decisis doctrine, but to continue by comparing the case of *Roe* with other cases of a comparable dimension, which responded to *national controversies*.⁶¹ In these cases, the nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty. However, in *Casey*, no such occasion is presented and overruling the prior law of *Roe* would be inadequate.⁶²

Finally, the Court used **consequential reasoning** to show that overruling *Roe* would lead to bad consequences. The Court argues that by overruling *Roe*, bad consequences would follow for the Court itself, but also for the people who rely on the rule of law. The Court states that overruling would lead to these bad results under the principles of stare decisis, and would weaken the Court's capacity to exercise the judicial power.⁶³

3.4 *Gonzales v. Carhart*⁶⁴

In this case, the Court was asked to consider the validity of the Partial Birth Abortion Ban Act of 2003. It held that the ban on partial-birth abortion was not unconstitutionally vague and did not impose an undue burden on the right to abortion.⁶⁵

In its decision, the Court focuses on the provisions of the act at hand, defining words and excerpts of the provisions by closely reading the act. Once more, the Court uses the interpretation method of **textualism**. The Court states that

60 *Casey* (n 50) 860–861.

61 *Casey* (n 50) 861–863. The Court makes a comparison between *Roe* and two decisional lines of comparable significance. The line identified with *Lochner v New York*, 198 US 45, and the line that has begun with *Plessy v Ferguson*, 163 US 537. Those lines were overruled by other cases: *West Coast Hotel Co. v Parrish*, 300 US 379 and *Brown v Board of Education*, 347 US 483. See also *Casey* (n 50) 836 syllabus.

62 *Casey* (n 50) 864. The Court states: '*Because the cases before us present no such occasion it could be seen as no such response. Because neither the factual underpinnings of Roe's central holding nor our understanding of it has changed (and because no other indication of weakened precedent has been shown), the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973. To overrule prior law for no other reason than that would run counter to the view repeated in our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.*'

63 *Casey* (n 50) 864–865.

64 *Gonzalez* (n 40).

65 *Ibid.*

*'a straightforward reading of the text of the act, demonstrates its purpose and the scope of the provisions.'*⁶⁶ Hence, the Court also applies the method of **textualism** to define its **textual purpose**. By using these two interpretation methods, the Court describes what exactly falls within the act and explains when the act is inapplicable.⁶⁷

Further, when the Court determines whether the act imposes an undue burden, the Court again looks at the **text** itself. The Court states: *'A review of the statutory text discloses the limits of its reach.'*⁶⁸ Further, the Court reflects on the Nebraska statute that was struck down in *Stenberg v. Carhart*.⁶⁹ By looking at the latter, the Court uses the **stare decisis doctrine** to interpret the act of 2003.

Moreover, the Court reviews the language of the text to define the meaning of the word 'deliver' and uses **textualism**. It stated that *'In interpreting statutory texts courts use the ordinary meaning of terms unless context requires a different result.'*⁷⁰ Further, *'Here, unlike in Stenberg, the language does not require a departure from the ordinary meaning.'*⁷¹ The Court focuses on the 'most reasonable reading' of the text and stated that although in *Stenberg*, the Court found dilation and evacuation (D&E), an abortion method, covered by the statute. However, the Court states that *'Here by contrast, interpreting the Act so that it does not prohibit standard D&E is the most reasonable reading and understanding of its terms.'*⁷²

Then the Court goes into the question whether the act imposes a substantial obstacle to late term, pre-viable abortions.⁷³ The Court states that the Partial Birth Abortion Ban Act does not impose an undue burden as prohibited in *Casey*. To reach this conclusion, the Court assessed the **textual purpose** of the act. According to the Court, the act's purpose is protecting the medical community's ethics and reputation and to protect innocent human life from brutal and inhumane procedures.⁷⁴

We think that the Court also interprets the act in a more moral and ethical way by using an **ethical argument**: *'Respect for human life finds an ultimate expression in the bond of love the mother has for the child. The Act recognized this*

66 Ibid 16.

67 Ibid 17.

68 Ibid 20.

69 *Stenberg v Carhart*, 530 US 914 (2000).

70 *Gonzalez* (n 40) 22.

71 Ibid.

72 Ibid 24.

73 Ibid 26.

74 Ibid.

*reality as well. Whether to have an abortion requires a difficult and painful moral decision.*⁷⁵

3.5 Conclusion on the Abortion Cases

In the *Casey* abortion case, consequential reasoning plays an important role, next to the stare decisis doctrine and probably ethical argumentation. In *Roe*, however, the Court relies on intertextualism, purposive interpretation and ethical argumentation, although not explicitly. *Casey* contains myriad references to *Roe*. Despite the replacement of the rigid trimester framework of *Roe* by the undue burden standard found in *Casey*, the Court emphasises that it upholds the holding in *Roe*. In *Casey*, the Court stresses that overruling *Roe* would entail bad consequences for all people that relied on this holding and even for the rule of law in general. In *Gonzales v. Carhart*, the Court heavily relied on textualism and textual purpose the Court also relied on ethical arguments. We can conclude that in abortion cases the stare decisis doctrine is an important interpretation method, combined with consequential reasoning, textualism and ethical argumentation.

4 Alien Torts Statute Cases

The Alien Torts Statute (ATS) is a jurisdictional statute, but has generated three Supreme Court decisions. According to the Alien Torts Statute (28 USC § 1350), *'the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.'* Because of its vague language, impact on the separation of powers and policy implications on US court decisions on human rights violations committed abroad,⁷⁶ ATS is likely to generate more decisions in the future.

We will discuss *Kiobel*,⁷⁷ a 2013 case, in detail because of its interesting references to interpretive methods in both the opinion of the Court and the

⁷⁵ Ibid 28.

⁷⁶ SE Allbright, 'Corporate Tort Liability under the Alien Torts Statute Post *Kiobel*' (2013) 21 *Miami Business Law Review* 281, 326. For an interesting study to the relation between ATS decisions and the administration of democratic and republican presidents, see J Nzelibe, 'Conteting Adjudication: The Partisan Divide over Alien Torts Statute Litigation' (2013) 33 *Northwestern Journal of International Law & Business* 475, 476, 526.

⁷⁷ *Kiobel v Royal Dutch Petro. Co.*, 133 S.Ct. 1659 (2013).

concurring opinion. We will also look into the *Sosa* case⁷⁸ and the *Daimler Chrysler* case,⁷⁹ dating from 2004 and 2014 respectively.

It is important to note that in these cases, the Supreme Court is called upon the Alien Torts Statute and not the Constitution itself. However, ATS does show important similarities to the elements of the US Constitution calling for a particular interpretation. Just as the Constitution, ATS is short and generates a need to read between the lines.⁸⁰ It moreover dates from 1789; right after the Constitution was enacted. However, the important difference between a law and the Constitution is of course that the former can be changed easily, while the latter is rarely ever amended.

4.1 *Kiobel v. Shell*

4.1.1 Facts and Judgment

In the *Kiobel* case, the oil and gas company Shell was accused of aiding and abetting the Nigerian government in committing human rights violations. The Nigerian government violently suppressed burgeoning demonstrations against the environmental effects of Shell's practices.

The Supreme Court decided that US courts did not have jurisdiction in this matter, for the presumption against extra-territorial application of a statute also applies to ATS and could not be displaced.⁸¹ Only when a claim touches and concerns the US territory with sufficient force, the presumption will be displaced. This is now called the 'touch and concern' test.

Although the Court was unanimous on the outcome of the case (9–0), the reasoning split about how to decide that there was no jurisdiction under ATS, was 5 Justices against and 4 Justices in favour. This reasoning split deserves due analysis in this paper. The first subsection analyses the methods of interpretation applied in the opinion of the Court, written by Justice Roberts. The second subsection looks into Justice Breyer's concurrence, which was joined by three other Justices.

4.1.2 Opinion of the Court by Chief Justice Roberts

In order to decide on the *Kiobel* case, Justice Roberts uses three methods of interpretation: textualism, originalism and consequential reasoning. Although the petitioners also invoked the purposes of ATS to interpret it, the Court

⁷⁸ *Sosa v Alvarez Machain*, 542 US 692 (2004).

⁷⁹ *Daimler AG v Bauman*, 134 S.Ct. 746 (2014).

⁸⁰ Dorf and Morrison (n 1) 44.

⁸¹ See also *Morrison v National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010).

refuses to look at the textual purpose. The Court very much stresses the policy implications of a broad interpretation of ATS. Here, textualist and originalist arguments serve to get to a result that should avoid bad consequences.

In interpreting ATS, the Supreme Court first and foremost seems wary of the 'serious foreign policy consequences' a broad interpretation would bring about and thus relies on **consequential reasoning**.⁸²

To support this consequential reasoning, Justice Roberts relies on an **originalist interpretation** of ATS. A clear intent of Congress would be necessary to displace the presumption against extraterritoriality and this cannot be found in the text or history of ATS. The presumption is derived from a canon of textualism: '*when a statute gives no clear indication of an extraterritorial application, it has none.*'⁸³ The Court thus uses the **text** of ATS itself and its historical context to retrieve the intent of the First Congress. The Court pays special attention to the application of ATS to piracy, which according to Justice Roberts, does not rebut the presumption against extra-territorial application.

4.1.3 Concurring Opinion by Justice Breyer

In his concurring opinion, joined by three other Justices, Justice Breyer sets out his rule to find jurisdiction under ATS and repudiates the application of the presumption against extraterritoriality.

While Justice Roberts refused to look at the purpose of ATS, Justice Breyer uses the textual **purpose** as his main method of interpretation. As piracy was one of the three crimes ATS was meant for, he asks himself '*who are today's pirates?*'⁸⁴ Torturers and perpetrators of genocide, among others, are, just like pirates in the 18th century, '*common enemies of all mankind.*'⁸⁵

To support his rule derived from the textual purpose, Justice Breyer relies on **consequential reasoning**. The latter is from a very different kind than the consequential reasoning applied by the majority of the Court. Justice Breyer argues that ATS should not be interpreted (too) narrowly because of the '*Nation's interest in not becoming a safe harbor for violators of the most fundamental international norms.*'⁸⁶

82 *Kiobel* (n 76) 1669.

83 *Kiobel* (n 76) 1664. Justice Roberts also mentions that '[...] it is well established that generic terms like 'any' or 'every' do not rebut the presumption against extraterritoriality.' in *Kiobel* (n 76) 1665.

84 *Kiobel* (n 76) 1671.

85 *Ibid* 1672.

86 *Ibid* 1674.

In arguing that the presumption against extraterritoriality does not apply to ATS, Justice Breyer uses **intertextualist arguments**. As ATS makes mention of aliens, treaties and the law of nations, it should not be used in a domestic context only.⁸⁷

Although Justice Breyer comes to the same result as Justice Roberts, because the parties and relevant conduct lack sufficient ties to the US, Breyer's interpretation is more in line with international jurisdictional principles.⁸⁸ This difference in reasoning would lead to another result, *i.e.* jurisdiction under ATS, in many other cases.

4.2 *Sosa: The Court Before Kiobel*

Before *Kiobel*, the Supreme Court examined ATS only once, namely in the *Sosa* case. *Sosa*, a Mexican citizen, was sued for unlawfully detaining Alvarez after a request of the US government to arrest the latter.

The Supreme Court decides that the US courts have no jurisdiction under ATS because an unlawful detention of one night cannot be considered a violation of international law. It furthermore decides by way of an originalist interpretation that ATS does provide a cause of action.

As in the opinion of the Court in *Kiobel*, **originalism** is an important method of interpretation in *Sosa*. First, the Court finds a cause of action because the First Congress cannot have intended ATS to be 'stillborn'.⁸⁹ The *Sosa* Court, however, seems more modest than the *Kiobel* Court. It acknowledges that '*a consensus understanding of what Congress intended has proven elusive*'.⁹⁰ Due to the lack of drafting history, the Court relies on **textualism and intertextualism** to retrieve the intention of the draftsmen.

Although the Court does not rely on **consequential reasoning** as heavily as the *Kiobel* Court, it warns for '*potential implications for the foreign relations of the United States*'.⁹¹ The *Sosa* decision could, however, not assure this as it generated an adverse reaction. As only serious human rights violations were now actionable under ATS, every tort was claimed to be almost a genocide.⁹²

87 Ibid 1672.

88 JC Balzano, 'Direct Effect Jurisdiction under the Foreign Sovereign Immunities Act: Searching for an Integrated Approach' (2013) 24 Duke Journal of Comparative and International Law 1, 13.

89 *Sosa* (n 77) 2744.

90 Ibid 2758.

91 Ibid 2763.

92 K. Anderson, "Kiobel v. Royal Dutch Petroleum: The Alien Torts Statute's Jurisdictional Universalism in Retreat", *Cato Sup. Ct. Rev.* (2013) 155–156.

4.3 *Daimler: The Court After Kiobel*

*Daimler AG v. Bauman*⁹³ is an illustration of how easily lower courts accepted jurisdiction before the *Kiobel* decision of the Supreme Court. The Court shortly touches upon the ATS claim as the judge below had considered this supportive for finding general jurisdiction. The Supreme Court now only applied **consequential reasoning** to discard the claim under ATS: *'The Ninth Circuit, moreover, paid little heed to the risks to international comity its expansive view of general jurisdiction posed.'*⁹⁴ In this case, the Court for the first time specifies the potential bad consequences. According to the Court, expansive views on jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments.

4.4 *Conclusion on the Alien Torts Statute*

The Alien Torts Statute is a jurisdictional statute to which a lot of attention in contemporary case law and doctrine is being attributed. The Supreme Court has so far granted certiorari⁹⁵ three times in ATS cases. In the *Kiobel* case, the Court mainly used a consequential reasoning, supported with originalist and textualist arguments. In *Sosa*, the Court used an originalist interpretation and used textualism and intertextualism in an attempt to find out the original meaning. In *Daimler*, in which the Court only touched upon ATS, consequential reasoning was the only applied method of interpretation. Despite these three decisions, ATS is still far from clear and there is a further need for interpretation. As we are here concerned with the interpretation of a statute, and not of the Constitution, some call upon the legislator to intervene.

5 General conclusion

The study of the Obamacare case, abortion cases and ATS cases shows that the Supreme Court very often applies consequential reasoning. One explanation for this can be that the citizens of the United States and the lower courts should accept a decision of the Court. Sometimes the Court has to make decisions with great implications and even changes for the people relying on, for instance, statutes and practices. Therefore, the Court must weigh the consequences for the people. This contributes to the legitimacy of the Court and the acceptance of the decision by the people.

93 *Daimler* (n 78).

94 *Daimler* (n 78) 763.

95 When the Supreme Court grants certiorari, it allows the appeal that was made and will decide on the case.

Except for the almost omnipresence of consequential reasoning, the Court cannot be said to have preferred interpretation methods. Textualism and intertextualism occur often, but this can be no surprise. These two interpretation methods are the easiest and most intuitively correct ways of interpreting a text. When prior landmark cases exist, as was the case for the abortion cases, the Court can easily refer to prior case law and rely upon the *stare decisis* doctrine. For the rest, however, the Court seems to pick its interpretation methods on a case-by-case basis, not even with a thread throughout one single line of cases.

The conclusion is that the Court is very eclectic⁹⁶ in determining how it interprets the Constitution or a statute. Consequential reasoning seems the preferred method of the Court. In interpreting a statute, it might be so that the Court can even rely more heavily upon consequential reasoning as the legislator can step in to amend the statute and thus change the consequence it has. The Constitution, however, can hardly be changed and must therefore be interpreted in a more modest way, without making (too) strong assumptions on the consequences it has. While heavily relying on consequential reasoning, the Court does not really address the criticism on this interpretation method. The Court can never be sure of the consequences a certain interpretation will bring. The *Kiobel* case is a good example of this as both the opinion of the Court and the concurring opinion apply consequential reasoning; however, the consequences the Court's opinion warns for are the opposite of those warned in the concurring opinion.

The conclusion that first, eclecticism, and second, consequential reasoning, are most often relied upon, might seem logical and even obvious to some. However, empirically verifying that eclecticism and consequential reasoning are the main interpretation methods used by the court is important for the study of court cases, both on their content and interpretation.

96 Eclecticism is the impracticability of any single approach. It reflects the complexity of life and the breadth of subjects regulated by the Constitution.

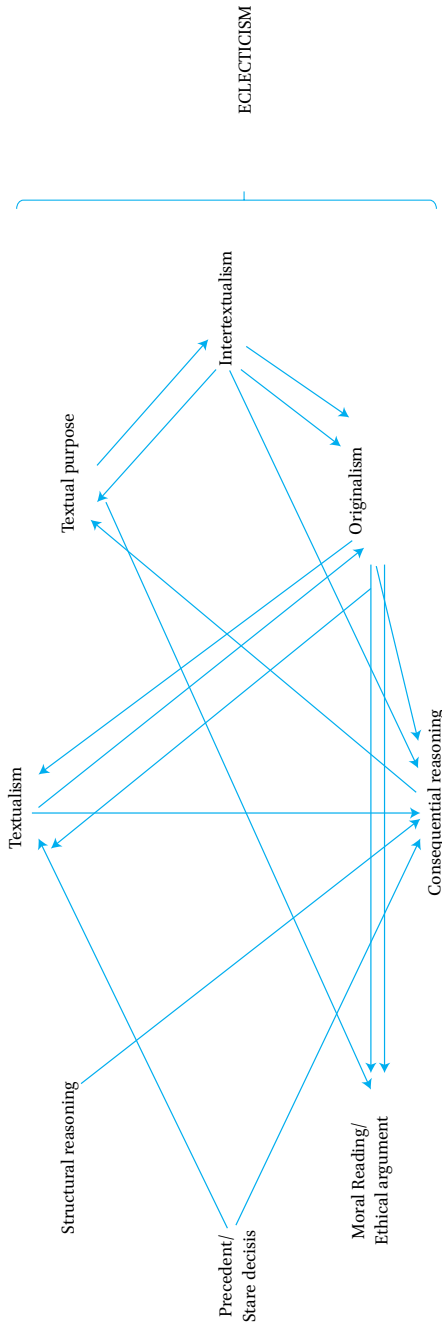


FIGURE 1 Matrix of interpretation methods as used by the US Supreme Court