

Provincialism in United States Courts

Patrick M. McFadden

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PROVINCIALISM IN UNITED STATES COURTS

Patrick M. McFadden†

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† Associate Professor of Law, Loyola University Chicago School of Law. The author gratefully acknowledges the comments of William T. Braithwaite, Elaine Frangedakis, Charles W. Murdock, Jordan J. Paust, Alan Raphael, Edward D. Re, Oscar Schachter and Phillip R. Trimble, along with the research assistance of Christine Siwik, Russ Herron, Brian Kozlowski and Phillip Couri.

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INTRODUCTION

Over the past 200 years, United States judges have developed a series of rules and practices that minimize the role of international law in domestic litigation. Considered collectively, these rules and practices embody a thoroughgoing, deeply rooted provincialism—an institutional, almost reflexive, animosity toward the application of international law in U.S. courts. As a consequence, international law plays almost no part in the judicial business of the United States. It is rarely discussed in American cases, and almost never provides the rule of decision upon which court judgments turn.

The provincialism of U.S. courts is in many ways puzzling. First, it is hard to square with official doctrine. The Constitution, for example, makes treaties the supreme law of the land,¹ and the Supreme Court has repeatedly asserted that “international law is part of our law.”² Second, it is hard to reconcile with the role of judges, who are institutionally committed to the rule of law. Because international law is *law* (a position debatable in some quarters but not in the courthouse),³ judges might be expected to lead the fight to apply it.⁴ Instead, they appear to have led the retreat. Third, the provincialism of U.S. courts seems, on its face, bizarrely at odds with contemporary conditions. It is a cliché, but no less true for that reason, that Ameri-

¹ U.S. CONST. art. VI, cl. 2.

² *The Paquete Habana*, 175 U.S. 677, 700 (1900), quoted in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 623 (1983); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423, 452-53 (1964); *Skiriotes v. Florida*, 313 U.S. 69, 72-73 (1941); *Kansas v. Colorado*, 206 U.S. 46, 97 (1907).

³ Judges seldom question the legal character of international law, but philosophers sometimes take a different view. See *infra* notes 171-86 and accompanying text (discussing positivism and international law). Without doubting its legal character, diplomats and political scientists often doubt international law's usefulness or practical relevance. See, e.g., DEAN ACHESON, *FRAGMENTS OF MY FLEECE* 156 (1971); GEORGE F. KENNAN, *AMERICAN DIPLOMACY 1900-1950*, at 95-101 (1951); HANS J. MORGENTHAU, *POLITICS AMONG NATIONS* 279-314 (5th ed., rev. 1978); Dean Acheson, *The Arrogance of International Lawyers*, 2 INT'L LAW. 591, 592 (1968); Ian Brownlie, *The Reality and Efficacy of International Law*, 52 BRIT. Y.B. INT'L L. 1, 1 (1981).

⁴ See, e.g., Edward D. Re, *Judicial Enforcement of International Human Rights*, 27 AKRON L. REV. 281, 300 (1994) (urging that effective enforcement of universally accepted legal norms ought to be the concern of both lawyers and judges).

can judges and lawyers are increasingly confronted with cases involving persons, property, or events outside the United States⁵—just the sorts of cases in which international law might be relevant. At the same time, the scope and detail of international law has expanded dramatically,⁶ making it ever more likely that international law does in fact have something to say about the situations lawyers and judges increasingly confront.

In the face of its puzzling development and growing anachronism how can the provincialism of U.S. courts be understood or defended? The answer is important, and not just for courts. Judicial provincialism inevitably migrates from the bench to the bar, and ultimately to the citizens and residents of the United States. Sensible litigators simply do not waste their time making arguments that are unlikely to persuade. Given the provincialism of U.S. courts, it is never surprising to find international law argued at the back of a brief, if it is argued at all.⁷ Because our courts apply international rules so infrequently, those rules become largely irrelevant in document drafting and transactional planning as well.

Puzzling in its development and profound in its implications, judicial provincialism warrants the kind of systematic study that it seldom receives.⁸ During law school and later practice, one is likely to

⁵ See, e.g., S. Tamer Cavusgil, *Globalization of Markets and Its Impact on Domestic Institutions*, 1 IND. J. GLOBAL LEGAL STUD. 83, 99 (Fall 1993); Harold H. Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2365-66 (1991); Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185, 188 (1993); *Recommendation & Report*, 1993 A.B.A. SEC. INT'L L. & PRAC. 2-3.

⁶ See, e.g., BENEDETTO CONFORTI, *INTERNATIONAL LAW AND THE ROLE OF DOMESTIC LEGAL SYSTEMS* 3-5 (Rene Provost trans., 1993); LOUIS HENKIN ET AL., *INTERNATIONAL LAW* at xxviii-xxix (3d ed. 1993); MALCOLM N. SHAW, *INTERNATIONAL LAW* 39-43 (2d ed. 1986); ABRAM CHAYES ET AL., *INTERNATIONAL LEGAL PROCESS* at ix-x (1968).

⁷ See FRANCIS A. BOYLE, *DEFENDING CIVIL RESISTANCE UNDER INTERNATIONAL LAW* 14-15 (1987) ("Invariably it is the case that the international law arguments are at the very bottom of the list of grounds upon which [criminal defense attorneys] intend to defend their clients. In order of priority, attorneys usually strongly prefer any type of argument based on the United States Constitution . . . ; then traditional substantive and procedural criminal law defenses; and finally, principles of international law.").

⁸ Several scholars have examined the individual doctrines that tend to marginalize international law. See, e.g., Michael J. Bazylar, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325 (1986); Michael J. Glennon, *Foreign Affairs and the Political Question Doctrine*, 83 AM. J. INT'L L. 814 (1989); Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988). Less frequently, scholars have taken a broader perspective, examining clusters of such doctrines. See, e.g., THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* (1992) [hereinafter FRANCK, *POLITICAL QUESTIONS*] (examining the political question doctrine, the act of state doctrine, and foreign sovereign immunity); JORDAN J. PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* (forthcoming 1996) (examining series of issues concerning international law's treatment in all three branches of government). Still other scholars have examined the role of particular kinds of international law in U.S. courts, or the receptivity of U.S. courts to particular classes of international cases. See, e.g., Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277 (1991) (arguing that certain types of

meet some rules and doctrines that help to minimize the role of international law in U.S. courts: standing requirements, the political question doctrine, the rule that treaties may not be invoked in U.S. courts unless they are self-executing, and perhaps others.⁹ But these rules and doctrines tend to be examined individually, and not always with particular reference to their effect on international law. They are typically scattered among several different courses in the legal curriculum—constitutional law, conflicts of law, civil procedure, and public international law, among others—and are thus studied in scattered ways by both students and scholars. For practicing lawyers, the rules and doctrines of judicial provincialism arise haphazardly—whenever a situation or lawsuit makes them relevant. Random confrontations and compartmentalized treatment hide the larger picture, a picture from which we can learn a great deal.

This Article begins by painting the larger picture. Part I collects all the rules and practices that conspire to minimize the role of international law in U.S. courts. The very size of the collection suggests the depth and breadth of judicial animosity toward international law and helps to dispel the impression, created by the Constitution and by some Supreme Court opinions, that international law plays a serious, effective role in domestic judicial practice. In addition, Part I groups the relevant rules and practices by type. It identifies three different ways in which U.S. courts marginalize international law: (1) by refusing to hear international cases; (2) by refusing to apply international rules in the cases they do hear; and (3) by treating both international cases and international law as if they were domestic.

Part II examines four Supreme Court cases decided within the past four years. The cases illustrate the deeply provincial character of American judging, and reveal, in a concrete way, how provincialism manifests itself in judicial decisions. Part III reviews the consequences of provincialism—its harms to litigants, our courts, and the United States as a whole—and suggests why those consequences cannot be ignored. Part IV seeks to explain why provincialism survives despite its

international cases are and ought to be heard in U.S. courts); Jordan J. Paust, *Customary International Law: Its Nature, Sources and Status as Law of the United States*, 12 MICH. J. INT'L L. 59 (1990) (surveying judicial references to and uses of customary international law in U.S. courts); Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986) [hereinafter Trimble, *Revisionist View*] (arguing that customary international law appropriately plays a more modest role than do treaties in domestic judicial practice).

The purpose of this Article, however, is to survey all of the rules and practices that tend to marginalize international law, whatever the source of that law (treaties, custom, or other sources) and whatever its substantive content. Such a project necessarily sacrifices the subtlety of narrower studies, but illuminates connections and recurring themes that narrower studies cannot.

⁹ See *infra* part I for the effect these and other rules have on international cases.

harms. The different forms of provincialism are founded on different sets of supporting grounds, ranging from constitutional concerns to ignorance. None, Part IV argues, is strong enough to justify U.S. courts' current maltreatment of international law.

Reform is needed. Because judge-made law forms the primary basis for provincialism, judges are in the best position to do something about it.¹⁰ The Article therefore concludes, in Part V, by urging the adoption of judicial education programs in international law. Judges will likely desire change once they see the issues and understand the stakes involved.

I

THE THREE FACES OF PROVINCIALISM

Despite their number and disparate origins, the elements of judicial provincialism fall into three main patterns or types: those that keep international cases from being heard at all; those that prevent international law from providing the rule of decision in cases that are heard; and those that hinder the proper handling of international issues and materials.

A. Jurisdictional Provincialism

"Jurisdictional provincialism" refers to the judiciary's use of rules that marginalize international law by providing grounds upon which a court may decline to hear a case with international ramifications. These doctrines address questions of "jurisdiction" or "justiciability," that is, the propriety of a court deciding a case at all. Doctrines of this type include:

- (1) personal jurisdiction requirements;¹¹

¹⁰ See Edward D. Re et al., *Judicial Education on International Law Committee of the Section of International Law of the American Bar Association: Final Report*, 24 INT'L LAW. 903, 903-04 (1990) (noting that international legal issues presented to courts are often not identified or considered adequately; calling for efforts to enhance the capacity of courts to recognize and address such issues). There are, of course, limits to judge-made reform. Other organs of the U.S. government equal or surpass the judiciary in their bias against international law, and the work of those organs constrains the options available to courts. To take the most obvious example, the U.S. Senate is often reluctant to give its advice and consent to the ratification of treaties the United States has previously signed, and U.S. courts cannot apply unratified treaties, regardless of their commitment to international law.

¹¹ See FED. R. CIV. P. 4 (covering federal service of process and personal jurisdiction requirements); 4A CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* §§ 1133-1136 (2d ed. 1987 & Supp. 1995) (discussing complexities and difficulties of obtaining service of process over foreign litigants in federal courts). See generally Gary B. Born & Andrew N. Vollmer, *The Effect of the Revised Federal Rules of Civil Procedure on Personal Jurisdiction, Service, and Discovery in International Cases*, 150 F.R.D. 221 (1993) (discussing 1993 amendments); Gary B. Born, *Reflections on Jurisdictional Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1 (1987).

- (2) subject-matter jurisdiction requirements;¹²
- (3) foreign sovereign immunity;¹³
- (4) standing requirements;¹⁴
- (5) the political question doctrine;¹⁵
- (6) forum non conveniens doctrine;¹⁶
- (7) lis alibi pendens doctrine;¹⁷ and
- (8) the act of state doctrine.¹⁸

¹² Federal courts obtain jurisdiction over many international cases pursuant to the "alienage" provisions of 28 U.S.C. § 1332(a)(2) (1988) (establishing federal jurisdiction over controversies between "citizens of a State and citizens or subjects of a foreign state"). Jurisdiction in these cases is defeated if foreign nationals appear on both sides of the dispute. See cases cited *infra* note 20.

¹³ With important exceptions, foreign states and certain related entities are immune from suit in U.S. courts. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1332, 1391, 1441, 1602-1611 (1988). Before the passage of that Act, judicial decisions often provided immunity. See, e.g., *National City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 358 (1955) ("Very early in our history this immunity was recognized and it has since become part of the fabric of our law.") (citations omitted); *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812) ("One of these [restrictions on the jurisdiction of a nation within its own territory] is admitted to be the exemption of the person of the sovereign from arrest or detention within a foreign territory.").

¹⁴ Because international law is primarily thought to concern relations between states, non-state parties to litigation may not be able to invoke that law in their claims for relief. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 59-60 (4th ed. 1990) (discussing primacy of states as subjects of international law); GEORG SCHWARZENBERGER & E.D. BROWN, *A MANUAL OF INTERNATIONAL LAW* 64 (6th ed. 1976) (arguing that under classic conception of international law, an individual's ability to benefit from international rules depends on his or her link with a state, which is alone competent to assert rights against other states); *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* 70-71 [hereinafter *RESTATEMENT*] ("Although individuals . . . have some independent status as persons in international law, the principal relationships between individuals and international law still run through the state, and their place in international life depends largely on their status as nationals of states.").

¹⁵ See FRANCK, *POLITICAL QUESTIONS*, *supra* note 8, at 10-20; LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 208-16 (1972) [hereinafter *HENKIN, FOREIGN AFFAIRS*]; Jonathan I. Charney, *Judicial Deference in Foreign Relations*, 83 *AM. J. INT'L L.* 805, 807-08 (1989); Linda Champlin & Alan Schwarz, *Political Question Doctrine and Allocation of Foreign Affairs Power*, 13 *HOFSTRA L. REV.* 215, 230-31 (1985); Glennon, *supra* note 8, at 814-16; Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 *YALE L.J.* 597 (1976).

¹⁶ See, e.g., Sheila L. Birnbaum & Douglas W. Dunham, *Foreign Plaintiffs and Forum Non Conveniens*, 16 *BROOK. J. INT'L L.* 241 (1990); Gordon W. Paulsen & Robert S. Burtick, *Forum Non Conveniens in Admiralty*, 13 *J. MAR. L. & COM.* 343 (1982).

¹⁷ See GARY B. BORN & DAVID WESTIN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 320-21 (2d ed. 1994).

¹⁸ See GERHARD VON GLAHN, *LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW* 152-53 (4th ed. 1981) ("International law is said to require each state to respect the validity of the public acts of other states, in the sense that its courts will not pass judgment on the legality or the constitutionality of the acts of a foreign sovereign under his own laws."); REBECCA M. WALLACE, *INTERNATIONAL LAW* 48-49 (1986) ("The act of state doctrine precludes the Court from inquiring into the validity of the public acts of a recognized foreign sovereign power within its own territory. . . . The essence of the act of state doctrine is that the act of one independent government cannot be successfully questioned by the courts of another.").

Courts have used all of these doctrines to decline hearing cases with international content. International cases often involve foreign defendants who are considered beyond the personal jurisdiction of our courts because of their location outside the United States or general lack of contact with the United States.¹⁹ Even if all the parties are subject to personal jurisdiction, federal courts, especially, may find themselves lacking subject-matter jurisdiction, frequently because foreign nationals appear on both sides of the dispute.²⁰ Jurisdiction is also blocked, with certain exceptions, when the defendant is a foreign state or a related entity.²¹

Assuming jurisdiction is established, a court may nonetheless refuse to hear an international case because the plaintiff lacks standing to assert a claim based on international law,²² the claim raises a political question more appropriately addressed by the executive or legislative branches,²³ the forum is determined to be inconvenient,²⁴ similar

¹⁹ *E.g.*, *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 418-19 (1984); *Pizarro v. Hoteles Concorde Int'l*, 907 F.2d 1256, 1257 (1st Cir. 1990); *Guardian Royal Exch. Assurance, Ltd. v. English China Clays*, 815 S.W.2d 223, 226 (Tex. 1991); *Gian-nouleas v. Phoenix Mar. Agencies*, 525 So. 2d 1067, 1071 (La. Ct. App.), *rev'd*, 525 So. 2d 1043 (La. 1988).

²⁰ *E.g.*, *Lloyds Bank PLC v. Norkin*, 817 F. Supp. 414, 419 (S.D.N.Y. 1993); *Arai v. Tachibana*, 778 F. Supp. 1535, 1543 (D. Haw. 1991); *Hercules Inc. v. Dynamic Export Corp.*, 71 F.R.D. 101, 107 (S.D.N.Y. 1976).

²¹ *E.g.*, *Saudi Arabia v. Nelson*, 113 S. Ct. 1471, 1473 (1993); *Drexel Burnham Lambert Group v. Galadari*, 12 F.3d 317, 330-31 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1644 (1994); *Antares Aircraft, L.P. v. Federal Republic of Nig.*, 999 F.2d 33, 36-37 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994).

²² *E.g.*, *United States v. Sainsbury-Suarez*, 797 F.2d 931, 933 (11th Cir. 1986) (ruling that crew of foreign vessel detained by U.S. officials for suspected drug smuggling lacked standing to complain of international law violation); *Dickens v. Lewis*, 750 F.2d 1251, 1254 (5th Cir. 1984) (ruling that individuals lacked standing to raise claims under United Nations Charter); *United States v. Noriega*, 746 F. Supp. 1506, 1533 (S.D. Fla. 1990) ("[I]ndividuals lack standing to assert violations of [non-self-executing] international treaties in the absence of a protest from the offended government."). *See also* *SEC v. Briggs*, 234 F. Supp. 618, 620-21 (N.D. Ohio 1964) (doubting whether U.S. citizen had standing to object to process served on her in Canada on the ground that the service violated Canadian sovereignty).

²³ *E.g.*, *United States v. Alvarez-Machain*, 504 U.S. 655, 669 (1992) (suggesting that question of U.S. violations of "general international law principles" is a matter for the executive branch); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 634 (1818) (stating that questions of foreign policy belong to executive branch); *Linder v. Portocarrero*, 963 F.2d 332, 337 (11th Cir. 1992) (determining civil action against Nicaraguan anti-government organizations and leaders presented nonjusticiable political question); *Greenham Women Against Cruise Missiles v. Reagan*, 591 F. Supp. 1332, 1340 (S.D.N.Y. 1984) (stating that action by non-Congressional litigants raised nonjusticiable political questions), *aff'd*, 755 F.2d 34 (2d Cir. 1985); *Crockett v. Reagan*, 558 F. Supp. 893, 903 (D.D.C. 1982) (deciding that action by members of Congress against President and Secretaries of Defense and State nonjusticiable), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984); *United States v. Sisson*, 294 F. Supp. 515, 517-18 (D. Mass. 1968) (determining that defendant's argument that United States involvement in Vietnam violated international law involves a nonjusticiable political question).

²⁴ *E.g.*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 259-60 (1981); *Ahmed v. Boeing Co.*,

litigation is proceeding elsewhere,²⁵ or a decision would require the court to judge the legality of another nation's acts taken within that nation's borders.²⁶

Not all of these rules and doctrines were created specifically for the purpose of reducing the international workload of domestic courts.²⁷ Nor were all of them created by courts.²⁸ Indeed, a few of the doctrines, like foreign sovereign immunity and the act of state doctrine, are animated by a deference to other nations and the requirements, real or perceived, of international law. But whatever their initial purposes and sources, and whatever their congruence with international law, these rules and practices, taken together, repeatedly screen out the sorts of cases that international law is most likely to govern.

B. Doctrinal Provincialism

"Doctrinal provincialism" refers to the judiciary's use of rules that restrict when international law can provide the rule of decision in a court's judgment. If not for its long-windedness, this might better be called "rule-of-decision provincialism." International law traditionally arises from three major sources: treaties, custom, and general principles of law.²⁹ Several rules and practices of U.S. courts limit the use of such sources in domestic litigation. These rules and practices include:

(1) the rule that prevents litigants from invoking treaties unless they are "self-executing";³⁰

720 F.2d 224, 225-26 (1st Cir. 1983); *Overseas Nat'l Airways, Inc. v. Cargolux Airlines Int'l, S.A.*, 712 F.2d 11, 13-14 (2d Cir. 1983); *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842, 866-67 (S.D.N.Y. 1986), *aff'd*, 809 F.2d 195 (2d Cir. 1987).

²⁵ *E.g.*, *Saemann v. Everest & Jennings, Int'l*, 343 F. Supp. 457, 461 (N.D. Ill. 1972); *Robinson v. Royal Bank of Can.*, 462 So. 2d 101, 101-02 (Fla. Dist. Ct. App. 1985); *Gillis v. Gillis*, 391 So. 2d 772, 772-73 (Fla. Dist. Ct. App. 1980); *Bentil v. Bentil*, 456 N.Y.S.2d 25, 25-26 (N.Y. App. Div. 1982).

²⁶ *E.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410-37 (1964); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 304 (1918) ("To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.'").

²⁷ Many leading cases involving personal jurisdiction, the political question doctrine, standing, and the forum non conveniens doctrine, for example, arose in a purely domestic context. *See, e.g.*, *Burnham v. Superior Ct. of Cal.*, 495 U.S. 604, 610 (1990) (personal jurisdiction); *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972) (standing); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 503 (1947) (forum non conveniens); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 139 (1803) (political question doctrine).

²⁸ The Constitution and federal statutes, for example, impose federal subject-matter jurisdiction requirements. U.S. CONST. art. III, § 2; 28 U.S.C. §§ 1331, 1332 (1988).

²⁹ RESTATEMENT, *supra* note 14, § 102(1); Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1055 (entered into force Oct. 24, 1945) [hereinafter ICJ Statute].

³⁰ *See, e.g.*, *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829); *United States v. Postal*, 589 F.2d 862, 876 (5th Cir.), *cert.*

(2) the rule that congressional legislation supersedes pre-existing treaty provisions;³¹

(3) the reluctance of U.S. courts to recognize the existence of international custom;³²

(4) the rule that courts may not invoke customary law, unless, like treaties, it is self-executing;³³

(5) the rule that congressional legislation supersedes pre-existing customary law;³⁴

denied, 444 U.S. 832 (1979); see also RESTATEMENT, *supra* note 14, § 111(3); JOSEPH G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 85 (10th ed. 1989) (“[T]reaties which are not self-executing, but require legislation, are not binding upon American courts until the necessary legislation is enacted.”); WALLACE, *supra* note 18, at 43 (“Self-executing treaties are automatically part of American domestic law—i.e., no complementary legislation is required—whereas non self-executing treaties are not incorporated into domestic law until the necessary enabling legislation has been passed.”).

³¹ See, e.g., *Rainey v. United States*, 232 U.S. 310, 316 (1914):

Treaties are contracts between nations, and by the Constitution are made the law of the land. But the Constitution does not declare that the law so established shall never be altered or repealed by Congress. Good faith toward the other contracting nation might require Congress to refrain from making any change, but if it does act, its enactment becomes the controlling law in this country.

(quoting lower court); see also RESTATEMENT, *supra* note 14, § 115(1)(a) (specifying conditions under which congressional acts will supersede prior treaties); 2 CHARLES C. HYDE, INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 59 (1922) (arguing that an act of Congress is regarded as superseding a prior treaty); GARY L. MARIS, INTERNATIONAL LAW 224 (1984) (“In the United States, the rule established by court decisions since the 1880s for which has precedence between a law of Congress and a treaty, is that the latest is given effect.”); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1563 n.31 (1984) (“Both the equality of statutes and treaties and the later-in-time rule have, however, been upheld in numerous cases and seem firmly established.”).

³² See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) (“The requirement that a rule [of customary international law] command the ‘general assent of civilized nations’ to become binding upon them . . . is a stringent one.”); see also MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 53 (2d ed. 1993) (“If no treaty can be found to authoritatively regulate a matter, it is by no means certain that customary international law will . . . provide a . . . rule to fill the gap.”); Trimble, *Revisionist View*, *supra* note 8, at 684 (“American courts have rarely applied customary international law, and have almost never applied it as a direct restraint against a government or a governmental interest.”).

³³ See, e.g., *United States v. Williams*, 617 F.2d 1063, 1090 (5th Cir. 1980) (noting that “rights under international common law must belong to sovereign nations, not to individuals” and that international common law “obviously could not be ‘self-executing’ in the sense that a treaty might be.”). See also Trimble, *Revisionist View*, *supra* note 8, at 693 (“[c]ustomary law, like treaties, may be non-self-executing, creating law between states but not in favor of individuals unless Congress has enacted implementing legislation.”). *But see* Paust, *supra* note 8, at 87 (stating that customary international law has been directly incorporable in U.S. law without any need for a special statutory base); Henkin, *supra* note 31, at 1561 (arguing international law is self-executing, and is applied by courts without need for congressional action).

³⁴ See, e.g., *Committee of United States Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 938-39 (D.C. Cir. 1988) (noting that an “inconsistent statute simply modifies or supersedes customary international law to the extent of the inconsistency” and that “under domestic law, statutes supersede customary international law.”); *Tag v. Rogers*, 267 F.2d 664,

(6) the rule that executive action supersedes pre-existing customary law;³⁵ and

(7) the reluctance of U.S. courts to recognize the existence of an international rule based on the "general principles of law recognized by civilized nations."³⁶

International law cannot provide the rule of decision in a given case unless an international rule is found to exist, and U.S. courts are noticeably stingy in this regard. In American practice, only treaties are reliable generators of international rules; custom and general principles of law are virtually ignored in the law-finding process.³⁷ Moreover, if a court determines that a rule from the international system exists, it often denies its application, either because the rule is not "self-executing," or, if it is self-executing, because congressional or presidential action has overridden it. The end result is that U.S. courts seldom decide international cases on the basis of international law.

666 (D.C. Cir. 1959) ("[I]t has long been settled in the United States that the federal courts are bound to recognize [treaties, statutes, and the Constitution] . . . as superior to canons of international law."), *cert. denied*, 362 U.S. 904 (1960); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp 1161, 1178 (E.D. Pa. 1980) ("[I]nternational [customary] law must give way when it conflicts with or is superseded by a federal statute or treaty . . ."); *see also* RESTATEMENT, *supra* note 14, § 115(1)(a) (specifying when congressional acts supersede existing custom); 1 INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 170 (E. Lauterpacht ed., 1970) ("[B]oth customary and conventional international law are placed in the same position as any other part of municipal law, they may be overridden by an Act of Congress . . ."); STARKE, *supra* note 30, at 84-85 ("[A] later clear statute will prevail over earlier customary international law.").

³⁵ *See, e.g.*, *Garcia-Mir v. Meese*, 788 F.2d 1446, 1454-55 (11th Cir.), *cert. denied*, 479 U.S. 889 (1986) (giving effect to actions of the Attorney General despite court's acknowledgement that those actions violated customary law); *United States v. Buck*, 690 F. Supp. 1291, 1301 (S.D.N.Y. 1988) (acknowledging that a controlling act of the executive branch may supersede customary international law); *see also* RESTATEMENT, *supra* note 14, § 115 reporters' note 3 (discussing authority for the position that the President may violate customary law); Jack M. Goldklang, *Back on Board the Paquete Habana: Resolving the Conflict Between Statutes and Customary International Law*, 25 VA. J. INT'L L. 143, 145 (1984) (arguing that the U.S. government has the power, via a "controlling executive act," to disregard customary international law). Scholars differ on the ability of the executive branch to trump customary international law. *Compare* Jordan J. Paust, *The President is Bound by International Law*, 81 AM. J. INT'L L. 377 (1987) (arguing that President may not lawfully violate binding international law) *with* Henkin, *supra* note 31, at 1567-69 (arguing that President has the power, if not the authority, to violate international law, and courts will not invalidate such acts because of such violation).

³⁶ No U.S. court, so far as this author can determine, has squarely found a "general principle of law" to exist. *See* VON GLAHN, *supra* note 18, at 25 ("[M]any international lawyers as well as statesmen harbor serious doubts as to the validity of the claim that 'general principles' represent a usable source of international law."). *But cf.* Howard S. Schrader, Note, *Custom and General Principles as Sources of International Law in American Federal Courts*, 82 COLUM. L. REV. 751, 770-79 (1982) (describing uses of "general principles" in U.S. decisions).

³⁷ *See infra* notes 234-38 and accompanying text.

C. Methodological Provincialism

“Methodological provincialism” refers to the judicial tendency to handle international cases as if they were domestic cases. U.S. courts tend to use domestic patterns of analysis in identifying the relevant issues in a case and in addressing and defending the resolution of those issues. This type of provincialism, unlike jurisdictional and doctrinal provincialism, does not depend on a specific set of legal rules or doctrines, but instead flows from an *approach* to rules and their analysis—an approach demonstrably different from that of international courts and tribunals.

This form of provincialism usually springs from the tacit assumption that international law works on the same principles, and with the same dynamics, as American law. It causes U.S. courts to:

(1) ignore or undervalue custom and general principles of law (primary sources of law in the international system, but largely unknown to our domestic one);³⁸

(2) undervalue scholarship (which, although a secondary source in both systems, has traditionally enjoyed a higher status in the international system);³⁹

(3) overvalue judicial decisions (a primary source of law domestically, but a secondary one internationally);⁴⁰

(4) interpret treaties as if they were domestic statutes or contracts;⁴¹ and

³⁸ See ICJ Statute, *supra* note 29, art. 38(1)(b)-(c) (directing the International Court of Justice to apply custom and general principles of law); RESTATEMENT, *supra* note 14, § 102(1)(a), (c) (explaining that international law is composed, inter alia, of custom and general principles).

³⁹ RESTATEMENT, *supra* note 14, § 103(2)(c) (when determining whether a rule has become international law, substantial weight is accorded to the writings of scholars); BROWNLIE, *supra* note 14, at 24-25 (“[T]he opinions of publicists are used widely” under the Statute of the International Court); HENKIN ET AL., *supra* note 6, at 123 (“The place of the writer in international law has always been more important than in municipal legal systems.”). See ICJ Statute, *supra* note 29, art. 38(1)(d) (teachings of the most highly qualified publicists provide a subsidiary means for determining rules of law).

⁴⁰ The Statute of the International Court of Justice expressly describes judicial decisions as a “subsidiary means” for determining the content of international law, nominally on par with the work of scholars and below treaty, custom, and general principles. ICJ Statute, *supra* note 29, art. 38(1)(d). Even decisions of the ICJ itself bind only the parties, and only with respect to the particular case decided. *Id.*, art. 59. Although the Restatement (Third) of Foreign Relations Law of the United States reports that “substantial weight” is accorded judicial decisions, it accords the same weight to scholarly writings. RESTATEMENT, *supra* note 14, § 103(2)(a)-(b).

⁴¹ For recent examples of this practice, see *United States v. Alvarez-Machain*, 504 U.S. 655, 662-63 (1992), and *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549, 2563-67 (1993), both discussed more fully *infra*, Part II. See also *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931); *Jordan v. Tashiro*, 278 U.S. 123, 127 (1928); *Sullivan v. Kidd*, 254 U.S. 433, 439 (1921); *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902); *United States v. Texas*, 162 U.S. 1, 36-37 (1896); *Geofroy v. Riggs*, 133 U.S. 258, 271 (1880); *Coplin v. United States*, 6 Cl. Ct.

(5) support propositions of international law with domestic citations.⁴²

Because methodological provincialism displays itself in judicial method and attitude, rather than in the express invocation of particular doctrines or rules, it is harder to detect than provincialism's other forms. Nevertheless, it exists, even at the highest levels of the national judiciary. The United States Supreme Court, in four recent cases, provides some of the clearest, sustained examples of the phenomenon.

II

PROVINCIALISM AND THE SUPREME COURT

During the last four years, the United States Supreme Court has considered a handful of cases with obvious international ramifications. Four of those cases, each to be studied here, involved respectively: (1) a U.S. government-sponsored kidnapping in Mexico;⁴³ (2) a U.S. company's alleged discrimination against an American citizen working in Saudi Arabia;⁴⁴ (3) a U.S. antitrust action against British nationals for conduct that occurred in Great Britain;⁴⁵ and (4) the U.S. government's interception of Haitian nationals on the high seas.⁴⁶ Each case involved other nations' interests. Additionally, there existed in each case a body of international law that directly addressed those interests. Yet the Supreme Court almost wilfully minimized the effect of international law. Not once did international law provide the rule of decision. Not once did it provide the framework of analysis. And only occasionally, in 100 pages of written opinions by four successive majorities, was it even mentioned by name. In the recent practice of the Supreme Court, international law has dropped from sight with hardly a trace.⁴⁷

115, 125-26 (1984), *rev'd*, 761 F.2d 688 (Fed. Cir. 1985), *aff'd sub nom.* O'Connor v. United States, 479 U.S. 27 (1986).

⁴² For a recent example of this practice, see *Alvarez-Machain*, 504 U.S. at 662-63 (supporting law of treaty interpretation and law of international extradition with domestic citations).

⁴³ *Alvarez-Machain*, 504 U.S. at 655.

⁴⁴ *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 246 (1991).

⁴⁵ *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891, 2898 (1993).

⁴⁶ *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549, 2552 (1993).

⁴⁷ See Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 40 (complaining that in recent cases, including *Alvarez-Machain* and *Sale*, the Supreme Court "has shown something less than 'a decent respect for the opinions of mankind.'"). The prognosis for international law is not, however, entirely bleak. Each of the four cases mentioned above generated dissents and international law received fair treatment in at least two of those opinions. See *Hartford*, 113 S. Ct. at 2917-22 (Scalia, J., dissenting in part); *Sale*, 113 S. Ct. at 2567-77 (Blackmun, J., dissenting). In addition, lower federal courts, as well as state courts, are occasionally more sympathetic to international law than is our highest tribunal. See, e.g., *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350 (2d Cir. 1992), *rev'd sub nom.* *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993); *United States Verdugo-Urquidez*, 939 F.2d 1341 (9th Cir. 1991), *cert. granted and judgment vacated*, 505 U.S. 1201

The international kidnapping case, *United States v. Alvarez-Machain*,⁴⁸ is particularly instructive, and forms the principal object of study in this Part. The other three cases will be examined more briefly, to demonstrate that the provincialism of *Alvarez-Machain* is not idiosyncratic and to highlight additional features of provincialism not fully apparent in *Alvarez-Machain*. Taken together, these cases not only reveal the deeply provincial character of Supreme Court decision-making, but also illustrate how the different forms of provincialism actually manifest themselves in the work of U.S. courts.

A. The Curious Case of *Alvarez-Machain* (and Why It Is So Curious)

In *Alvarez-Machain*, the Supreme Court held that a Mexican national's forcible abduction from Mexico, at the request of U.S. government officials, did not rob U.S. courts of jurisdiction to try him on federal criminal charges.⁴⁹ As one might expect, the decision generated a maelstrom of law review comment—most of it critical.⁵⁰ National leaders from around the world were critical as well:

Neighboring countries like Canada and most Latin American states, long-time friends including Switzerland and Australia, and more predictable critics, such as Cuba and Iran, [reacted negatively]. The Chinese press, eager to discuss a human rights issue other than the Tienanmen Massacre, joined the chorus.⁵¹

(1992); *United States v. Caro-Quintero*, 745 F. Supp. 599 (C.D. Cal. 1990), *aff'd sub nom. United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *and rev'd*, 504 U.S. 655 (1992); *see also* *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980) (international human rights); *Van Dardel v. U.S.S.R.*, 623 F. Supp. 246, 249 (D.D.C. 1985) (international law regarding treatment of diplomats), *vacated*, 736 F. Supp. 1 (D.D.C. 1990); *State v. Miller*, 755 P.2d 434, 436 (Ariz. Ct. App. 1988) (international law of prescriptive jurisdiction).

⁴⁸ 504 U.S. 655 (1992).

⁴⁹ *Id.* at 657.

⁵⁰ Compare Manuel R. Angulo & James D. Reardon, Jr., *The Apparent Political and Administrative Expediency Exception Established by the Supreme Court in United States v. Humberto Alvarez-Machain to the Rule of Law as Reflected by Recognized Principles of International Law*, 16 B.C. INT'L & COMP. L. REV. 245, 245 (1993) and Jonathan A. Bush, *How Did We Get Here? Foreign Abduction After Alvarez-Machain*, 45 STAN. L. REV. 939, 943-44 (1993) and Michael J. Glennon, *State-Sponsored Abduction: A Comment on U.S. v. Alvarez-Machain*, 86 AM. J. INT'L L. 746, 746 (1992) and John Quigley, *Our Men in Guadalajara and the Abduction of Suspects Abroad: A Comment on U.S. v. Alvarez-Machain*, 68 NOTRE DAME L. REV. 723, 723-24 (1993) and Hernan J. Ruiz-Bravo, *Monstrous Decision: Kidnapping Is Legal*, 20 HASTINGS CONST. L.Q. 833, 834-35 (1993) (criticizing the decision) with Malvina Halberstam, *In Defense of the Supreme Court Decision in Alvarez-Machain*, 86 AM. J. INT'L L. 736, 737 (1992) (defending the decision).

⁵¹ Bush, *supra* note 50, at 942 (internal citations omitted); *see generally* David O. Stewart, *The Price of Vengeance*, 78 A.B.A. J. 50 (Nov. 1992) (describing the adverse reactions of several nations).

The Mexican government, of course, considered the decision "invalid and unacceptable."⁵²

From the perspective of the international lawyer, however, the most striking aspect of the case does not lie in the Supreme Court's ultimate decision. The precise substantive issue decided by the Court was narrow. The Court held that a state-sponsored abduction of another state's national from its territory will not, in the absence of an explicit treaty obligation to the contrary, rob the abducting state's courts of jurisdiction to try the abductee—an issue important enough for only a sentence or two in a general treatise on international law⁵³ and a decision at least plausibly correct.⁵⁴ Of much more enduring interest is the Court's approach to the case: its conception of the issues presented and its methods of resolving them. This approach was doggedly domestic, and confirms the meager role of international law in U.S. courts.

It is hard to imagine a case more squarely international in both its facts and ramifications. Dr. Alvarez-Machain, a Mexican national, was accused of participating in the kidnap, torture, and murder of a U.S. official in Mexico. A U.S. grand jury indicted him. Mexican nationals, at the urging of U.S. officials, kidnapped him in Mexico and brought him to the United States. He was prosecuted in U.S. courts. The Mexican government repeatedly protested the kidnapping and prosecution.⁵⁵ Upon such facts one could organize a three-day conference on international law, with panels on international human rights, territorial sovereignty, extradition, national jurisdiction to prescribe and enforce domestic legislation, diplomatic protection by a state of its own nationals, and the international drug war.

How remarkable, then, to read the opinion of *Alvarez-Machain*: its structure, its argument, and its supporting sources are thoroughly, almost fanatically, domestic. The Court framed its entire opinion by asking whether the reasoning of one previous Supreme Court case (*Ker v. Illinois*⁵⁶) rather than another (*United States v. Rauscher*⁵⁷) controlled the case at bar.⁵⁸ As a matter of form, international law was not engaged at all. Nor was it engaged as a matter of substance, except in the secondary and attenuated sense that *Ker* and *Rauscher* dis-

⁵² Tim Golden, *After Court Ruling, Mexico Tells U.S. Drug Agents to Halt Activity*, N.Y. TIMES, June 16, 1992, at A19.

⁵³ See, e.g., BROWNIE, *supra* note 14, at 317.

⁵⁴ See *infra* note 68 (citing a representative sample of materials on the substantive law of international abductions and national jurisdiction).

⁵⁵ *United States v. Alvarez-Machain*, 504 U.S. 655, 656 (1992).

⁵⁶ 119 U.S. 436 (1886).

⁵⁷ 119 U.S. 407 (1886).

⁵⁸ *Alvarez-Machain*, 504 U.S. at 658-64.

cuss international law.⁵⁹ The Court took *Ker* for the proposition that the abduction of a defendant does not rob a U.S. court of jurisdiction to try that defendant. It took *Rauscher* for the proposition that jurisdiction may not exist if the treatment of a defendant violates an extradition treaty.⁶⁰

Because the choice between *Ker* and *Rauscher* depended on whether the U.S.-Mexico Extradition Treaty had been violated, the Court understandably sought guidance on how to construe treaties. International lawyers would reflexively turn to Articles Thirty-one and Thirty-two of the Vienna Convention on the Law of Treaties (the "Vienna Convention"),⁶¹ but the Court, just as reflexively, turned elsewhere. "In construing a treaty, as in construing a statute," the Court

⁵⁹ The *Rauscher* Court carefully examined international law. Justice Miller, writing for the majority, examined the terms and history of the Webster-Ashburton Treaty of 1842 between England and the United States, the practice of nations regarding extradition treaties, and the writings of international publicists. *Rauscher*, 119 U.S. at 410-34. The *Ker* Court, however, allowed international law to play only a minimal role in its analysis, largely because the relevant extradition treaty "was not called into operation . . ." *Ker*, 119 U.S. at 443.

⁶⁰ *Alvarez-Machain*, 504 U.S. at 658-64.

⁶¹

ARTICLE 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

ARTICLE 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27 (1969), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, arts. 31, 32 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention]. Although the United States is not a party to the Vienna Convention, the document is largely a restatement of existing law and the U.S. Department

said, "we first look to its terms to determine its meaning."⁶² Everything about this passage is domestic: its implied equation of domestic statutes and international agreements; its command to look first to the terms of the treaty (a simpler methodology than that which the Vienna Convention describes);⁶³ and its supporting reference to two previous Supreme Court decisions instead of to international legal sources. Whether or not this approach caused the Court to err in its interpretation of the treaty, one is struck by its failure even to acknowledge that the interpretation of treaties might be a matter of international law.

The Court's citation practice further reveals its surprisingly domestic perspective. International legal decisions typically include references to treaties, historical accounts of state practice, court decisions from several nations, and the works of publicists—all traditional sources of international law.⁶⁴ The opinion in *Alvarez-Machain*, however, refers almost exclusively to previous Supreme Court decisions, even for propositions that, for the international lawyer, are most naturally supported in other ways.⁶⁵ The Court made no references to courts outside the United States, to the work of international organizations, or to scholarship produced outside the United States.

Finally, the *Alvarez* Court simply by-passed any serious discussion of customary international law. This is puzzling, not only because custom, along with treaty law, forms a primary source of international law,⁶⁶ but because custom has something to say about state-sponsored abductions.⁶⁷ Since there are serious disputes about the content of

of State has reported that the Vienna Convention "is recognized as the authoritative guide to current treaty law and practice." S. Exec. Doc. L., 92d Cong., 1st Sess. 1 (1971).

⁶² *Alvarez-Machain*, 504 U.S. at 663 (citing *Air France v. Saks*, 470 U.S. 392, 397 (1985) and *Valentine v. United States ex. rel. Neidecker*, 299 U.S. 5, 11 (1936)).

⁶³ The Convention's rules of interpretation are considerably more complex than the rule the Court offered. According to the Convention, the first level of analysis involves not only the words of the treaty (including preamble and annexes), but also contemporaneous side agreements and the treaty's "object and purpose." Vienna Convention, *supra* note 61, arts. 31(1)-(2), 32.

⁶⁴ Traditional sources, generally speaking, are treaties, customary law, general principles of law, scholarship, and judicial decisions. See ICJ Statute, *supra* note 29, art. 38(1).

⁶⁵ The first example of this practice was the Court's citation to its own cases for the law of treaty interpretation. See *supra* notes 62-63 and accompanying text. Another example appears a bit later: "In the absence of an extradition treaty, nations are under no obligation to surrender those in their country to foreign authorities for prosecution." *Alvarez-Machain*, 504 U.S. at 664 (citing *United States v. Rauscher*, 119 U.S. 407, 411-12 (1886), and *Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933)).

⁶⁶ ICJ Statute, *supra* note 29, art. 38(1)(b); Restatement, *supra* note 14, § 102(1)(a).

⁶⁷ E.g., Restatement, *supra* note 14, § 432 cmt. c ("If the unauthorized action includes abduction of a person, the state from which the person was abducted may demand return of the person, and international law requires that he be returned."); Restatement, *supra* note 14, § 432 reporters' notes 2, 3; F.A. Mann, *Reflections on the Prosecution of Persons Abducted in Breach of International Law*, in *INTERNATIONAL LAW AT A TIME OF PERPLEXITY* 407 (Yoram Dinstein & Mala Tabory eds., 1989).

that customary law,⁶⁸ one might have expected the Court to discuss the matter at some length. Instead, the Court addressed custom in two sentences:

Respondent and his *amici* may be correct that respondent's abduction was "shocking," . . . and that it may be in violation of general international law principles. Mexico has protested the abduction of respondent through diplomatic notes, . . . and the decision of whether respondent should be returned to Mexico, as a matter outside of the Treaty, is a matter for the Executive Branch.⁶⁹

In this remarkable passage, the Court displayed all three forms of judicial provincialism. First, the Court suggested that a customary violation, if shown, is properly the business of the executive branch. This bears the mark of jurisdictional provincialism: by sending the matter to the executive branch, the Court left international law unvindicated in the judicial branch. Second, the Court acknowledged, but took no position on, the question of whether international custom has in fact been violated. This bears the mark of doctrinal provincialism: by failing to take a position on customary international law, the court rendered it impossible for that custom to provide the rule of decision. Third, the very brevity of the passage, along with the Court's studied sloppiness in nomenclature ("general international law principles" must surely refer to custom), bear the mark of methodological provincialism. Because international custom has no simple analogue in American law, the Court virtually ignored its importance.

The Court's approach in *Alvarez-Machain* lies in stark contrast to the work of foreign courts facing similar issues. The courts of Israel,⁷⁰ South Africa,⁷¹ and the United Kingdom,⁷² for example, found it important to review the international law regarding state-sponsored ab-

⁶⁸ At least one national court has held that the international illegality of a state-sponsored abduction from another state robs the abducting state's courts of jurisdiction to try the abductee. *State v. Ebrahim*, 31 I.L.M. 888, 899 (S. Afr. 1992). Indeed, scholars who have examined the issue of state-sponsored abductions have almost universally condemned them. See e.g., Abraham Abramovsky & Steven J. Eagle, *U.S. Policy in Apprehending Alleged Offenders Abroad: Extradition, Abduction or Irregular Rendition*, 57 OR. L. REV. 51, 92 (1978); F.A. Mann, *supra* note 67, at 420 (stating that such abductions are "bound to lead to international anarchy and friction . . ."). Nevertheless, several scholars maintain that the illegality of an abduction does not rob the abducting state of jurisdiction to try the abductee. E.g., BROWNIE, *supra* note 14, at 317; Malvina Halberstam, *Agora: International Kidnapping*, 86 AM. J. INT'L L. 736, 737-38 (1992).

⁶⁹ *Alvarez-Machain*, 504 U.S. at 669 (citations omitted).

⁷⁰ *Attorney-General of the Govt. of Isr. v. Eichmann*, 36 I.L.R. 5, 57-76 (Dist. Ct. Jerusalem 1961) (upholding jurisdiction over abductee), *aff'd*, 36 I.L.R. 277, 342 (Sup. Ct. Isr. 1962).

⁷¹ *Ebrahim*, 31 I.L.M. at 899 (declining jurisdiction over abductee).

⁷² *R. v. Plymouth Magistrates' Ct., ex parte Driver*, 2 All E.R. 681, 695-97 (Q.B. 1985); *R. v. Bow St. Mags., ex parte Mackeson*, 75 Crim. App. 24 (C.A. 1981).

ductions or at least to examine the practice of other states.⁷³ Rare is the case, like *Alvarez-Machain*, in which a national court addressing these issues has cited only its own precedents.⁷⁴

The reasoning of *Alvarez-Machain* is bound to strike the international lawyer as bordering on the perverse: How can one discuss the proper interpretation of a treaty and not cite the Vienna Convention on the Law of Treaties? How can one ask whether an act violates treaty law and, given a negative answer, not reflexively go on to ask whether the act violates custom? How can one write an opinion involving international legal issues without a single reference to sources outside the United States?

The strangeness of the Court's approach is demonstrated by those who have risen to defend the opinion. In one of the earliest such defenses, for example, Professor John M. Rogers began by observing that:

There is a very respectable argument that permitting [Alvarez-Machain's trial in the United States] is perfectly consistent with United States obligations under customary international law, and that no treaty has changed the customary rule. The argument is supported by policy, as well as by international precedent.⁷⁵

He went on to argue that no rule of customary international law mandates the return of an abducted national to his home state, and that the U.S.-Mexico Extradition Treaty, because it failed to address abductions, did not change that result as between those two states.⁷⁶ In short, Professor Rogers made the international arguments that the Court could have made but did not. Likewise, in the October 1992 issue of the *American Journal of International Law*, Professor Malvina Halberstam ably argued, inter alia, that the "Court's holding [in *Alvarez-Machain*] is consistent with existing international law."⁷⁷ In support of that proposition she cited examples of state practice, decisions from courts in several different countries, and the work of publicists.⁷⁸ She, too, was concerned with showing that the Supreme Court could have found support for its holding if it had consulted international law. As students of international law, both Rogers and Halberstam felt

⁷³ See also *Re Argoud*, 45 I.L.R. 90, 103 (Cass. crim. 1964) (including notation by reporter that French judges were willing to examine precedents from other nations); *Afounch v. Attorney-General*, 10 Ann. Dig. 327, 328 (Palestine Sup. Ct. 1942) (citing MOORE'S DIGEST OF INTERNATIONAL LAW (1906)).

⁷⁴ Such cases do, however, exist. E.g., *R. v. O./C. Depot Battalion*, 1 All E.R. 373 (K.B. 1949). But even here, the English court discussed Scottish precedent. *Id.* at 377-78.

⁷⁵ John M. Rogers, *Response to President's Notes on Alvarez-Machain*, ASIL NEWSL. (Am. Soc'y Int'l L., Washington, D.C.), Jan.-Feb. 1993, at 5.

⁷⁶ *Id.*

⁷⁷ Halberstam, *supra* note 50, at 737.

⁷⁸ *Id.* at 737-39.

compelled to defend the Court on grounds the Court itself either ignored or left undeveloped.

Alvarez-Machain is indeed a curious case. Redolent with international implications, it was nonetheless treated by the Supreme Court as a domestic case, to be decided on the basis of domestic law and precedent. This is certainly not the approach one would have expected from an international tribunal, nor, it appears, from the courts of other nations. It is, however, an approach one might have expected from an American court, and from the Supreme Court in particular, for the Supreme Court repeats the provincialism of *Alvarez-Machain* in several other recent cases.

B. *Alvarez-Machain* in Context: *Aramco*, *Hartford*, and *Sale*

1. *Aramco*

The issue in *EEOC v. Arabian American Oil Co.*⁷⁹ ("*Aramco*") was whether Title VII of the Civil Rights Act of 1964⁸⁰ governed a U.S. company's employment of a U.S. citizen in Saudi Arabia. The Court held that it did not: Congress is presumed to intend legislation to apply only within the territory of the United States, and only a clear expression of contrary intent can overcome that presumption.⁸¹ The petitioners' evidence that Congress intended an extraterritorial reach for Title VII was insufficiently clear for the Court to overturn the territorial presumption.⁸²

The Court treated this case as if it raised a matter of purely domestic law—the proper interpretation of a congressional act. Throughout its entire opinion, the Court cited only U.S. statutes and cases. But it could have handled *Aramco* differently. International law has generated a body of principles regarding the proper reach of national legislation—principles that bear on the ability of a nation to prescribe conduct beyond its borders.⁸³ The Court, therefore, could have asked whether these principles permitted (or precluded) the extraterritorial application of Title VII for which the petitioners argued. In the alternative, the Court could have used these international rules as an interpretive aid, asking how they might legitimately affect the construction of a congressional statute. The Court chose neither of

⁷⁹ 499 U.S. 244 (1991).

⁸⁰ 42 U.S.C. §§ 2000e-2000e-17 (1988).

⁸¹ *Aramco*, 499 U.S. at 248.

⁸² *Id.* at 248-58. Congress itself promptly overturned the Court's interpretation of Title VII, amending the law to explicitly cover the employment of U.S. nationals abroad. Civil Rights Act of 1991, 42 U.S.C. § 2000e(f) (1988 & Supp. III 1991).

⁸³ See, e.g., RESTATEMENT, *supra* note 14, §§ 402, 403.

these paths and, indeed, failed even to acknowledge the existence of applicable international rules.⁸⁴

The Court concededly adopted its territorial presumption partly out of deference to the interests of other nations and with a view to avoiding the conflicts that might arise if U.S. laws were applied extra-territorially.⁸⁵ Accordingly, one might be tempted to understand the Court as tacitly acknowledging the limits imposed by international law. But this is not how the Court understood the matter. The Court itself called the territorial presumption "a longstanding principle of *American law*" and cited domestic precedent for support.⁸⁶ Moreover, had the Court really looked to international law for guidance, it likely would have fashioned a different rule. The international law of prescriptive jurisdiction does *not* restrict nations to prescribing conduct solely within their physical borders,⁸⁷ but instead recognizes the ability of states to prescribe extraterritorial conduct if that conduct has certain other connections with the prescribing state.⁸⁸ These non-territorial grounds of prescriptive jurisdiction have grown so important in recent years that contemporary international law does not readily support the Court's heavy territorial presumption.⁸⁹

⁸⁴ The Court's apparent ignorance of the international law of prescriptive jurisdiction led it to say some odd things in its analysis:

If petitioners are correct that [Title VII] applies to employers overseas, we see no way of distinguishing in its application between United States employers and foreign employers. Thus, a French employer of a United States citizen in France would be subject to Title VII—a result at which even petitioners balk. The EEOC assures us that in its view the term "employer" means only "American employer," but there is no such distinction in this statute and no indication that the EEOC in the normal course of its administration had produced a reasoned basis for such a distinction.

Aramco, 499 U.S. at 255. International law, which allows states broader regulatory powers over their nationals, as compared to non-nationals, abroad, provides the "reasoned basis for such a distinction." See RESTATEMENT, *supra* note 14, § 402.

⁸⁵ *Aramco*, 499 U.S. at 248.

⁸⁶ *Id.* at 248 (emphasis added) (citing *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

⁸⁷ See RESTATEMENT, *supra* note 14, §§ 402, 403.

⁸⁸ Subject to certain restrictions, for example, a state may regulate the conduct of its nationals wherever they are found, and the conduct of non-nationals abroad if that conduct has direct and substantial effects on the prescribing state. RESTATEMENT, *supra* note 14, §§ 402(1)(c), 402(2) (describing as justified both the regulation of conduct outside a state's territory that has, or is intended to have, substantial effect within its territory, and the regulation of activities of a state's nationals outside as well as within its territory).

⁸⁹ At the beginning of this century, one could more plausibly characterize international law as limiting a state's prescriptive jurisdiction to its own territory. Today, however, international law evidences a great deal more flexibility in assessing claims of prescriptive jurisdiction. See, e.g., RESTATEMENT, *supra* note 14, §§ 402-404 (describing the bases for prescriptive jurisdiction and the limitations on that jurisdiction, respectively); Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U. S. Law*, 24 LAW & POL'Y INT'L BUS. 1 (1992); Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 S. Ct. Rev. 179, 183-84.

In sum, the *Aramco* Court treated the issue before it as raising matters of purely domestic law despite both the obvious international implications and the existence of a relevant body of international law. In this sense, the *Aramco* decision represents an even more thoroughgoing example of provincialism than *Alvarez-Machain*, which at least made a few passing references to international law.⁹⁰

2. *Hartford*

The Supreme Court faced a similar issue in *Hartford Fire Ins. Co. v. California*.⁹¹ In this consolidated case, nineteen states and several individuals sued a number of domestic and foreign insurance companies alleging a conspiracy that made certain kinds of insurance coverage unavailable to American insurance buyers.⁹² The case raised several issues under U.S. antitrust law, but only one issue had international ramifications.

In the relevant part of the case, several British defendants sought to dismiss the claims against them on the ground that Section One of the Sherman Act did not apply to their conduct outside the United States.⁹³ The Court treated the defense as raising issues of purely domestic law—the proper interpretation of a congressional act and the propriety of domestic judicial abstention.

The Court first turned to the interpretation of the Congressional act. “[I]t is well established by now,” said the Court, “that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.”⁹⁴ The principle, once stated, was easy to apply, since the plaintiffs had alleged that the British defendants conspired to affect and did affect the United States.⁹⁵ The defendants next argued that the claims against them should be dismissed on grounds of international comity.⁹⁶ This defense failed as well, with the Court remarking that comity could be invoked only if there was a “true conflict between domestic and foreign law.”⁹⁷ Here, it observed, there was no “true conflict” because British law did not *require* British insurers to act in the ways complained of in the antitrust suit.⁹⁸

⁹⁰ *E.g.*, *United States v. Alvarez-Machain*, 504 U.S. 655, 666-68 (1992) (mentioning international law briefly).

⁹¹ 113 S. Ct. 2891 (1993).

⁹² *Id.* at 2895.

⁹³ *Id.* at 2908-09.

⁹⁴ *Id.* at 2909.

⁹⁵ *Id.*

⁹⁶ *Id.* at 2909-11.

⁹⁷ *Id.* at 2910 (quoting *Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct.*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part)).

⁹⁸ *Id.* at 2911.

The Court's discussion, both of the Sherman Antitrust Act and of international comity, is curious in its exclusive reference to domestic law.⁹⁹ Step by step, proposition by proposition, the Court grounded its analysis on domestic precedents and proceeded as if no international sources or methods of analysis existed. The Court even domesticated the notion of "international comity," citing only U.S. sources.¹⁰⁰

As noted in the discussion of the *Aramco* case above,¹⁰¹ there exists an international law of prescriptive jurisdiction. This law provides a set of international principles relevant to the question of whether the Sherman Antitrust Act can or should apply to actions outside the United States. There is also an international law of judicial jurisdiction. It provides a set of principles describing the conditions under which a state may hear disputes in its courts.¹⁰² Had the Supreme Court turned to these principles, its analysis would have proceeded differently. It would, for example, have likely begun by asking questions of prescriptive jurisdiction: whether the traditional bases of prescriptive jurisdiction could support the U.S. assertion of Sherman Act liability on British insurers;¹⁰³ whether such an assertion was reasonable;¹⁰⁴ and even if reasonable, whether the interest of the United Kingdom in regulating that same conduct was "clearly greater."¹⁰⁵ Had it found that legislative jurisdiction was justified, the Court might then have proceeded to ask questions about judicial jurisdiction: whether there were sufficient contacts between the defendants, their actions, and the U.S. courts to support a U.S. court's ability to hear the case.¹⁰⁶

⁹⁹ *Id.* at 2909 (discussing the reach of the Sherman Act and, in doing so, citing only U.S. cases, statutes, and treatises, along with § 415 of the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, which describes exclusively U.S. law in regard to the extraterritorial effect of antitrust laws).

¹⁰⁰ *Id.* at 2909-11. In its comity analysis, the Court cited only U.S. cases, statutes, and treatises. Its references to the *Restatement* are to § 415, by its terms a description of U.S. law, and to § 403, the only reference arguably addressing principles of international law.

¹⁰¹ See *supra* notes 83-89 and accompanying text.

¹⁰² See, e.g., RESTATEMENT, *supra* note 14, § 421.

¹⁰³ See, e.g., *id.* § 402 (describing territorial location of occurrence or effect, nationality of action, and effects on important state interests as grounds for prescriptive jurisdiction); *id.* § 404 (describing the commission of certain offenses of universal concern as a ground for prescriptive jurisdiction).

¹⁰⁴ *Id.* § 403(1).

¹⁰⁵ *Id.* § 403(3). This last inquiry is appropriate only if an exercise of prescriptive jurisdiction is reasonable for both nations, and "one state requires what another prohibits, or where compliance with the regulations of two states . . . is otherwise impossible." *Id.* § 403 cmt. e. One may question whether this *Restatement* approach truly reflects current international law. See, e.g., Phillip R. Trimble, *The Supreme Court and International Law: The Demise of Restatement Section 403*, 89 AM. J. INT'L L. 53, 54-56 (1995) (arguing that section 403 does not reflect customary international law); PAUST, *supra* note 8, at 403 n.55.

¹⁰⁶ See RESTATEMENT, *supra* note 14, § 421.

The differences in approach are nicely illustrated by Justice Scalia's dissent to this part of the case.¹⁰⁷ Following the Restatement's mode of analysis, Justice Scalia focused primarily on the international propriety of asserting Sherman Act liability against the British defendants (the question of prescriptive jurisdiction).¹⁰⁸ This analysis led Justice Scalia to a result different from that reached by the majority: Justice Scalia would have interpreted the Sherman Act as failing to reach the conduct of the British defendants and thus would have dismissed the case against them.¹⁰⁹ One could argue about whether the different approaches—majority and dissent—required different results on these facts,¹¹⁰ but Scalia's dissent suggests that different results are certainly possible. As such, it is even more startling that the majority flatly omitted any reference to the relevant international rules.

3. *Sale*

The Court had a more difficult time ignoring international law in *Sale v. Haitian Centers Council, Inc.*¹¹¹ In *Sale*, the respondents challenged President Clinton's order directing the Coast Guard to interdict Haitians on the high seas and return them to Haiti without first determining whether they qualified as refugees.¹¹² Issues of both domestic and international law were clearly raised since both bodies of law accord special rights to refugees. The Immigration and Nationality Act of 1952¹¹³ (the "Immigration Act") contains the relevant domestic rules. The Protocol Relating to the Status of Refugees¹¹⁴ (the "Protocol"), a treaty to which the United States is a party, contains the relevant international rules.

Yet the Court found it hard to acknowledge the international issue. "The question presented in this case," the Court began, "is whether such forced repatriation, 'authorized to be undertaken only beyond the territorial sea of the United States,' violates §243(h)(1) of

¹⁰⁷ *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891, 2917-22 (1993) (Scalia, J., dissenting in part).

¹⁰⁸ *Id.* at 2918-21.

¹⁰⁹ *Id.* at 2921, 2922. From Scalia's viewpoint, the majority's focus on comity and the question of whether American courts should abstain from hearing a case against foreign defendants, was "simply misdirected." *Id.* at 2921.

¹¹⁰ See, e.g., Andreas F. Lowenfeld, *Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case*, 89 AM. J. INT'L L. 42, 50 (1995) (expressing uncertainty on how case should have been decided under the Restatement's analysis).

¹¹¹ 113 S. Ct. 2549 (1993).

¹¹² *Id.* at 2552.

¹¹³ 8 U.S.C. § 1253(h) (1988 & Supp. IV 1992), as amended by the Refugee Act of 1980, 8 U.S.C. § 203(e) (1988).

¹¹⁴ Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577.

the [Immigration Act]."¹¹⁵ This formulation of the question is odd, given the obvious relevance of international law and, moreover, given the Court's holding, in the next sentence, that neither the Immigration Act nor the Protocol applied to the Coast Guard's actions.¹¹⁶

The Court's first statement of the question presented, bereft of any reference to international law, might be viewed as an inadvertent omission. After all, the Court devoted a substantial part of its opinion to the international question.¹¹⁷ Still, the omission is significant, because it telegraphs the Court's ambivalence about international law. Specifically, it signals the Court's inability to decide whether the Protocol needs to be discussed at all, and if so, exactly why.

The Court introduced its discussion of the Protocol as follows:

[B]ecause the history of the [Immigration Act] . . . does disclose a general intent to conform our law to [the Protocol] . . . , it *might* be argued that the extraterritorial obligations imposed by [the Protocol] were so clear that Congress, in acceding to the Protocol, and then in amending the statute to harmonize the two, meant to give the latter a correspondingly extraterritorial effect. Or, . . . [the Protocol] *might* have established an extraterritorial obligation which the statute does not; under the Supremacy Clause, that broader treaty obligation *might* then provide the controlling rule of law. With those *possibilities* in mind we shall consider both the text and negotiating history of the Convention itself.¹¹⁸

The passage is remarkably indecisive. The Court did not commit itself on the treaty's precise relevance. The Court merely suggested possibilities for the Protocol's relevance and "with those . . . in mind" proceeded to discuss it. A court that took the treaty seriously would state clearly how it fit in the logic of the decision.¹¹⁹

Commentators have described the Court's holding—that the Protocol's obligations do not apply to actions of the United States taken outside its territorial boundaries—as "eccentric, highly implausible,"¹²⁰ and "seriously flawed,"¹²¹ and by Justice Blackmun, the sole

¹¹⁵ *Sale*, 113 S. Ct. at 2552 (footnote omitted).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 2562-67.

¹¹⁸ *Id.* at 2562 (emphasis added) (footnote omitted).

¹¹⁹ Lower courts had held that respondents could not invoke the Protocol because it was not "self-executing." *Id.* at 2556-57. This, along with later Congressional action—the relevant provisions of the Immigration Act—certainly muddied the Protocol's status in the *Sale* litigation. The crucial point, however, is that the Court side-stepped these issues rather than tackling them directly.

¹²⁰ Louis Henkin, *Notes from the President*, ASIL NEWSL. (Am. Soc'y Int'l L., Washington, D.C.), Sept.-Oct. 1993, at 7.

¹²¹ Thomas D. Jones, *International Decision*, 88 AM. J. INT'L L. 114, 126 (1994).

dissenter in *Sale*, as “extraordinary.”¹²² But like the other cases reviewed here, the real significance of the Court’s opinion lies not in the substance of its holding, but in the approach.¹²³

The case squarely presented an issue of treaty interpretation, an issue for which the international law of treaties is undoubtedly relevant. And yet the majority never mentioned the Vienna Convention on the Law of Treaties, nor, for that matter, any other source on the international law of treaties.¹²⁴ Instead, the Court proceeded on exactly the same grounds, using exactly the same methods, as one would expect a court to pursue in a purely domestic case of statutory interpretation. It examined the text and its negotiating history.¹²⁵ But the international rules of treaty interpretation differ from the domestic rules of statutory interpretation.¹²⁶ Justice Blackmun’s dissent carefully demonstrated how those differences in approach could have led to a different result.¹²⁷

C. The Lessons

These four cases—*Alvarez-Machain*, *Aramco*, *Hartford*, and *Sale*—do more than demonstrate the consistency of the Supreme Court’s provincialism; they illustrate how each of provincialism’s forms actually manifests itself in the work of U.S. courts. In *Alvarez-Machain*, the Court suggested that the existence of a customary law violation and its possible remedy are properly left to the executive branch¹²⁸—a clear example of jurisdictional provincialism. The same form of provincialism played a role in *Sale*. At the end of that opinion, the Court suggested that its territorial reading of the Immigration Act and the Protocol was particularly justified because the situation involved “foreign and military affairs for which the President has unique responsibility.”¹²⁹ Then, quoting an earlier case from the D.C. Circuit, the Court concluded that “[a]lthough the human crisis is compelling, there is no solution to be found in a judicial remedy.”¹³⁰ This fatalistic willingness to leave international law unvindicated in the courts

¹²² *Sale*, 113 S. Ct. at 2568 (Blackmun, J., dissenting); see also Blackmun, *supra* note 47, at 43-45 (discussing the *Sale* case and concluding that the Court’s decision renders the Refugee Convention “a cruel hoax”).

¹²³ An approach Justice Blackmun in dissent labeled, by turns, “unsupported,” “peculiar,” and “flawed.” *Id.* at 2569-70 (Blackmun, J., dissenting).

¹²⁴ *Cf. id.* at 2569 (Blackmun, J., dissenting) (citing the Vienna Convention).

¹²⁵ *Id.* at 2563-67.

¹²⁶ See *supra* note 63.

¹²⁷ *Sale*, 113 S. Ct. at 2569-73 (Blackmun, J., dissenting).

¹²⁸ *United States v. Alvarez-Machain*, 504 U.S. 655, 669 (1992).

¹²⁹ 113 S. Ct. at 2567.

¹³⁰ *Id.* (quoting *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 841 (D.C. Cir. 1987) (Edwards, J., concurring in part and dissenting in part)).

because the executive branch is available to deal with the problem forms a recurrent theme in American jurisprudence.

In *Alvarez-Machain*, the Supreme Court was unwilling to find the existence of a customary rule regarding abductions,¹³¹ and this unwillingness effectively prevented the Court from applying customary law as its rule of decision—a clear example of doctrinal provincialism. The same form of provincialism appeared in *Aramco*, *Hartford*, and *Sale*. In each case, there existed a relevant body of international law that the Court could have cited, discussed, and applied. In each case, however, the Court proceeded as if the only relevant question was the proper interpretation of a congressional act. One might speculate that the Court's repeated willingness to by-pass international analysis pays subtle homage to the rules that later congressional acts trump prior treaty and customary law. There is little point in discussing international law or determining its content if congressional action will ultimately control. This suggests that the rules constituting doctrinal provincialism work on at least two levels: they cause courts explicitly to reject international rules in favor of domestic ones, and, more subtly, they discourage courts from explicating international rules in the first place.

The recurring judicial argument that the executive branch can best resolve international legal problems, together with the existence of many rules that prevent international law from providing the rule of decision in American cases, encourage courts to treat international cases as if they were domestic ones. In this manner, jurisdictional and doctrinal provincialism feed a provincialism of method. Indeed, methodological provincialism is the most striking feature of the four cases just reviewed. In case after case, each with obvious international ramifications, the Supreme Court asked domestic questions, cited domestic precedents, and gave domestic answers.

III

WHY PROVINCIALISM IS A PROBLEM

Provincialism is destructive. It harms litigants, damages courts and hurts the United States as a whole. It corrodes international law and undercuts the rule of law. But it does not do so all at once. The different forms of provincialism breed characteristically different harms, and a proper assessment of provincialism must take account of these differences.

¹³¹ See *Alvarez-Machain*, 504 U.S. at 666-67.

A. The Harms of Methodological Provincialism

The peculiar harm of methodological provincialism is the embarrassment of error. The practice of treating international cases or international law in purely domestic terms is simply a mistake. Domestic law and international law are different, and to treat them the same is to confuse two distinct systems of law. Most of this confusion appears to stem from ignorance. For example, a court might mishandle the sources of international law based on an assumption that they resemble domestic sources.¹³² Mistakes based on ignorance, of course, reflect badly on the courts, because they suggest carelessness or incompetence. Yet methodological provincialism is no less harmful when it results from deliberate decisions to exclude relevant international legal analysis or to apply domestic methods to international materials.¹³³ These are still errors; willfulness only adds to the vice of their commission.

If mistakes of method do not affect the outcome of a case, the harm stops at the embarrassment of a job poorly done. If, in contrast, mistakes of method do affect the outcome of a case, the harms begin to mount. In addition to the embarrassment of error, one must add harm to a litigant who should have won but did not; harm to the United States, which may incur liability for the violation of one of its international obligations; and the harm to international law, which goes unvindicated.¹³⁴ Each of these harms, more characteristic of doctrinal provincialism, will be discussed presently.

B. The Harms of Doctrinal Provincialism

1. *A Short Survey*

Typically, doctrinal provincialism arises when rules from both international law and domestic law are known to a court and the court consciously chooses to apply the latter.¹³⁵ There is here no "embarrassment of error" of the type associated with methodological provincialism. Nevertheless, the court's conscious choice to apply domestic rules is likely to determine the outcome of the case; if it did not, there would be little reason to make the choice at all. Contrary domestic law having been applied, international rights are left unvindicated or

¹³² See *supra* notes 38-42 and accompanying text.

¹³³ See *infra* part IV.A (suggesting that the reasons behind a willful adoption of methodological provincialism—xenophobia, sloth and rhetorical advantage—deserve no more praise than ignorance).

¹³⁴ See *infra* part III.B.

¹³⁵ See, e.g., *Whitney v. Robertson*, 124 U.S. 190, 193 (1888) (domestic legislation supersedes treaty obligation); *Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (domestic law controls when a treaty is not self-executing).

international obligations are left unenforced. This invites several distinct harms.

a. *Harm to Deserving Litigants*

Generally speaking, the law recognizes that persons are entitled to redress when they suffer harm from the illegal acts of others.¹³⁶ That principle is violated, however, when a litigant fails to gain redress for government actions that breach a treaty obligation on the ground either that the treaty is not self-executing¹³⁷ or that it has been superseded by later congressional legislation.¹³⁸ The principle is likewise violated when a litigant fails to gain redress for government actions that violate customary international law on the ground that controlling executive action has superseded the custom.¹³⁹ In each case, the wrongdoer escapes the consequences of its illegal conduct and the victim is left without legal remedy.

b. *Harm to the United States*

When a U.S. court fails to vindicate an international right or to enforce an international obligation, the court's failure is attributed to the nation as a whole, and the nation is held responsible.¹⁴⁰ The court's failure may itself violate international law,¹⁴¹ or, more com-

¹³⁶ In regard to domestic law: "As a general principle, whenever there is a wrongful breach of an agreement or invasion of a right, the law infers some damage, and the innocent person should have a remedy." MARTIN WEINSTEIN, *SUMMARY OF AMERICAN LAW* 190 (3d ed. 2d prtg. 1989). A similar rule applies in the international system. *See, e.g.*, HENKIN ET AL., *supra* note 6, at 544-45.

¹³⁷ *E.g.*, *Cameron Septic Tank Co. v. Knoxville*, 227 U.S. 39, 50 (1913) (treaty on industrial property); *United States v. Postal*, 589 F.2d 862, 875 (5th Cir.) (Convention on the High Seas), *cert. denied*, 444 U.S. 832 (1979); *Robertson v. General Elec. Co.*, 32 F.2d 495 (4th Cir.) (patent provision in Treaty of Versailles), *cert. denied*, 280 U.S. 571 (1929).

¹³⁸ *E.g.*, *Chae Chan Ping v. United States*, 130 U.S. 581, 600-01 (1889) (congressional act excluding Chinese nationals supersedes prior treaty with China); *Committee of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988) (determining later congressional funding of contras supersedes prior treaty obligation under U.N. Charter); *Diggs v. Shultz*, 470 F.2d 461, 465 (D.C. Cir. 1972) (ruling later congressional statute supersedes U.N. Security Council embargo on Rhodesian products), *cert. denied*, 411 U.S. 931 (1973); *Tag v. Rogers*, 267 F.2d 664, 667-68 (D.C. Cir. 1959) (finding later congressional statute supersedes prior treaty with Germany), *cert. denied*, 362 U.S. 904 (1960).

¹³⁹ *E.g.*, *Garcia-Mir v. Meese*, 788 F.2d 1446, 1455 (11th Cir.), *cert. denied*, 479 U.S. 889 (1986).

¹⁴⁰ RESTATEMENT, *supra* note 14, § 115(1)(b) (stating that judicial preference for later congressional act does not relieve U.S. of its international obligations or of the consequences for violations of those obligations); BROWNLIE, *supra* note 14, at 449-50, 529-30 (arguing that actions of national courts can engage state's international responsibility).

¹⁴¹ The international wrong, "denial of justice," is peculiarly the province of a nation's courts. States are responsible for injuries to aliens resulting from: "a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process . . . or a manifestly unjust judgment." HARVARD LAW SCHOOL, *RESEARCH IN INTERNATIONAL LAW: THE LAW OF RESPONSIBILITY OF STATES FOR DAMAGE DONE IN THEIR TERRITORY TO THE PERSON OR PROPERTY OF FOREIGNERS*, art. 9 (1929), *reprinted in* 23 AM. J.

monly, preclude it from correcting or ameliorating presidential and congressional violations. When Congress passes a law that is inconsistent with one of the United States' international obligations, courts can ameliorate—or even eradicate—the harm by refusing to enforce the legislation. But they cannot do so if they take the position that later congressional legislation supersedes treaty and customary law.¹⁴² When the President or other members of the executive branch violate the United States' international obligations, the courts can ameliorate the harm by refusing to enforce the offending directive in court, by enjoining the executive branch from taking enforcement action on its own, or by awarding damages to the harmed plaintiffs. But they cannot do so if they take the position that executive action trumps treaty or custom,¹⁴³ or if they are hesitant to find the existence of any custom at all.¹⁴⁴

A doctrinal provincialism that increases the frequency of U.S. violations of international law has important consequences. The first is reputational. Throughout its history, the United States has publicly supported the rule of law in international affairs.¹⁴⁵ Judicial policies that create or countenance violations of international law obviously undercut the nation's credibility on this point.¹⁴⁶ In addition, these violations sometimes cost money: reparations must be paid, or money must be spent to return a situation to the status quo ante.¹⁴⁷ Sometimes the cost inheres in suffering the retaliatory action of an offended state.¹⁴⁸ Sometimes the cost is more indirect, but no less real—such as the creation of ill-will among allies—a cost paid in future relations with the governments concerned.¹⁴⁹

INT'L L. 173 (Special Supp. 1929). See also RESTATEMENT, *supra* note 14, § 711(b) cmt. a (on denial of justice); BROWNIE, *supra* note 14, at 529-30 (same).

¹⁴² See *supra* notes 31, 34 (citing cases taking that position).

¹⁴³ See *Garcia-Mir*, 788 F.2d at 1453 (ruling that executive action trumps customary international law).

¹⁴⁴ See *supra* note 32 and accompanying text.

¹⁴⁵ See LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 53, 62-63 (2d ed. 1979).

¹⁴⁶ See *id.* at 52.

¹⁴⁷ International law firmly establishes the requirement of reparations. *E.g.*, Reparation for Injuries Suffered in Service of the United Nations, 1949 I.C.J., Report of Judgments, Advisory Opinions with Orders, 174, 181 (Apr. 11) (Advisory Opinion); Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 23 (Apr. 9); Factory at Chorzow (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 47-48 (Sept. 13); Chorzow Factory (Ger. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9, at 21 (July 26). See also F.A. Mann, *The Consequences of an International Wrong in International and National Law*, 48 BRIT. Y.B. INT'L L. 1, 2 (1976-77).

¹⁴⁸ See RESTATEMENT, *supra* note 14, § 905 (describing countermeasures in response to international legal violations); JULIUS STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 288-93 (Garland Publishing, Inc. 1973) (1954) (describing responsive methods short of war); ELISABETH ZOLLER, *ENFORCING INTERNATIONAL LAW THROUGH U.S. LEGISLATION* 135-67 (1985) (describing unilateral measures with special reference to U.S. practice).

¹⁴⁹ In the wake of the Supreme Court's decision in *Abvarez-Machain*, for example, the government of Mexico threatened to halt its cooperation with the United States in drug

c. *Harm to United States Courts*

Doctrinal provincialism visits a special harm on U.S. courts. At base, it tends to involve them in violations of law by causing them either to violate international law themselves or to countenance such violations by the executive and legislative branches. But a court must always stand, ultimately, for the rule of law. When it does not, it loses its distinctive character, and thereby its distinctive worth, as an institution.¹⁵⁰

This harm is so easily stated that its significance can be overlooked. The value of courts *as courts* lies precisely in their dedication to the rule of law. They find their primary justification as a separate institution in their willingness to support law and the lawful resolution of disputes. When, instead, they countenance illegality, when they approach the resolution of disputes with the same casualness about the rule of law that sometimes marks other political institutions, they fail in the very duty that distinguishes them from others.

d. *Harm to International Law*

Doctrinal provincialism harms international law in two ways. First, it chokes off an important method of enforcement. Historically, municipal courts have played an important role in the enforcement of international law, and that importance is likely to continue in the future.¹⁵¹ When U.S. courts refuse to apply international law, they help to debilitate one of its most important enforcement mechanisms.

Second, doctrinal provincialism corrodes the very system of international law. The efficacy, and even existence, of any legal system depends on the general willingness of its subjects to obey its norms. International law is no different in this regard, and, indeed, the small number and nature of its subjects magnifies the importance of each subject's behavior.¹⁵² Any course of conduct that repeatedly violates international law, or that condones its violation, not only destabilizes the laws that are broken, but destabilizes the system as a whole. The

control efforts and sent a Mexican patrol into U.S. territory, without U.S. consent, to arrest a fugitive. Bush, *supra* note 50, at 971; *see supra* part II.A (discussing *Alvarez-Machain*). Nations not directly involved in the abduction have also threatened a chilling of relations with the United States. *See* Bush, *supra* note 50, at 942; Stewart, *supra* note 51, at 50.

¹⁵⁰ *See* Edward D. Re, *Human Rights, Domestic Courts, and Effective Remedies*, 67 ST. JOHN'S L. REV. 581, 592 (1993) (warning that "courts cannot risk the fate of becoming irrelevant in their crucial role of applying the law as an instrument of justice.").

¹⁵¹ *See, e.g.*, BENEDETTO CONFORTI, *INTERNATIONAL LAW AND THE ROLE OF DOMESTIC LEGAL SYSTEMS* 8-9 (Rene Provost trans., 1993); RICHARD A. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* xi-xii (1964).

¹⁵² *See, e.g.*, Stanley Hoffmann, *International Law and the Control of Force*, in *THE RELEVANCE OF INTERNATIONAL LAW* 21, 34-41 (Karl W. Deutsch & Stanley Hoffmann eds., 1971).

doctrinal provincialism of U.S. courts clearly harms the international system.

2. *Discounting the Harms, and the Limits of Judicial Indifference*

The harms of doctrinal provincialism—to litigants, to the courts, to the United States, and to international law—are well known and largely undisputed. The real issue is their seriousness: are these bad things all that bad?

Consider first the harm to international law. The importance of international law is, perhaps, self-evident to most readers of this journal, and harm to it presumptively bad. An important intellectual tradition, however, holds that the rule of law is not—or ought not be—relevant to the behavior of states. Instead, power and national interest (suitably defined) governs—or ought to govern—the relations of states.¹⁵³ This tradition is founded upon serious thinking about politics and law and is understandably attractive to those who reside in (and help to govern) the most powerful nation on earth. An argument against doctrinal provincialism, based on its harm to international law, simply will not persuade thinkers in this tradition.

Doctrinal provincialism's harms to the United States, to its courts, and to its litigants can be discounted in similar ways. If one seriously doubts the importance of international law, or seriously doubts the prudence of promoting it, then increased violations of that law will be of little consequence. Any resulting harm to the United States or to its courts is discounted. Any sense of injustice to litigants is diminished for they lose nothing they "should have" received.

But can *courts* take these views? Although one can understand the political or diplomatic inclination to deny the existence or to discount the importance of international law, courts begin with different assumptions. Law-denying or law-minimizing views have little place in an institution dedicated to the rule of law. It is thus not terribly surprising that the language of *The Paquete Habana*¹⁵⁴ has found resonance in U.S. courts. International law, the Court there instructs, "must be ascertained and administered by the courts of justice of ap-

¹⁵³ This view of international relations, usually called "realism," was famously developed and defended in Hans Morgenthau's classic 1948 book, *Politics Among Nations*, now in its sixth edition. HANS J. MORGENTHAU & KENNETH W. THOMPSON, *POLITICS AMONG NATIONS* (6th ed. 1985). Although the realist view has suffered serious criticism over the past 40 years, it still dominates the works of political scientists, who, in the face of the criticism, either modify it ("neorealism"), or reject it in favor of other theories (e.g., "multilateralism" or "liberal institutionalism"). See, e.g., *NEOREALISM AND ITS CRITICS* (Robert O. Keohane ed., 1986) (presenting challenges to realist claims); see also, e.g., *MULTILATERALISM MATTERS* (John G. Ruggie ed., 1993) (exploring the multilateralism concept); *NEO-REALISM AND NEO-LIBERALISM* (David A. Baldwin ed., 1993) (exploring neo-realist and neo-liberal theory).

¹⁵⁴ 175 U.S. 677 (1900).

propriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."¹⁵⁵ If, in our courts' own traditions, international law is not only law, but *our* law, then the harms of doctrinal provincialism return in full virulence. A court must be concerned if its actions place the United States in violation of international law. A court must be concerned if it finds itself supporting the international violations of the Congress or the President. A court must be concerned if it turns away litigants with legitimate claims based on international law.

C. *The Harms of Jurisdictional Provincialism*

1. *The Old Harms, Revisited*

When a court refuses to hear a case with international implications, it risks the same sort of harms—to litigants, to the court itself, to the United States, and to international law—as when it chooses to apply domestic law in preference to applicable international law. But unlike the case of doctrinal provincialism, these harms are contingent.

Litigants are harmed only when their claims are well-founded in international law and they are nonetheless turned away. If their claims are not well-founded, a court's refusal to hear the case does not rob the litigants of a remedy they would otherwise have received. The courts are harmed only when they act callously or opportunistically: because they do not reach the merits of a given case, they are not put in the position, explicitly, of themselves violating international law or condoning its violation by others; they can only be suspected of disregarding the *effects* of their actions, or intending to achieve an unworthy end by a "neutral" procedural means. The United States is harmed only when the court's refusal to hear a case itself violates international law (an unlikely circumstance, because international law seldom requires a nation's courts to hear particular cases)¹⁵⁶ or when, because of that refusal, a previous U.S. violation of international law remains unvindicated. Finally, international law is harmed only when it was both relevant to the case and in fact violated: only then is international law "unvindicated."

The harms generated by a court's refusal to hear an international case are not only contingent, but speculative as well. The harms depend on certain facts about the case at hand, facts that are typically determined at the merits stage of a proceeding. Because the court, by definition, does not reach the merits, the existence of these facts is uncertain. In any particular case, it will be a matter for argument, for

¹⁵⁵ *Id.* at 700.

¹⁵⁶ See *infra* note 194 and accompanying text.

example, whether a rule of international law was properly applicable, whether it had been violated, and what the proper remedy might have been. One cannot be sure that an injustice was done, or that the United States violated international law, or that international law was left unvindicated.

Marked by contingency and speculation, the harms of jurisdictional provincialism are easy to discount. Still, when a court refuses to hear an international case, it inevitably *risks* harms to the litigants, to the courts, to the United States, and to international law. One must suppose, therefore, that these harms sometimes occur. An increased willingness to hear international cases would reduce the risk of harm and the frequency of its actual occurrence.¹⁵⁷

2. *Harm to the Rule of Law*

As the previous subsection demonstrated, jurisdictional provincialism risks the same kinds of harms as doctrinal provincialism, albeit more contingently and speculatively. A court's refusal to hear international cases also risks a harm not found in provincialism's other forms. When a court consciously chooses to apply domestic law instead of international law to a case (the mark of doctrinal provincialism), it still chooses to apply law. When a court refuses to hear the case at all (the mark of jurisdictional provincialism), it reduces the chances of a lawful settlement. In this way, the court harms the rule of law.

If legal rights go unvindicated in U.S. courts, they may not be vindicated at all, resulting in an indisputable loss of justice.¹⁵⁸ Although other courts, foreign or international, may eventually vindicate those rights, a U.S. court has no assurance of this result when it simply refuses to hear the case. In addition, a delay in justice is unavoidable. Cases rejected by U.S. courts may be settled outside of courts, but the judicial settlement of disputes has special virtues: a unique concern for rules, consistently applied, and for fairness to the parties. Judicial settlement is also peaceful—an important advantage in the international system, a system in which self-help is well-accepted, many of the players are armed, and those who choose to fight

¹⁵⁷ There are dangers, of course, in an overzealous willingness to hear international cases. An overeager court might, for example, overstep its legitimate authority to hear a case under international law. See *RESTATEMENT*, *supra* note 14, § 421 (describing limitations on jurisdiction to adjudicate). And a court, having decided to hear an international case, might get the law wrong, harming an innocent litigant and placing the United States in violation of its international obligations. Such consequences arguably followed the Supreme Court's decisions in *Alvarez-Machain*, *Hartford*, and *Sale*, discussed *supra* part II.B.

¹⁵⁸ This is justice as compensation, not justice as fairness, although the two conceptions are related. See H.L.A. HART, *THE CONCEPT OF LAW* 163-67 (2d ed. 1994); see also JOHN RAWLS, *A THEORY OF JUSTICE* 3-9 (1971) (contrasting justice as fairness with compensatory justice); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 61-63 (distinguishing between corrective and distributive justice).

are seldom the ones who die. It would be ludicrous to suggest that each exercise of jurisdictional provincialism risks war, but it does risk injustice, and a delay in justice is almost assured.

IV

THE CAUSES OF PROVINCIALISM (AND THE WISDOM OF A CURE)

Judicial provincialism is a puzzling phenomenon. It risks many harms, the bulk of which are particularly unsettling for courts.¹⁵⁹ It flies in the face of constitutional¹⁶⁰ and Supreme Court¹⁶¹ language that seems to thrust international law directly into the American courtroom. And, it suggests an obliviousness both to the growing stream of transnational intercourse and to the burgeoning corpus of international law that regulates it.¹⁶² Why, then, does provincialism flourish? Why is it that, when one turns to American cases, one sees international law blocked, side-stepped, or ignored at almost every turn?

The first answer is that, despite its growing relevance and its formal acceptance in the U.S. legal system, international law is burdened by several features that render it an unlikely source of guidance in domestic litigation.

(1) It is unknown. Few judges and lawyers approach their work with a solid grounding in the substance and methods of international law.

(2) It is not raised. Even if known, lawyers seldom have an interest in pressing the international legal aspects of a case and judges seldom have an interest in raising them on their own.

(3) It is unusual. Both lawyers and judges lack experience in handling international issues and are ill-disposed to explore unfamiliar territory.

(4) It is foreign. International law comes from abroad and may not be well-fitted to the American experience.

(5) It is undemocratic. International law is generated in ways far removed from the citizens of the United States and, indeed, from the citizens of other nations.

(6) It is not law. International law is generated in ways that call into question its status as "law."

(7) It is not applicable. International law speaks primarily to states, which are seldom litigants.

¹⁵⁹ See *supra* part III.

¹⁶⁰ U.S. CONST. art. VI, cl. 2 (Treaties are "the supreme Law of the Land.").

¹⁶¹ *The Paquete Habana*, 175 U.S. 677, 700 (1900) (describing international law as "part of our law").

¹⁶² See *supra* notes 5-6 and accompanying text.

(8) It is trumped by domestic law. The actions of domestic institutions have long been held to supersede international law in a variety of circumstances.

(9) It is not persuasive. Given a lack of notoriety and dubious relevance, international law is not nearly so persuasive a ground of judgment as domestic law.

(10) It is not appropriate. The determination and application of international law is more properly left to others: the executive, the legislature, foreign courts, or international tribunals.

This heady mix of reasons—founded upon considerations as wide-ranging as practical experience, philosophical rumination, legal doctrine, and raw xenophobia—help to explain why judges seem almost reflexively to eschew international law. It should not surprise us that men and women of practical affairs are reluctant to pursue a line of analysis about which they know little, which is seldom brought to their attention, whose mastery requires a substantial investment of time, and whose ultimate usefulness is open to question.

Taken together, this list helps to explain, in a general way, why U.S. judges are inclined to ignore or to side-step international law. But a deeper analysis is warranted. As we have seen, international law is marginalized in three distinct ways. Each form of provincialism grows out of a particular context and has developed for characteristically different reasons. Sorting out those contexts and reasons is important, not only for analytical precision, but for what it tells us about the likelihood—and wisdom—of change.

A. Methodological Provincialism

The tendency to treat international cases as if they were domestic ones grows primarily out of ignorance. Courts often fail to address the international legal aspects of a case because they are unaware of them. Courts often misapprehend the sources of international law, or mishandle international materials, because they assume that the sources and methods of international law are the same as domestic sources and methods.¹⁶³

The four Supreme Court cases reviewed in Part II—*Alvarez-Machain*, *Aramco*, *Hartford*, and *Sale*—suggest, however, that there is more to methodological provincialism than ignorance. It simply does not seem plausible to attribute to four successive majorities of the Supreme Court an unfamiliarity with international law generally, or

¹⁶³ Judges, of course, do not deserve the sole blame for this ignorance. The responsibility lies also with lawyers, who fail to raise relevant international issues or who themselves mishandle the sources; with law clerks, on whose thoroughness of research and analysis judges must often rely; and with law professors, who bear an obligation to equip the bench and bar with the knowledge and tools needed for their work.

with the specific rules of international law relevant to those decisions. Dissents in at least two of the cases¹⁶⁴ demonstrate that some of the Justices were aware of these matters, and indicate that the Court as a whole had the relevant knowledge or the means to obtain it.

A lack of seasoning, rather than a lack of knowledge, may therefore explain many mistakes of method. International cases are rare in any court, even the Supreme Court.¹⁶⁵ Because the structure, method, and citation practice of domestic legal argument is far more familiar to our courts than those of international law, it is quite natural for our courts to fall into the more familiar patterns of thought and analysis even when they know that international law is at issue.

But lack of seasoning may not explain all judicial errors. In reading cases like *Alvarez-Machain*, *Aramco*, *Hartford*, and *Sale*, one is tempted to conclude that judges sometimes make deliberate—though unannounced—decisions to exclude international legal issues from consideration or to apply to those issues a domestic methodology. This suggestion, however, leads down a dark and messy path. For what reasons might a court deliberately choose to ignore international law or argue about it as if it were a species of domestic law? Such a court might be motivated by a general suspicion of things foreign, an unwillingness to spend the time needed to uncover and analyze international materials, or a fear that international argument, even if correct, will be unpersuasive. But xenophobia, sloth, and rhetorical expediency are not the sorts of motivations one properly attributes to judges. Faced with unexplained examples of methodological provincialism, a presumption of good faith suggests that we attribute mistakes to a lack of knowledge or seasoning.

The causes underlying methodological provincialism suggest that it is, in principle, very easy to change. Lack of knowledge and lack of

¹⁶⁴ *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891, 2917-22 (1993) (Scalia, J., dissenting in part); *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549, 2567-77 (1993) (Blackmun, J., dissenting).

¹⁶⁵ Although counting international cases is no science, the Supreme Court seems to be averaging two substantive opinions per year. In the past five years, for example, the Court has decided the four cases discussed in Part II, along with six others: *Saudi Arabia v. Nelson*, 113 S. Ct. 1471 (1993) (foreign sovereign immunity); *Argentina v. Weltover*, 504 U.S. 607 (1992) (foreign sovereign immunity); *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991) (Warsaw Convention); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (extraterritorial application of the Fourth Amendment); *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400 (1990) (act of state doctrine); *Argentine Rep. v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) (jurisdiction). The total number of signed, written opinions by the Supreme Court has been running at something over 100 opinions per term. See, e.g., *The Supreme Court, 1992 Term—Leading Cases*, 107 HARV. L. REV. 144, 376 (1993) (reporting 114 written opinions during 1992 term); *The Supreme Court, 1991 Term—Leading Cases*, 106 HARV. L. REV. 163, 382 (1992) (reporting 114 written opinions during 1991 term); cf. LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM* 73 (1994) (number of signed opinions during the 1989-92 terms ranged from 107 to 129).

seasoning have straightforward antidotes: education and practice. Judges and lawyers alike need a serious education in international law, beginning in law school and continuing with post-graduate training.¹⁶⁶ An effective educational effort would take money and commitment, and for that reason may be slow to develop and hard to sustain, but it is in form eminently possible and perfectly fitted to the challenge of reducing methodological provincialism. No precedents need to be overturned, no venerable theories of American government need to be attacked and discarded; nothing is needed but a simple spreading of the word.

The causes underlying methodological provincialism also suggest that it *should* be changed. Although its harms can be discounted, there is nothing on the other side of the balance to justify the practice. A lack of judicial knowledge (or sloth, xenophobia, or rhetorical expediency) might explain or account for errors of method, but do not justify them. When all the explanatory clutter is cleared away, a mistake is still a mistake. This makes easy work of the normative analysis: methodological provincialism is unambiguously bad.

B. Doctrinal Provincialism

Doctrinal provincialism—the tendency to exclude international rules as the rules of decision in American cases—presents a different situation. It does not grow out of ignorance. It instead reflects serious thinking about the role of international law in the domestic legal system. Each element of doctrinal provincialism fleshes out the meaning of the claim that “[i]nternational law is part of our law.”¹⁶⁷ Do treaties come in? If so, under what circumstances? Are U.S. courts to apply international custom? If so, when?¹⁶⁸

The answers are informed by jurisprudence, the Constitution, and international law itself. Such grounds are not as easy to condemn as ignorance and, if found wanting, are harder to correct. Any change will require a rethinking of some longstanding, traditional views on jurisprudence and American government. Furthermore, traditions often find expression in precedent, and the modification or reversal of precedent is never an easy task. Still, as I will argue, change is both

¹⁶⁶ Part V sketches the outline of such a program. See *infra* Part V.

¹⁶⁷ *The Paquete Habana*, 175 U.S. 677, 700 (1900); see also *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 623 (1983) (citing *Paquete Habana*); *Skiriotes v. Florida*, 313 U.S. 69, 72 (1941) (same).

¹⁶⁸ See generally Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States* (pt. 1), 101 U. PA. L. REV. 26 (1952) (reviewing the progress and position of the law of nations in the United States); Henkin, *supra* note 31 (examining the integration of international and domestic law); Harold H. Sprout, *Theories as to the Applicability of International Law in the Federal Courts of the United States*, 26 AM. J. INT'L L. 280 (1932) (same).

possible and desirable. There are many harms in doctrinal provincialism and its grounds are not nearly so firm as is often imagined.

1. *The Jurisprudential Sources*

Reflections about the nature of law and, more specifically, the proper conceptual relation between international and domestic law, play a large role in doctrinal provincialism. For many years, these reflections were characterized by a metaphysical debate between monists and dualists: a debate between those who posit the existence of just one legal system, of which international law and national law are constituent parts, and those who posit the existence of several legal systems, each with its own ability to set the conditions under which it takes account of the others.¹⁶⁹ The debate has grown stale in recent years, not only because lawyers have a limited attention span for metaphysics, but because the dualists soundly thrashed the monists.¹⁷⁰

But the dualist victory did not answer the substantive question; it simply settled the question's form: under what conditions, and in what ways, will U.S. law take account of international law? In answering this question, conceptual reasoning remains important. Indeed, two lines of jurisprudential thought have greatly influenced U.S. courts' treatment of international law. The following subsections examine them in turn.

a. *Positivism*

Over 150 years ago, John Austin famously declared that law, properly so called, consisted of the commands of a sovereign.¹⁷¹ Today, commands of the sovereign are understood to mean the authoritative pronouncements of the lawfully constituted government of a state.¹⁷² Law, from the positivist perspective, is contingent, essentially political, and properly separated from morality. In both its earliest and current

¹⁶⁹ See, e.g., HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 363-88 (Anders Wedberg trans., Atheneum Publishers, Inc. 1961) (1945); ALF ROSS, *A TEXTBOOK OF INTERNATIONAL LAW* 59-73 (1947); Edwin Borchar, *Relation Between International Law and Municipal Law*, 27 VA. L. REV. 137 (1940); J.G. Stark, *Monism and Dualism in the Theory of International Law*, 1936 BRIT. Y.B. INT'L L. 66.

¹⁷⁰ See JANIS, *supra* note 32, at 83-84.

¹⁷¹ JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 198-99 (1832) ("Every positive law, or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons . . .").

¹⁷² See Beau James Brock, *Mr. Justice Antonin Scalia: A Renaissance of Positivism and Predictability in Constitutional Adjudication*, 51 LA. L. REV. 623, 632 (1991) ("The legal positivist holds that only positive law, those juridical norms which have been established by the authority of the state, is law."); Reginald Parker, *Legal Positivism*, 32 NOTRE DAME L. REV. 31, 35 (1956) (arguing only positive law is law, and "positive law" means those legal norms created by authority of the state; thus everything state authority creates is law). Leading contemporary formulations of positivism can be found in HART, *supra* note 158 and JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM* (2d ed. 1980).

versions, positivism finds law by examining the law-making activity of government officials and never (as natural law theory sometimes does) by reasoning deductively from first principles.¹⁷³ So understood, positivism is the working faith of most contemporary lawyers and judges.¹⁷⁴

This view, unremarkable in many of its ramifications, has important consequences for international law. It calls into question the very status of that law and thus provides the groundwork upon which doctrinal provincialism can flourish. There is, in the international system, neither a sovereign to issue commands nor a supranational state whose organs issue authoritative pronouncements of law.¹⁷⁵ This suggests that international law is not law at all, but something else; Austin, in fact, called it "positive morality."¹⁷⁶

For the positivist, international law founded on custom [or general principles of law is especially suspect. Treaties are based on the explicit consent of the states concerned—based, that is, on affirmative acts of sovereign states. Although they do not arise out of a supranational government, and thus remain questionable, treaties can be understood to make law in the same way that private individuals, by contract, make law in a domestic system. Custom and general principles of law, in contrast, are doubly disabled. Not only do they fail, like treaties, to issue from a supranational authority, but their modes of creation (state practice and *opinio juris*, and the concordant internal practices of civilized nations) do not constitute authoritative, governmental pronouncements of international legal judgments or rules.

¹⁷³ In *Erie Ry. v. Tompkins*, the Supreme Court stated:

But law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State . . . is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.

...

The authority and only authority is the State.

Erie Ry. v. Tompkins, 304 U.S. 64, 79 (1938) (quoting *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 533-34 (1928) (Holmes, J., dissenting)); cf. 1 WILLIAM BLACKSTONE, COMMENTARIES *38-41 (discussing first principles of the law of nature).

¹⁷⁴ See, e.g., RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 16 (1977) (stating positivism is accepted "by most working and academic lawyers who hold views on jurisprudence."); JOSEPH VINING, THE AUTHORITATIVE AND THE AUTHORITARIAN 17 (1986) ("[L]awyers today all act as . . . positivists from time to time, and with some conviction"); David Millon, *Positivism in the Historiography of the Common Law*, 1989 WIS. L. REV. 669, 670 n.3 ("[P]ositivism remains the dominant way of thinking about what law is and ought to be in the United States as well as in Great Britain.").

¹⁷⁵ STONE, *supra* note 148, at 17-18; Roberto Ago, *Positive Law and International Law*, 51 AM. J. INT'L L. 691, 700-07 (1957); see also HART, *supra* note 158, at 3-4 (describing international law as a "doubtful case[]" of law).

¹⁷⁶ AUSTIN, *supra* note 171, at 148.

A nascent commitment to positivism helps explain why judges often accord international law only that level of effectiveness that the Constitution and congressional statutes indisputably require.¹⁷⁷ It also helps explain particular elements of doctrinal provincialism: first, the judicial reluctance to find the existence of customary law or general principles of law, neither of which fits neatly into the positivist paradigm of authoritative governmental pronouncement; and second, the judicial inclination to treat congressional acts—authoritative pronouncements of the state—as superior to any form of international law. Turning to cases, a nascent commitment to positivism helps explain *Alvarez-Machain's* concentration on treaty law to the virtual exclusion of custom.¹⁷⁸ Likewise, such a commitment to positivism helps explain the Court's failure even to acknowledge the customary law of prescriptive jurisdiction in *Aramco* and *Hartford*, or the customary law of refugees in *Sale*.¹⁷⁹ For the positivist, treaties count more than custom.¹⁸⁰

But positivism is riddled with problems. It has come under increasing attack throughout this century from many different quarters.¹⁸¹ There have been calls to reject it in favor of a revitalized theory of natural law,¹⁸² which positivism was thought to replace, or to reject it in favor of still newer theories of law.¹⁸³ Even more signifi-

¹⁷⁷ Treaties fare best in U.S. law because the Constitution specifically makes them the "supreme Law of the Land." U.S. CONST. art. VI, cl. 2. Customary rules reliably form a basis for U.S. decision-making only when Congress invites the practice, as it does, for example, in the Alien Tort Statute. See 28 U.S.C. § 1350 (1988); see, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980).

¹⁷⁸ See *supra* part II.A.

¹⁷⁹ See *supra* part II.B.

¹⁸⁰ The commitment to positivism also explains, in all four cases, the Court's almost fanatical devotion to its own case law: its consistent practice of citing its own cases even in support of international legal propositions. This reflects a positivist viewpoint: Supreme Court decisions issue from an authoritative organ of a government, whereas the traditional sources of international law do not.

¹⁸¹ See, e.g., RONALD DWORIN, *LAW'S EMPIRE* 31-44 (1986); SAMUEL I. SHUMAN, *LEGAL POSITIVISM: ITS SCOPE AND LIMITATIONS* 27 (1963) (describing legal positivism as "afflicted with [an] . . . incompleteness or inadequacy"); Henry Mather, *Legal Positivism and American Case Law*, 38 U. FLA. L. REV. 615, 615-16 (1986) (arguing that "contemporary positivism is incompatible with the realities of American case law."); Reginald Parker, *Legal Positivism*, 32 NOTRE DAME LAW. 31, 34-42 (1956-57). Positivists themselves have criticized and modified Austin's "sovereign command" version of the theory. See generally, e.g., H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994) (containing the preeminent analysis and qualification of Austinian positivism).

¹⁸² E.g., JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980); see also Robert P. George, *Recent Criticism of Natural Law Theory*, 55 U. CHI. L. REV. 1371 (1988); Heidi M. Hurd, *Justifiably Punishing the Justified*, 90 MICH. L. REV. 2203, 2222-23 (1992) (utilizing a natural law perspective).

¹⁸³ Recent strands of thought include critical legal studies, law and economics, feminist jurisprudence, and critical race theory. See generally EVA H. HANKS ET AL., *ELEMENTS OF LAW* 539-686 (1994) (giving representative samples of writings in each of these traditions). Some of these traditions give an entirely different answer to the question "What is Law?"

cantly, a common ground of attack has been the observation that there is more (or less) to law than the command of a sovereign, more (or less) to law than the authoritative pronouncements of state organs.¹⁸⁴ In other words, critics have called into question the very aspect of positivism most damaging to international law.¹⁸⁵

Furthermore, even if some version of positivism is accepted as an adequate account of domestic law, this does not mean that positivism adequately describes other systems of law. That which fruitfully describes domestic law need not fruitfully describe international law. Once this connection is broken, the positivistic attack on international law is exposed as the banal observation that international law is not the same as national law. The positivistic attack on international law is compelling only if we assume that national law is the paradigm in terms of which all other systems of law must be understood. But it is not clear why this should be so. We might just as easily assume, for example, that international law is the paradigm for "law" and conclude that domestic law is not "law" at all, but something else. If this seems like word-play and the conclusion seems ludicrous, it is equally a matter of word-play, and equally ludicrous, to claim that international law is not "law" because it does not work like domestic legal systems.¹⁸⁶

b. *Black-Box Theory*

Doctrinal provincialism is also driven by an idea that can be described as the "black-box" theory of international legal obligation. This theory conceives international law as imposing its obligations only on each state as a whole, and not on any of its constituent organs.

Others appear to make the answer irrelevant or much less interesting. For the effect of these new theories on international law, see, for example, Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991); David Kennedy, *A New Stream of International Law Scholarship*, 7 WIS. INT'L L.J. 1 (1988) (analyzing public international law); Fernando R. Teson, *Feminism and International Law: A Reply*, 33 VA. J. INT'L L. 647 (1993) (critiquing international law from a liberal and feminist perspective).

¹⁸⁴ H.L.A. Hart argues that Austinian theory does not, among other things, adequately account for several types of law. HART, *supra* note 158, at 18-49. Ronald Dworkin argues that even Hart's more sophisticated version of positivism still focuses too exclusively on law as rules and fails, therefore, to account for the meaningful expression and application of principles by judges and lawyers. DWORKIN, *supra* note 174, at 14-80.

¹⁸⁵ It is significant that Hart's version of positivism, shorn of the "sovereign command" theory of law, is much kinder to international law. HART, *supra* note 158, at 211-31.

¹⁸⁶ See, e.g., Glanville L. Williams, *International Law and the Controversy Concerning the Word "Law,"* 22 BRIT. Y.B. INT'L L. 146 (1945); see also Roger Fisher, *Bringing Law to Bear on Governments*, 74 HARV. L. REV. 1130-31 (1961) (questioning a definition of law as superior force and suggesting a method for strengthening the role of international law); Gidon Gottlieb, *The Nature of International Law: Toward a Second Concept of Law*, in 4 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 331 (Cyril E. Black & Richard A. Falk eds., 1972) (arguing for a concept of law that acknowledges horizontal systems and that thus accounts for international law).

It is a matter for each state to determine which of its organs shall execute the nation's international responsibilities, and each of those organs, consequently, must await an internal signal to operate. For judges, this means that international law has no independent authority in the courtroom.

Black-box theory made an early appearance in American jurisprudence and has remained a common feature of judicial reasoning to this day. In 1829, for example, when Chief Justice Marshall introduced the distinction between self-executing and non-self-executing treaties, he began with the observation that:

A treaty is *in its nature* a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished; *especially so far as its operation is infra-territorial*; but is carried into execution by the sovereign power of the respective parties to the instrument.¹⁸⁷

And so the situation might have stood, had it not been for the U.S. Constitution:

In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in Courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.¹⁸⁸

It is the Constitution that requires a different (and "unnatural") ordering of the relation between international and domestic law. But the Constitution can only work its magic in certain situations: even if a treaty is equated with legislation, it cannot really operate as legislation unless it *looks* like legislation. Unless a treaty looks like legislation, it reverts to its natural status of unenforceability in domestic courts.¹⁸⁹

The black-box theory of international obligation also lies behind several other elements of doctrinal provincialism: the rules that Congressional legislation supersedes prior treaty provisions and customary law, and the rule that executive action supersedes prior customary

¹⁸⁷ *Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253, 313-314 (1829) (emphasis added).

¹⁸⁸ *Id.* at 314.

¹⁸⁹ Professor Paust reads Marshall's analysis differently, arguing that Marshall would find all treaties capable of direct judicial enforcement unless the treaty itself explicitly contemplates further domestic legislation. Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760, 767-68 (1988). I find this reading difficult to square with Marshall's remarks that a treaty is not "*in its nature*" a legislative act, and that it "does not *generally* effect, of itself, the object to be accomplished." *Foster*, 27 U.S. (2 Pet.) at 313 (emphasis added).

law.¹⁹⁰ At first blush, the "last-in-time" principle¹⁹¹ justifies these rules, but it is the black-box theory that ultimately sustains them. Each rule acknowledges that the political branches properly limit a court's ability to enforce international law. The black-box theory, in turn, makes that limitation plausible. To see the connection, consider an alternative view of international obligations: suppose such obligations apply not only to the state as a whole, but to each organ of the state.¹⁹² On such a view, the President and the Congress would be obliged to act within the confines of international law and, correspondingly, the courts would be under no obligation to give effect to their acts contravening that law. On such an alternative view, the notion that presidential or congressional action can override treaty and customary rules becomes much harder, if not impossible, to justify. In short, the black-box theory helps to explain how an American court of law can knowingly violate "our law," or countenance violations of "our law" by the President and Congress.

But domestic reliance on black-box theory is flawed for two reasons. First, the theory itself simply has begun to crumble under the weight of contrary evidence. With increasing frequency since World War II, international law has reached inside state boundaries to make individuals the holders of rights and the bearers of responsibilities.¹⁹³ It has reached inside the state to require that legislatures act, that executives prosecute, and that courts try.¹⁹⁴ It is no longer tenable to

¹⁹⁰ See *supra* notes 31, 34, 35 and accompanying text.

¹⁹¹ See *infra* notes 212-13 and accompanying text.

¹⁹² Professor Paust argues persuasively that this alternative view was in fact the "original understanding," at least regarding treaties. Paust, *supra* note 189, at 760-66.

¹⁹³ The growth of international human rights law bears witness to the proposition that individuals increasingly hold rights under international law. See generally ANTONIO CASSESE, HUMAN RIGHTS IN A CHANGING WORLD (1990) (discussing the rights of individuals and peoples in the context of the international community); DAVID P. FORSYTHE, THE INTERNATIONALIZATION OF HUMAN RIGHTS (1991) (analyzing and documenting the growth of international human rights); HUMAN RIGHTS IN INTERNATIONAL LAW (Theodor Meron ed., 1984) (discussing global and regional protection of human rights); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1 (1982) (exploring various human rights protected by international law). At the same time, individuals are increasingly understood to be the bearers of responsibility under international law. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, S. TREATY DOC. NO. 1, 81st Cong., 2d Sess., art. III-IV, 78 U.N.T.S. 277 (registered Jan. 12, 1951) (criminalizing genocide and related offenses); International L. Comm'n, *Draft Code of Crimes Against the Peace and Security of Mankind*, 30 I.L.M. 1584, 1584-1593 (1991); see generally INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni ed., 1986) (discussing all aspects of international criminal law including penalties for individual breaches of international law).

¹⁹⁴ This results especially from human rights and anti-terrorism conventions. See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 193, at 277, art. V-VI (directing ratifying states to undertake domestic legislation and to try those charged with genocide); United Nations, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 23 I.L.M. 1027, 1028 (1984) (obliging states to "take effective

maintain that international law is "in its nature" a state-to-state affair, or that it is fundamentally incapable of peering inside the black-box of the state.¹⁹⁵

Second, whatever its current state of decline, black-box theory represents the *international community's* position on the nature of international legal obligation, not necessarily the position properly taken by individual states, including the United States. Black-box theory makes a great deal of sense, from a global perspective, because it recognizes both the fact and legitimacy of states having organized themselves in different ways. It would be an unwarranted interference in domestic affairs, as well as impractical, to require that specific institutions carry out international obligations. But when one moves from a global view to a domestic view, the analysis changes radically. The United States has organized itself in a manner that suggests the domestic application of black-box theory is inappropriate. The United States has exalted the rule of law and has made its courts the final arbiters of that law. In such a context, one cannot treat it as a matter of indifference (as might the international community) whether the nation's political branches should be bound to act in accordance with international law, or whether the courts should play a leading role as that law's final arbiters. Black box theory is plausible internationally, but far less so domestically.

2. *The Quasi-Constitutional Sources*

Taken together, legal positivism and the black-box theory of international legal obligation go a long way toward explaining the deepest foundations of doctrinal provincialism in U.S. courts. From the courts' perspective, however, the more immediate concern is the Constitution and what it says about the proper relation between domestic and international law.

Actually, the Constitution says very little. The only direct statement comes from Article VI:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the

legislative, administrative, judicial or other measures" to prevent torture); G.A. Res. 146, United Nations, *International Convention Against the Taking of Hostages*, U.N. GAOR 6th Comm., 34th Sess., Agenda Item 113, at art. 2-6, U.N. Doc. A/C.6/34/L.23 (1979), reprinted in 18 I.L.M. 1456, 1456-1459 (1979) (requiring states to legislate, investigate, and prosecute hostage-takers).

¹⁹⁵ Professors Schwarzenberger and Brown aptly summarize the general situation: "The rules governing recognition [of international personality] are so elastic that there is no limit to the objects which, by recognition, may be transformed into subjects of international law." GEORG SCHWARZENBERGER & E.D. BROWN, *A MANUAL OF INTERNATIONAL LAW* 64 (6th ed. 1976).

supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.¹⁹⁶

This requires only that treaties override state law. It does not specify how treaties fare against the Constitution and congressional statutes or how other sources of international law relate to domestic law. The courts, of course, have filled in the gaps and, in doing so, have often perceived themselves as performing constitutional analysis. Such a characterization may not be harmful, so long as one remembers that: (i) whatever it is that the courts are analyzing, it is not the constitutional text;¹⁹⁷ and (ii) theories of American government, founded not on the explicit text of the Constitution, but on structure, history, and policy, are subject to counter-arguments based on the same extrinsic sources.¹⁹⁸

What the courts have developed, in the face of textual silence, is a quasi-constitutional theory of American government characterized by the desire to maintain separate spheres of authority among the coordinate branches of the federal government. These "separation of powers" concerns have generated principles of deference to the Congress and the President that have inhibited the courts' ability to apply international law. Such deference clearly lies both behind the rules that congressional action supersedes prior international treaties and international customary law, and the suggestion that executive action supersedes earlier custom.¹⁹⁹ In these circumstances, courts will enforce a violation of international law because another branch of government caused it. In addition, deference to the Congress and the President lies behind the rule that U.S. courts will not apply treaties and customary law unless they are self-executing.²⁰⁰ In this situation, courts defer because they believe themselves unable to apply international law unless Congress enacts implementing legislation.²⁰¹

But what in the structure of American government requires judicial deference to the other branches? Two primary theories exist.

¹⁹⁶ U.S. CONST. art. VI, cl. 2.

¹⁹⁷ Cf. Henkin, *supra* note 31, at 1562-63 & n.31 (1984) (noting that the language of the Constitution does not require certain judicial doctrines that disfavor international law).

¹⁹⁸ See, e.g., FRANCK, *POLITICAL QUESTIONS*, *supra* note 8, at 31-60; LOUIS L. JAFFE, *JUDICIAL ASPECTS OF FOREIGN RELATIONS* 12-41 (1933); Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 *YALE L.J.* 597, 622 (1976).

¹⁹⁹ See *supra* notes 31, 34, 35 and accompanying text.

²⁰⁰ See *supra* notes 30, 33 and accompanying text.

²⁰¹ This sort of deference, of course, also derives from the black-box theory of international legal obligation. See *supra* notes 187-92 and accompanying text.

a. *Locus of the Sovereign Will*

Courts in the United States often defer to the political branches, especially to Congress, on the ground that those other branches, rather than the courts, represent the locus of American sovereignty. While talk of "sovereignty" is often loose (and sometimes dangerous), if one takes the word to mean "ultimate political authority," the argument seems straightforward enough. If the political authority of the nation lies ultimately with its people, those branches of government elected by the people—Congress and the President—speak with more authority than the unelected branch.

One sees this principle at work, for example, in *Whitney v. Robertson*.²⁰² In that case, the Supreme Court sought support for the rule that later statutes supersede prior treaties as the law to be applied in U.S. courts. In *Whitney*, Justice Field wrote that "the duty of the courts is to construe and give effect to the latest expression of the sovereign will."²⁰³ He presumed that the legislature is the proper locus of "the sovereign will" and that, when the sovereign changes its mind, the courts are obliged to follow.²⁰⁴

An even clearer and more detailed use of the principle appears in the *Head Money Cases*.²⁰⁵ In that case Justice Miller considered the possible justifications for the opposite rule, which would place treaties, categorically, above congressional legislation.

The Constitution gives [a treaty] no superiority over an act of Congress *Nor is there anything in its essential character, or in the branches of the government by which the treaty is made, which gives it this superior sanctity.*

A treaty is made by the President and the Senate. Statutes are made by the President, the Senate and the House of Representatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the other two. If there be any difference in this regard, it would seem to be in favor of an act in which all three of the bodies participate.²⁰⁶

In short, the source of law that engages the greatest number of our elected institutions is the one most entitled to judicial deference.

²⁰² 124 U.S. 190 (1888).

²⁰³ *Id.* at 195.

²⁰⁴ See also *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (holding that an exercise of legislative power to keep Chinese laborers out of the United States superseded any treaty between the United States and China); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 854 (1987) (concluding that the judiciary abdicates its responsibility in failing to prevent the executive from breaching international obligations).

²⁰⁵ 112 U.S. 580 (1884).

²⁰⁶ *Id.* at 599 (emphasis added).

But judicial deference to Congress or the President, on the ground that the elected branches of government more directly engage the people's—and thus the nation's—sovereign will, is unduly simplistic and does not account for the ways in which we actually distribute legal authority. There is no simple correlation between the method by which a decision-maker is selected and the legal authority of that decision-maker. Many state judges, for example, are elected directly by the citizens of the state in which they serve, but they do not, for this reason, have the power to overturn the actions of appointed state officials. Collectively, state governments are just as electorally well connected to the people as the federal government, but this does not lead us to conclude that they may countermand earlier federal law.²⁰⁷ And most dramatically of all, the appointive status of federal judges has not prevented us from accepting their assertion of the power to overturn the work of popularly elected legislatures and executives, both federal and state, on the ground that these assertions of “the people’s will” are unconstitutional.²⁰⁸

Ties to the electorate are important, but often not decisive, in settling questions of relative legal authority. Other principles—turning on concerns of constitutionalism and the proper roles of different governmental actors—come into play. And once a court accepts (as it must) the propriety of resorting to “non-electoral” principles in sorting out questions of authority, it cannot defer to the elected branches simply because they are elected. The courts must dig deeper than “sovereign will” analysis.

A return to the work of Justice Miller in the *Head Money Cases*²⁰⁹ reveals the fruitfulness of digging deeper. As he sought to determine whether later congressional acts should supersede earlier treaty obligations as the law of the United States, Justice Miller’s “sovereign will” analysis led him to conclude that there was nothing “in the branches of government by which the treaty is made, which gives it . . . superior sanctity.”²¹⁰ Indeed, he found a slight reason for preferring congressional acts, since they involve the concurrence of the President, Senate, and House, while treaties only require consent by the President and Senate.²¹¹ Tellingly, however, Justice Miller did not rest his con-

²⁰⁷ Of course such a conclusion would contravene the Supremacy Clause. See e.g., *Howlett v. Rose*, 496 U.S. 356 (1990) (discussing state court responsibility under Supremacy Clause).

²⁰⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Acceptance of judicial review does not, of course, mean “acceptance without controversy.” See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 23-66 (2d ed. 1988) (canvassing judicial and scholarly reaction to judicial review).

²⁰⁹ 112 U.S. 580 (1884).

²¹⁰ *Id.* at 599.

²¹¹ *Id.*

clusion on "electoral analysis," but turned instead to another principle: the electoral authority of congressional acts and treaties being of roughly equal soundness, he concluded that the principle of "last-in-time" should govern.²¹² He himself recognized the limits of sovereign will analysis and turned to another principle.

Once the relevance of other principles is recognized, there is no good reason, *a priori*, to stop at "last-in-time." In the *Head Money* question, for example, Justice Miller might have noted that a preference for later congressional acts, because it puts the United States in violation of prior international obligations, engages the nation's legal liability for reparations or damages, and that a preference for earlier treaties does not. Based on a principle of "relative legal liability," Justice Miller could have sensibly concluded, and we might conclude today, that treaty law supersedes even later congressional acts.²¹³ In any event, we can surely agree with Justice Miller that courts ought not defer to the President or Congress solely on the ground that they are the proper repositories of the sovereign will.

b. *Locus of Foreign Affairs Power*

Sovereign will analysis often leads courts to defer to Congress. Judicial deference to the President is, however, more likely based on the President's perceived role in foreign affairs. The President's pre-eminence in foreign affairs derives its cogency from two different lines of argument. The first is constitutional and is grounded in a particular reading of the Constitution that places "foreign affairs" in the President's hands.²¹⁴ The second is practical and is drawn primarily from reflections about the necessities of any government, however organized: courts defer to the President because nations need a single voice in foreign affairs and the executive branch is the branch best organized to provide that single voice.²¹⁵

But as a ground for doctrinal provincialism, judicial deference to the President in foreign affairs is dubious. First, the Constitution

²¹² *Id.*

²¹³ *See, e.g.,* Henkin, *supra* note 204, at 870-71 (noting, among other things, that "treaties may indeed have superior sanctity, because of their essential character as international obligations.")

²¹⁴ *E.g.,* Johnson v. Eisentrager, 339 U.S. 763, 789 (1950) (ruling President exclusively responsible for conduct of diplomatic and foreign affairs); The Prize Cases, 67 U.S. (2 Black) 635, 696-97 (1862) (stating that President conducts foreign relations of government).

²¹⁵ *E.g.,* Baker v. Carr, 369 U.S. 186, 211 (1962) (stating that many questions of foreign relations uniquely demand a single-voiced statement of the government's views); Doe v. Braden, 57 U.S. (16 How.) 635, 657 (1853) (arguing that it would be impossible for the executive to conduct foreign relations if every court in the country had the authority to decide whether the person who ratified a treaty on behalf of a foreign nation had such power to ratify).

makes no mention of a "foreign affairs power," much less places it with the President. Instead, the Constitution gives specific "foreign affairs" powers to each branch of government: to the President, it grants the command of the armed forces and the power to appoint and receive ambassadors;²¹⁶ to the Congress, it gives the power to declare war, regulate foreign trade, and set tariffs;²¹⁷ and to the Supreme Court, it grants the power to hear cases affecting Ambassadors and other foreign officials.²¹⁸ Since foreign affairs competence is divided among all three branches, one should not conceive the President's control of foreign affairs as exclusive, even if one acknowledges the President's primacy in those matters.²¹⁹

Second, even acknowledging the President's preeminent role in foreign affairs, one may properly question the extent to which that role should influence U.S. judicial treatment of international law. There is nothing inconsistent in thinking that foreign affairs policy belongs in the executive branch and international law in the judicial branch.²²⁰ Though clearly related, foreign affairs policy and international law are distinct areas of endeavor, just as domestic policy and domestic law are legitimately subject to division between the political branches and the courts.

Likewise, deference to the President on the "one-voice" theory—the notion, that is, that the nation needs to speak with one voice, that of the President—would be more convincing but for two facts: (1) it is not clear that nations need to speak with one voice in order to survive, or even to prosper, in international relations;²²¹ and (2) because of congressional prerogatives, our nation often speaks with at least two voices anyway.²²²

3. *The International Sources*

Two elements of doctrinal provincialism appear to find their justification not in jurisprudential theories of law or quasi-constitutional

²¹⁶ U.S. CONST. art. II, § 2, cl. 1, 2, § 3.

²¹⁷ *Id.* art. I, § 8, cl. 1, 3, 11.

²¹⁸ *Id.* art. III, § 2, cl. 2. The federal courts as a whole are given even wider responsibilities in international affairs. *Id.* art. III, § 2, cl. 1 (extending judicial power to all cases involving treaties, admiralty and maritime claims, and suits between U.S. and foreign citizens).

²¹⁹ See Arthur Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined*, 5 SETON HALL L. REV. 527, 537-40 (1974) (arguing founders did not intend foreign policy to be the prerogative of any one branch).

²²⁰ See, e.g., FRANCK, *POLITICAL QUESTIONS*, *supra* note 8, at 5-6 (distinguishing foreign policy from judicial policy); HENKIN, *FOREIGN AFFAIRS*, *supra* note 15, at 205-24 (describing legitimate role of courts in matters involving international relations).

²²¹ On the experience of post-war Germany, for example, see FRANCK, *POLITICAL QUESTIONS*, *supra* note 8, at 107-25.

²²² See, e.g., THOMAS M. FRANCK & EDWARD WEISBAND, *FOREIGN POLICY BY CONGRESS* 13 (1979); HENKIN, *FOREIGN AFFAIRS*, *supra* note 15, at 89-123; TRIBE, *supra* note 208, at 219-25.

theories of American government, but, ironically, in the theory and practice of international law itself. More specifically, the reluctance of U.S. courts to find the existence of an international custom, or to find the existence of a general principle of law, echoes a similar reluctance in the practice of international courts.

International custom is hard to establish. It requires a consistent pattern of behavior by nation-states and a belief by those states that such behavior is legally required.²²³ The classic case of the *S.S. Lotus*,²²⁴ decided by the Permanent Court of International Justice in 1927, demonstrates how difficult it can be to convince even an international court that a custom exists. In *Lotus*, the French government objected to the Turkish trial of a French seaman following a collision of French and Turkish vessels on the high seas.²²⁵ The French sought to establish rules of customary law that would bar such a trial, but failed, in three successive attempts to convince the Court that the proposed rules did in fact exist.²²⁶ On a more abstract level, before and after *Lotus*, the very nature of international custom, and the theory by which it binds states, have been matters of controversy.²²⁷

General principles of law, likewise, are sometimes difficult to establish. Even the International Court of Justice, whose founding statute explicitly makes general principles of law a primary source of international law,²²⁸ has been "distinctly, and perhaps understandably, conservative"²²⁹ in its use of such principles. It is fairly common for scholars and judges to relegate general principles of law to "filling in the gaps" left by treaty and custom.²³⁰

²²³ See RESTATEMENT, *supra* note 14, § 102(2) cmts. b, c (stating custom results from a general and consistent practice of states, acting out of a sense of legal obligation); ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 47-72 (1971) (summarizing traditional views on the elements of custom); KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW 40-51 (2d rev. ed. 1993) (summarizing elements of custom from the practice of the International Court of Justice and the International Law Commission).

²²⁴ *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 4 (Sept. 7).

²²⁵ *Id.* at 5-6.

²²⁶ *Id.* at 22-31.

²²⁷ See, e.g., D'AMATO, *supra* note 223, at 47-102, 169-229 (presenting scholarly and judicial arguments about the elements of custom and its binding force); WOLFKE, *supra* note 223, at 1-44, 160-68 (same).

²²⁸ ICJ Statute, *supra* note 29, art. 38(1)(c).

²²⁹ C. WILFRED JENKS, THE PROSPECTS OF INTERNATIONAL ADJUDICATION 305 (1964); see also Schrader, *supra* note 36, at 769 (describing international courts as conservative in their application of general principles).

²³⁰ E.g., Appeal Relating to the Jurisdiction of the ICAO Council (*India v. Pak.*), 1972 I.C.J. 46, 109 (Aug. 18) (separate opinion of Judge Dillard) (stating general principles act as aids in establishing custom or the implied terms of treaties); RESTATEMENT, *supra* note 14, § 102(4) (describing general principles as "supplementary rules" that may be important when no custom or treaty applies); JANIS, *supra* note 32, at 54-58 (describing general principles as "gap fillers").

U.S. courts—in their reluctance to find the existence of custom and general principles of law—seem merely to have adopted a practice of caution shared by their international counterparts. But this appearance is misleading. Although cautionary in their approach, international tribunals habitually invoke custom and general principles of law in their judgments.²³¹ This is hardly surprising, since custom continues to dominate many areas of international law,²³² and since international law still has many “gaps” left to be filled by general principles.²³³

Seen in this light, U.S. courts have pushed caution to an extreme.²³⁴ For example, the Supreme Court has not explicitly recognized the existence of a custom in almost 100 years.²³⁵ Lower federal courts have made such holdings on occasion,²³⁶ but a handful of cases in a century's worth of litigation bespeaks a level of caution better described as full retreat.²³⁷ General principles of law have fared no better.²³⁸ Despite their caution, international tribunals regularly find

²³¹ See BIN CHENG, *GENERAL PRINCIPLES OF LAW: AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 387-99 (1953) (formulating a draft code of international principles that international courts and tribunals apply); JENKS, *supra* note 229, at 266-315 (reviewing general principles that international tribunals utilize); H. LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW* 60-62 (1927) (noting that agreements between governments direct international courts and tribunals, in almost all cases, to apply general principles of some sort); WOLFKE, *supra* note 223, at 116-59 (reviewing international judicial practice in ascertaining custom); Rudolph Bernhardt, *Customary International Law*, in 7 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 61 (1984) (presenting a short survey of the theory and application of customary law); Hermann Mosler, *General Principles of Law*, in 7 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 89 (1984) (describing general principles that judicial tribunals invoke).

²³² See WOLFKE, *supra* note 223, at xiii.

²³³ See OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 49 (1991).

²³⁴ Cf. Schrader, *supra* note 36, at 757 (observing that U.S. courts “have traditionally been more conservative than international bodies in deriving rules of law from such sources as custom and general principles”).

²³⁵ Research for this Article indicates that the last such case was *The Paquete Habana*, 175 U.S. 677 (1900).

²³⁶ E.g., *Filariga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) (holding that state-sponsored torture violates international customary law); *Forti v. Suarez-Mason*, 694 F. Supp. 707, 709 (N.D. Cal. 1988) (holding that “causing disappearances” is an international tort established by custom); *Fernandez v. Wilkinson*, 505 F. Supp. 787, 798 (D. Kan. 1980) (holding that indeterminate detention of an alien implicates customary law), *aff'd on other grounds*, 654 F.2d 1382 (10th Cir. 1981).

²³⁷ See Trimble, *Revisionist View*, *supra* note 8, at 684-707 (documenting the infrequent use of customary law in American courts). Courts in the United States have often made reference to customary law, assuming it exists for the purpose of argument or using it to help construe congressional legislation. See, e.g., Ralph G. Steinhardt, *The Role of International Law As a Canon of Domestic Statutory Construction*, 43 *VAND. L. REV.* 1103, 1135-62 (1990) (collecting cases and describing historical development of international law's use as interpretive aid). But these uses differ categorically from an explicit determination that a rule of customary law does exist, and a determination of its precise content.

²³⁸ See Schrader, *supra* note 36, at 769-79 (discussing recent judicial references to “general” or “universally accepted” principles). None of the opinions the Schrader Note de-

and apply both custom and general principles; the virtual refusal of American courts to find such law at all cannot reasonably be justified as merely echoing the international approach.²³⁹

4. *The Prognosis for Change*

Doctrinal provincialism is not so easily condemned as its methodological sibling. Although its potential harms are greater—to litigants, to the courts, to the United States, and to international law—it is founded on grounds more laudable than ignorance. This is not to say, however, that they are good grounds, or good enough to justify the harms.

Opinions are likely to vary on the current vigor of positivism and the black-box theory of international legal obligation, but support for these theories is clearly declining. As these theories erode, the philosophical bases of doctrinal provincialism erode with them. Opinions will also vary on the strength of the quasi-constitutional theories of American government that push U.S. courts to eschew the application of international law in deference to the work of the political branches. But these theories, too, are debatable and the constitutional text clearly does not require them. All of this suggests that doctrinal provincialism, while not to be condemned categorically, ought to be subjected to a searching, element-by-element review.

Change will be difficult. Each element of doctrinal provincialism is grounded not only in the deeper philosophical and constitutional considerations discussed here, but more immediately in precedent. Some elements are more firmly entrenched in precedent than others, but all have judicial decisions, sometimes Supreme Court decisions, supporting them.²⁴⁰ Change will necessarily require a firm conviction that the old ways were wrong or, at least, that they warrant serious reexamination. The strength of recent criticism suggests that some elements of doctrinal provincialism ought to be jettisoned and others modified.²⁴¹

scribes explicitly derived a rule of international, as opposed to domestic, law from a general principle of law.

²³⁹ *But cf.* Schrader, *supra* note 36, at 762-68, 770-82 (reviewing and criticizing recent uses of customary law and general principles of law in American decisions); Trimble, *Revisionist View*, *supra* note 8, at 678-84, 707-31 (questioning the legitimacy and wisdom of domestic judicial use of customary international law). Those who doubt the legitimacy or wisdom of invoking custom and general principles in U.S. courts are understandably less concerned about judicial failures to find the existence of such rules in the first place.

²⁴⁰ *See supra* notes 30-36.

²⁴¹ On the self-executing treaties doctrine, see, for example, Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT'L L. 627 (1986); Paust, *supra* note 189. On the last-in-time doctrine, see, for example, Henkin, *Chinese Exclusion*, *supra* note 204, at 870-78 (1987); Jordan J. Paust, *Rediscovering the Relationship Be-*

C. Jurisdictional Provincialism

Jurisdictional provincialism—the tendency of U.S. courts to exclude international cases from the domestic docket—is the most challenging of provincialism's three forms to assess. As we have already seen, its harms—to litigants, to the United States, and to international law—are more contingent than those of provincialism's other forms, because not every international case excluded from the American docket necessarily involves international law. Those things that make a case "international"—the existence, for example, of parties, evidence, or events with different national links—increase the likelihood, but do not assure, that international law is germane. And if it is not, then a judicial refusal to hear such a case causes no harm to international law or the interests of the international community.

Many international cases, however, do involve international law. The refusal to hear such cases risks injustice to litigants with claims well-founded in that law, risks harm to the United States if the courts' refusal to hear such cases permits on-going U.S. violations of international law, and harms international law, which goes unvindicated. Whether international law is involved or not, a denial of a hearing always risks injustice (if, for example, no other forum is available) and always causes a delay in justice. Such harms should not be countenanced unless otherwise justified.

What, then, are the grounds of jurisdictional provincialism? Unlike doctrinal and methodological provincialism, jurisdictional provincialism grows out of neither ignorance nor a concern for the proper role of international law. Rather, it grows out of a concern for the proper role of the courts themselves. It grows from the conviction that courts ought not to hear every case presented to them for decision.

Generally speaking, courts reject cases for three sorts of reasons. First, a case must be well-suited to judicial resolution. If there are no opposing parties with real interests currently at stake, or if the parties seek or need a kind of relief that courts cannot easily provide, judicial resolution is inappropriate. Such considerations have generated the requirement of standing,²⁴² as well as the doctrines of mootness²⁴³

tween Congressional Power and International Law: Exceptions to the Last in Time Rule and the Primacy of Custom, 28 VA. J. INT'L L. 393 (1988).

²⁴² E.g., *Allen v. Wright*, 468 U.S. 737, 752 (1984); *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972); *Flast v. Cohen*, 392 U.S. 83, 85 (1968).

²⁴³ E.g., *SEC v. Medical Comm. for Human Rights*, 404 U.S. 403, 407 (1972); *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam); *Powell v. McCormack*, 395 U.S. 486, 495-97 (1969).

and ripeness,²⁴⁴ and the judicial aversion to advisory opinions.²⁴⁵ Second, assuming a case is well-suited to judicial resolution, a court may refrain from deciding on grounds of fairness, believing, for example, that a particular proceeding burdens the litigants with a process they had no legitimate reason to expect, or with one held in a place that is needlessly inconvenient. These considerations have generated rules of personal jurisdiction²⁴⁶ and the defense of *forum non conveniens*.²⁴⁷ Third, even if a cause is susceptible to judicial resolution and the particular proceedings are likely to be fair to the parties, a court may still refrain from deciding because it believes that some other court, or some other institution entirely, is more appropriate. This deference to other decision-makers lies behind most of the elements of jurisdictional provincialism and warrants further analysis.

Sometimes a court defers to other courts within its own national system by refusing to hear a case for lack of subject-matter jurisdiction²⁴⁸ or staying a case currently pending in another court under the *lis alibi pendens* doctrine.²⁴⁹ Sometimes a court defers instead to the other branches of government by refusing to hear a case that raises a "political question."²⁵⁰ And sometimes a court defers to authorities in other nations by providing immunity to a foreign sovereign²⁵¹ or by

²⁴⁴ *E.g.*, *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 200-01 (1983); *Abbot Lab. v. Gardner*, 387 U.S. 136, 148-49 (1967).

²⁴⁵ *E.g.*, *United States v. Fruehauf*, 365 U.S. 146, 157 (1961); *Muskrat v. United States*, 219 U.S. 346, 362 (1911); *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n.(a) (1792).

²⁴⁶ *E.g.*, *Burnham v. Superior Ct. of Cal.*, 495 U.S. 604, 617-18 (1990) (stating jurisdiction over non-consenting, out-of-forum defendant turns on traditional notions of fair play and substantial justice); *see also Helicopteros Nacionales de Colom. v. Hall*, 466 U.S. 408 (1984) (determining foreign corporation's contacts with the State of Texas insufficient to support in personam jurisdiction); *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (ruling that minimum contacts with the forum state are needed in order to subject a defendant to an in personam judgment).

²⁴⁷ *E.g.*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981) (ruling dismissal appropriate when plaintiff's chosen forum is oppressive or vexatious to defendant and an alternative forum exists); *see also Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507-09 (1947) (discussing the interests a court should take into account when deciding whether to dismiss based upon a claim of *forum non conveniens*).

²⁴⁸ *E.g.*, *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 377 (1978) (determining that wrongful death claim between two Iowa litigants is a matter for adjudication in state forum).

²⁴⁹ *E.g.*, *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 184 (1952) (upholding stay of federal action in Delaware so that federal action in Illinois could proceed); *Landis v. North Am. Co.*, 299 U.S. 248, 253 (1936) (setting out principles for determining propriety of staying action in one court in deference to actions in another); *see generally Propriety of Staying Action or Proceeding Pending Another Action or Proceeding*, 81 L. Ed. 161 annot. (1937) (discussing scope of *lis alibi pendens* doctrine).

²⁵⁰ *E.g.*, *Baker v. Carr*, 369 U.S. 186, 210-17 (1962); *Luther v. Borden*, 48 U.S. (7 How.) 1, 46 (1849).

²⁵¹ *E.g.*, *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562, 576 (1926); *United States v. Diekelman*, 92 U.S. 520, 524 (1875); *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812).

refusing to sit in judgment of a foreign nation's acts within its own territory (the "act of state doctrine").²⁵²

This analysis suggests a straightforward correspondence between the sorts of institutions deferred to—other domestic courts, other branches of domestic government, and other nations—and the particular elements of jurisdictional provincialism. The situation, however, is more complex than that. It often happens that a particular form of judicial self-abnegation is grounded on deference to more than one decision-maker. The act of state doctrine, for example, is grounded both on deference to foreign states and deference to the executive branch of our domestic government (the courts believing that judicial review of another nation's actions may interfere with the foreign relations prerogatives of the President).²⁵³ The *lis alibi pendens* doctrine, to cite another example, usually involves deference to another court, but if that court is in another country, deference to a foreign sovereign and its judicial process is also implicated.²⁵⁴

In sum, jurisdictional provincialism grows out of at least three overlapping concerns: that the parties' dispute be amenable to judicial resolution; that the parties be treated fairly; and that no other decision-maker is better situated to handle the matter.²⁵⁵ The first two concerns are less problematic than the third. It is undoubtedly true that some disputes are not well-suited to judicial resolution. A request for judgment, for example, that does not involve a conflict between real adversaries, with real interests at stake, is likely to be handled poorly by a court system whose rules and practices presume the existence of such adversaries at every turn. Similarly, it is hard to question, in principle, a court's concern with whether a particular

²⁵² *E.g.*, *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 402-04 (1990); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 400-01 (1964); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

²⁵³ *Compare Underhill*, 168 U.S. at 252 (discussing sovereignty of states *rationale*) with *Banco Nacional de Cuba*, 376 U.S. at 423, 426 (offering constitutional separation-of-powers *rationale*).

²⁵⁴ *E.g.*, *Robinson v. Royal Bank of Can.*, 462 So. 2d 101, 102 (Fla. Dist. Ct. App. 1985) (*per curiam*).

²⁵⁵ The immediate doctrinal sources of deference vary as well. Courts defer to others based on the requirements of the Constitution, on congressional statutes, and on prior judicial decisions. Judge-made rules of deference, in turn, are usually based on prudence. Grounds for a particular doctrine can also vary over time. Foreign sovereign immunity, for example, was historically based on the perceived requirements of international law and a quasi-constitutional, separation-of-powers deference to the President in matters of foreign affairs; today, a congressional statute clearly forms the basis for such immunity. *Compare National City Bank of N.Y. v. Republic of China*, 348 U.S. 356 (1955) (reviewing the international and national policies underlying the judge-made doctrine of foreign sovereign immunity) with *Foreign Sovereign Immunities Act*, 28 U.S.C. §§ 1602-1611 (1988) and H.R. REP. NO. 1487, 94th Cong., 2d Sess. 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6610-11 (FSIA to provide "sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts.").

proceeding would be unfair to one of the parties. Courts are particularly concerned with fairness and one would expect them to abstain from acting in ways that are unfair. But if a case is amenable to judicial resolution and the particular proceeding would be fair to the parties involved, it becomes harder to justify abstention. If a court can do a good job and do it fairly, then it properly defers to other institutions only when that deference is clearly warranted.

Courts in the United States do, of course, work within a system of governments, both domestic and foreign, and a sensitivity to "system" concerns is certainly appropriate. But U.S. courts tend to go astray in just this area, by overestimating the claims of other institutions as better fora. This propensity is clearest in their deference to the political branches and to the governments of other nations.²⁵⁶ Judicial deference to the political branches, as demonstrated earlier, derives primarily from quasi-constitutional theories of American government not required by the constitutional text.²⁵⁷ Likewise, judicial deference to other nations is frequently overblown. Our courts uncritically defer to the "prerogatives of foreign sovereigns" in cases in which international law recognizes no such prerogatives or recognizes them in a much more limited fashion than do our courts.²⁵⁸ This suggests that the elements of jurisdictional provincialism most in need of serious re-examination are those that are founded primarily on deference to the domestic political branches and to other nations, specifically, the political question doctrine, foreign sovereign immunity, and the act of state doctrine. Indeed, these particular elements of jurisdictional pro-

²⁵⁶ See FRANCK, POLITICAL QUESTIONS, *supra* note 8, *passim* (presenting an extended, well-reasoned attack on judicial deference to the political branches). In Franck's view, such deference animates not only the political question doctrine, but the act of state doctrine and the judicially-created rules of foreign sovereign immunity.

²⁵⁷ See *supra* part IV.B.2.

²⁵⁸ The act of state doctrine, for example, finds little support in international law. International scholar Ian Brownlie says flatly that it "is not a rule of public international law." BROWNLIE, *supra* note 14, at 507. The United States Supreme Court has itself recognized that international law does not compel recognition of the doctrine. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421-23 (1964). The *Restatement* quite properly describes it as "Law of the United States." RESTATEMENT, *supra* note 14, § 443.

The *Restatement* describes the provision of foreign sovereign immunity, on the other hand, as "an undisputed principle of customary international law." *Id.* at 390. Even so, domestic courts have historically provided immunity to foreign sovereigns under circumstances that international law did not require: first, by maintaining a rule of "absolute" immunity at a time when other states had begun to provide such immunity only on a more restricted basis; and second, by deferring conclusively to executive branch determinations of immunity when international law nowhere required such a practice. See *Ex Parte Rep. of Peru*, 318 U.S. 578, 588 (1943); *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562, 571 (1926). Congress forced change with the passage of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1332(a)(2)(3)(4), 1391(f), 1441(d), 1602-11 (1988).

vincialism have tended to attract the most scathing criticism by international scholars.²⁵⁹

The other elements of jurisdictional provincialism—personal jurisdiction requirements, subject-matter jurisdiction requirements, standing requirements, the forum non conveniens doctrine, and the lis alibi pendens doctrine—require scrutiny as well, although their ultimate reform will be harder to achieve. As previously noted, they tend to derive from legitimate concerns about the limits of the judicial function and the need for fairness.²⁶⁰ In addition, they have developed primarily in a domestic context and have “proven” themselves in a broad range of (admittedly domestic) cases. It is unlikely, for this reason, that courts will simply discard them. Consequently, the proponent of change must take the rhetorically difficult position of arguing that an exception should be made, and that the effects of a jurisdictional rule should be ameliorated, when international cases arise. Moreover, rhetorical disadvantage aside, many of the remaining elements of jurisdictional provincialism are based on constitutional or statutory provisions, which, at least from a judge’s perspective, places them beyond effective criticism.²⁶¹

Despite these hurdles, the remaining elements of jurisdictional provincialism ought to be examined and reformed. First, problems often arise from the *application* of a doctrine rather than from the doctrine itself or its underlying rationale. For example, the use of the standing requirement most corrosive to international law derives not so much from the requirement itself, but from its use as a vehicle for

²⁵⁹ On the political question doctrine, see, for example, Michael J. Glennon, *Foreign Affairs and the Political Question Doctrine*, 83 AM. J. INT’L L. 814 (1989); Louis Henkin, *Lexical Priority or “Political Question”: A Response*, 101 HARV. L. REV. 524 (1987); Henkin, *supra* note 15; Wayne McCormack, *The Justiciability Myth and the Concept of Law*, 14 HASTINGS CONST. L.Q. 595 (1987). On the act of state doctrine, see, for example, Michael J. Bazylar, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325 (1986). Since the passage of the Foreign Sovereign Immunities Act of 1976, scholarly attention has generally been drawn away from the essential soundness of providing foreign sovereign immunity and defining its proper limits, and has instead focused on the Act’s application in the courts. The primary purpose of this focus has been to bring order out of chaos. See, e.g., Mark B. Feldman, *Foreign Sovereign Immunity in United States Courts: 1976-1986*, 19 VAND. J. TRANSNAT’L L. 19 (1986); see generally FRANCK, POLITICAL QUESTIONS, *supra* note 8, *passim* (criticizing judicial use of all three doctrines).

²⁶⁰ See *supra* notes 242-47 and accompanying text.

²⁶¹ In federal practice, for example, only the forum non conveniens and lis alibi pendens doctrines lack some direct foundation in the Constitution, congressional statute, or federal rule. See BORN & WESTIN, *supra* note 17, at 275, 320. The purely domestic use of forum non conveniens now has a statutory foundation. 28 U.S.C. § 1404(a) (1988). Both the Constitution, U.S. CONST. art. III, § 2, and federal statutes, e.g., 28 U.S.C. §§ 1331, 1332 (1988) directly address subject matter jurisdiction. Federal rule, FED. R. CIV. P. 4(k), and constitutional requirements of due process, U.S. CONST. amend. V, XIV, govern personal jurisdiction. Although neither the Constitution, statute, nor rule explicitly require standing, it is grounded in the constitutional “case” or “controversy” requirement. U.S. CONST. art. III, § 2.

applying the "black-box" theory of international legal obligation:²⁶² its use in denying standing to individuals with international law claims because those individuals "are not the subjects of international law."²⁶³ A change in this particular application of standing doctrine does not threaten either the requirement itself or the legitimate policy that underlies it. Likewise, personal jurisdiction requirements and the forum non conveniens doctrine can be profitably analyzed to insure that their application to international cases does not rely on similarly misguided notions of legal theory or international law.²⁶⁴

Second, although most of these doctrines have "proven" themselves in a broad range of domestic cases, and any change to them would likely come in the form of exceptions, such exceptions might be justified for international cases. Simply put, the stakes are higher when a court declines to hear an international case. When a court declines to hear a domestic case, there is some assurance that another domestic forum will be available. Domestic jurisdictional rules tend to be developed with an eye toward the rules of other domestic jurisdictions, and as a consequence, relatively few domestic cases "fall between the cracks."²⁶⁵ In international cases, however, the alternative fora are more likely to be located in foreign states with which our own domestic jurisdictional rules are not coordinated. Consequently, for the international case, a denial of jurisdiction in a U.S. court is more likely to result in a denial of a hearing anywhere.²⁶⁶ If an alternative forum is found, the change of forum is likely to be more convulsive than in a domestic case, involving greatly increased travelling distances for at least one of the parties, a new language of adjudication, and a very different set of procedures. Finally, because international cases are more likely to involve international law, refusals to hear such cases risk both harm to the United States, which may incur interna-

²⁶² See *supra* notes 14 & 22 and accompanying text.

²⁶³ See *supra* note 22 (cases denying standing).

²⁶⁴ Courts can, at least, apply these doctrines with a view toward the special circumstances of international litigation. Since the personal jurisdiction of the federal courts now essentially encompasses all that is constitutionally permissible, see FED. R. CIV. P. 4(k)(1)(A), (2), international rules of jurisdiction to adjudicate can inform the due process analysis in international cases. See *RESTATEMENT*, *supra* note 14, § 421 (defining jurisdiction to adjudicate under international law). Forum non conveniens practice already helps to minimize the danger that a U.S. court's refusal to hear a case will result in the case not being heard at all by requiring that an alternative forum does, in fact, exist. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981) (stating dismissal on forum non conveniens grounds generally inappropriate if alternative forum provides "clearly inadequate or unsatisfactory" remedy); see generally *BORN & WESTIN*, *supra* note 17, at 312-16 (containing a careful discussion and survey of cases on the alternative forum requirement).

²⁶⁵ The knowledge that one or more state courts will serve as alternative fora might, for example, assuage worries about strict jurisdictional rules in the federal courts.

²⁶⁶ The forum non conveniens doctrine is the only element of jurisdictional provincialism that takes explicit account of the availability of an alternative forum. See *supra* note 264.

tional liability for a continued violation of that law, and harm to international law itself, which loses an opportunity for vindication.²⁶⁷ There are no such risks when a U.S. court dismisses a purely domestic case. These higher stakes, taken together, suggest that exceptions to domestic jurisdictional rules are desirable in international cases.

Third, although many of these doctrines derive variously from the Constitution, a statute, or a rule, and thus are immune from frontal judicial attack, only subject matter jurisdiction (at least in the federal system) has a direct basis in both the U.S. Constitution and in congressional statutes.²⁶⁸ Two other requirements—standing and personal jurisdiction—have only an indirect basis in the Constitution,²⁶⁹ and the other doctrines have no constitutional or statutory basis at all. In short, from a judge's perspective, not all the elements of jurisdictional provincialism are equally intransigent.

Finally, from a reformer's perspective, all the elements of jurisdictional provincialism require careful examination. One cannot study the domestic treatment of international law for very long without getting the clear impression that courts often use jurisdictional arguments as pretexts, or at least adopt them uncritically, to avoid having to deal with international law.²⁷⁰ For the reformer, advances made in eradicating methodological and doctrinal provincialism will be lost if courts still find easy refuge in jurisdictional refusals to hear international cases at all.

V

WHAT IS TO BE DONE?

American courts are more deeply and pervasively hostile to international law than is commonly acknowledged. The late William Bishop's report to a generation of law students, that "American courts frequently apply rules of international law,"²⁷¹ seems unnecessarily bright.²⁷² The evidence, in fact, runs the other way. The Supreme Court's recent work—in *Alvarez-Machain*, *Aramco*, *Hartford*, and *Sale*—illustrates the real status of international law in domestic decision-

²⁶⁷ See *supra* part III.B.1.

²⁶⁸ U.S. CONST. art. III; 28 U.S.C. §§ 1331, 1332 (1988).

²⁶⁹ *Id.* art. III, § 2, amend. V, XIV (delineating the case or controversy requirement from which developed the doctrine of standing and the due process clauses, which limit the exercise of personal jurisdiction).

²⁷⁰ E.g., Bazylar, *supra* note 8, at 328 ("Courts use the [act of state] doctrine as an excuse to avoid deciding difficult international transaction cases.").

²⁷¹ WILLIAM W. BISHOP, JR., *INTERNATIONAL LAW* 78 (3d ed. 1971); see also Brilmayer, *supra* note 8, at 2285 ("American courts routinely enforce international claims of varying shapes and sizes.").

²⁷² Compare the more measured and more recent claim of Professors Carter and Trimble, that "[s]ometimes U.S. courts will apply international law." BARRY E. CARTER & PHILIP R. TRIMBLE, *INTERNATIONAL LAW* 4 (2d prtg. 1991).

making²⁷³ and that status is clearly marginal. What, then, should be done?

The first step is to recognize the depth and breadth of the phenomenon. Professor Oscar Schachter has aptly described provincialism as "our guild's dirty little secret, which we tend to cover up with the best of intentions."²⁷⁴ However, a problem cannot be addressed unless its existence is acknowledged. Those with the greatest interest in promoting international law have the greatest interest in exposing the full measure of its crippled domestic status.

The next step is to learn all we can about the phenomenon. As I have argued throughout this Article, judicial animosity toward international law does not manifest itself as a large, undifferentiated mass of rules and practices, but occurs in at least three distinct forms, each with its own characteristic set of justifications and harms. I have also tried to show the benefits of thinking about provincialism in this way. What is most remarkable, I think, about these different forms is the inverse symmetry between their wisdom and their amenability to change. Methodological provincialism—the tendency to treat international cases as if they were domestic ones—is categorically bad and the most amenable to change. Doctrinal provincialism—the tendency to eschew international rules as rules of decision—although not categorically bad, is subject to element-by-element critique, and is less amenable to change. Jurisdictional provincialism—the tendency to dismiss cases with international implications—is least problematic categorically, and will be the most difficult to reform.

There is much work yet to be done. The constituent elements of provincialism, the work-a-day rules and practices that present themselves to judges and lawyers, need serious, individual study. Some elements have already received such study.²⁷⁵ Others need such study for the first time.²⁷⁶

The next step, which need not await the completion of a dozen more studies, is to educate judges about international law. The most enduring improvement would begin in law schools, with a required course in international law. With such a requirement, the entire bench (as well as those who appear before it) would eventually have a

²⁷³ See *supra* part II.

²⁷⁴ Letter from Oscar Schachter, Hamilton Fish Professor of International Law & Diplomacy Emeritus, Columbia University School of Law, to Patrick M. McFadden, Associate Professor of Law, Loyola University Chicago School of Law (June 17, 1994) (on file with author).

²⁷⁵ See, e.g., *supra* notes 8, 241, 259 (citing such studies).

²⁷⁶ The ways and means of methodological provincialism have never received systematic study. Elements of the other forms of provincialism that seem most in need of a fresh, systematic examination are the *lis alibi pendens* doctrine and the judicial reluctance to find the existence of general principles of law. Cf. Trimble, *Revisionist View*, *supra* note 8, at 732 (reporting on the reluctance of courts to find custom).

minimal facility in international legal argument and a minimal sensitivity to its possible applications.²⁷⁷ A universally required course in international law would, of course, represent a sea-change in the standard law school curriculum,²⁷⁸ but this requirement is neither unprecedented nor beyond rational hope of achievement. A few North American law schools (in Quebec and Puerto Rico)²⁷⁹ and almost all European law schools currently require a course in international law for their first degree. Indeed, at the beginning of this century, about one-quarter of U.S. law schools required it as well.²⁸⁰ Those days might return: the Section of International Law and Practice of the American Bar Association has recently recommended (this time unsuccessfully) that the multistate or individual state bar examinations include international law questions.²⁸¹ If such an effort ever succeeds, curricular changes probably will follow.

Due regard for the real world, however, suggests that reformers explore other avenues as well. Bar associations and others could offer continuing legal education in international law to both lawyers and judges, although an effort aimed at judges would be the most direct.²⁸² The American Society of International Law and the ABA's Section on International Law and Practice are natural choices to lead such an effort, as is the National Judicial College for the education of state judges.²⁸³ The federal judicial system and almost every state judicial system hold conferences at least annually. These conferences could provide a forum for short-courses on international law and its proper use in U.S. courts.

The success of programmatic efforts in continuing judicial education depends primarily on two things: first, on an institutionally-based, organized effort to bring the program to the attention of judicial educators, and second, on the ready availability of teaching mater-

²⁷⁷ For both theoretical and practical reasons, Professor Phillip R. Trimble has urged those in charge of developing law school curricula to take better account of international law not by requiring a separate course on the subject, but by integrating relevant aspects of international law into current course offerings. Phillip R. Trimble, *Affirmative Reply*, in INTERNATIONAL LAW ANTHOLOGY 408-09 (Anthony D'Amato ed., 1994).

²⁷⁸ No U.S. law school currently requires a course in international law. JOHN K. GAMBLE, TEACHING INTERNATIONAL LAW IN THE 1990s 22 (1993).

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 4 (citing CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, REPORT ON THE TEACHING OF INTERNATIONAL LAW IN THE EDUCATIONAL INSTITUTIONS OF THE UNITED STATES 26 (1913)).

²⁸¹ *Recommendation & Report*, *supra* note 5, at 1.

²⁸² The American Bar Association's Section on International Law and Practice has long recognized the need for judicial education in international law. See Committee Report, *supra* note 10, at 903-04.

²⁸³ See generally National Conference of State Trial Judges & National Judicial College, The Judge's Book 371-77 (2d ed. 1994) (surveying providers of continuing judicial education).

ials. Reformers should thus devote physical space, personnel and funding to the effort and develop a model curriculum complete with teaching materials. It would represent no small advance in these educational efforts simply to provide a primary text on international law to every federal judge and to every state judge of general or appellate jurisdiction.

The provision of books aside, the substance of the educational effort would come in two parts. The first part would involve a study of international law's sources, materials, and modes of argument, along with some of its basic substantive principles. It would, in other words, cover the kinds of topics typically surveyed in a law school course on international law—geared, of course, toward those who are already quite sophisticated in legal analysis. This would have an obvious and direct effect on methodological provincialism. Armed with such knowledge, judges simply could not ignore the differences between international and domestic law.

The second part of the educational effort would involve a close study of the relation between international and domestic law. It would entail a longer and more sophisticated treatment of that subject than is probably typical of most law school courses. The reason for this emphasis is straightforward: judges must face the question of relevance every time international law is argued, or whenever they believe, based on their own research, that it might be pertinent. This part of the educational program would likely begin with a brief treatment of the philosophical and constitutional framework within which international law operates domestically, followed by a critical examination of the doctrines and practices discussed in this Article. It would examine provincialism, element by element, asking in each case whether a constitutional or congressional mandate requires the doctrine or practice, and if not, whether the policies supporting the doctrine or practice are sufficiently persuasive to overcome its harms. Such an examination would necessarily include the question of whether courts should read supporting judicial precedents narrowly, confine those precedents to their facts, or flatly overturn them as no longer good law.

The provincialism of U.S. courts does harm, sometimes serious harm, to litigants, to the courts themselves, to the United States, to international law, and to the rule of law. Such provincialism must be challenged and U.S. judges must lead the effort. Judges are primarily responsible for the treatment of international law in U.S. courts, and judges are in the best position to implement reforms.