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Our International Constitution

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Article

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I. INTRODUCTION

In *Roper v. Simmons*, six members of the Supreme Court agreed that international law is relevant to determination of "society's evolving standards of decency" under the Eighth Amendment.[1] *Roper* represented the culmination of a battle over the use of international and foreign law in constitutional interpretation that has raged on the Court since the late 1980s, and that has found expression recently in cases such as *Lawrence v. Texas*,[2] invalidating the Texas homosexual sodomy statute; *Grutter v. Bollinger*,[3] upholding affirmative action in higher

1. Roper v. Simmons, 125 S. Ct. 1183, 1198 (2005) ("Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."). Although Justice O'Connor disagreed with the majority's identification of a national consensus prohibiting the execution of juveniles, she agreed that international law was relevant to the Court's analysis. *Id.* at 1215 (O'Connor, J., dissenting) ("Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency. . . . At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus.").

2. 539 U.S. 558 (2003) (invoking the European Court of Human Rights's opinion in *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981)). The reference was the first time the European Court's jurisprudence had been cited in a Supreme Court majority opinion. Justice Kennedy underscored the significance of the citation by mentioning it when he announced the opinion from the bench.

3. 539 U.S. 306, 344 (2003) (Ginsburg and Breyer, JJ., concurring) (citing the International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106, Annex, UN GAOR, 20th Sess., Supp. No. 21, UN Doc. A/6014 (Dec. 21, 1965), and the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, UN GAOR, 34th Sess., Supp. No. 46, UN Doc A/34/46 (Sept. 3, 1981)). The concurrence invoked the treaties for the proposition that affirmative action must end, as a constitutional matter, when its goals are achieved.

education; and *Atkins v. Virginia*,[4] invalidating the death penalty for the intellectually disabled.[5] And in extrajudicial speeches and writings, Justices Ginsburg, Breyer, and O'Connor, and at one point the late Chief Justice Rehnquist, all indicated that consideration of international and foreign law is important to the jurisprudence of the modern Supreme Court.[6]

Reference to international and foreign sources in constitutional analysis has provoked a sharp backlash from other members of the Court. Justice Scalia condemned the Court's "discussion of . . . foreign views" in *Lawrence* as "dangerous" dicta,[7] and invoked Justice Thomas for the proposition that "this Court . . . should not impose foreign moods, fads, or fashions on Americans."[8] Dissenting in *Atkins*, Chief Justice Rehnquist criticized the majority's invocation of "the views of other countries," emphasizing that under the Eighth Amendment, "'*American* conceptions of decency . . . are dispositive.'"[9] Likewise in *Roper*, Justice Scalia argued that the majority's assumption "that American law should conform to the law of the rest of the world . . . ought to be rejected out of hand."[10] Indeed, in a recent address, Justice Scalia argued that "modern foreign legal material can *never* be relevant to an interpretation of . . . the *meaning* of . . . the U.S. Constitution."[11]

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4. 536 U.S. 304, 316 n.21 (2002) (noting that the practice was "overwhelmingly disapproved" within the world community, and citing Brief of Amicus Curiae the European Union in Support of the Petitioner at 4, McCarver v. North Carolina, 532 U.S. 941 (2001) (No. 00-8727)).

5. 536 U.S. at 316 n.21.

6. William H. Rehnquist, *Constitutional Courts—Comparative Remarks* (1989), *in* GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM 411, 412 (Paul Kirchof & Donald P. Kommers eds., 1993); Stephen Breyer, Keynote Address at the American Society of International Law Proceedings (Apr. 2-5, 2003), *in* 97 AM. SOC'Y INT'L L. PROC. 265 (2003); Sandra Day O'Connor, Keynote Address at the American Society of International Law Proceedings (Mar. 16, 2002), *in* 96 AM. SOC'Y INT'L L. PROC. 348, 350 (2002); Ruth Bader Ginsburg, Remarks at the Ninety-Ninth Annual Meeting of the American Society of International Law, A Decent Respect to the Opinions of [Human]kind: The Value of a Comparative Perspective in Constitutional Adjudication (Apr. 1, 2005) [hereinafter Ginsburg, A Decent Respect]; Ruth Bader Ginsburg, Remarks for the American Constitution Society, Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication (Aug. 2, 2003) [hereinafter Ginsburg, Looking Beyond]; Sandra Day O'Connor, Remarks at the Southern Center for International Studies (Oct. 28, 2003) *available at* http://www.southerncenter.org/oconner_transcript.pdf [hereinafter O'Connor, Remarks] ("[C]onclusions reached by other countries and by the international community, although not formally binding upon our decisions, should at times constitute persuasive authority in American courts . . . .").

7. 539 U.S. at 598 (Scalia, J., dissenting).

8. *Id.* (quoting Foster v. Florida, 537 U.S. 990 (2002) (Thomas, J., concurring in denial of certiorari)).

9. *Atkins*, 536 U.S. at 325 (Rehnquist, C.J., dissenting) (quoting Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989)); *see also id.* at 347 (Scalia, J., dissenting) ("[T]he prize for the Court's Most Feeble Effort to fabricate 'national consensus' must go to its appeal . . . to the views of . . . the so-called 'world-community.'").

10. *Roper*, 125 S. Ct. at 1226 (Scalia, J., dissenting).

11. Antonin Scalia, Keynote Address at the American Society of International Law Proceedings: Foreign Legal Authority in the Federal Courts, *in* 98 AM. SOC'Y INT'L L. PROC. (2004); *see also* Ann Gearan, *Foreign Rulings Not Relevant to High Court, Scalia Says*, WASH. POST, Apr. 3, 2004, at A07.

Academic,[12] press,[13] and particularly congressional[14] criticisms have been equally sharp. One proposed House resolution opposing the use of foreign authority criticized the *Lawrence* and *Atkins* majorities for "employ[ing] a new technique of interpretation called 'transjudicialism.'"[15] Congressman Tom Feeney of Florida, who co-sponsored another proposed resolution, has argued that "[t]he people of the United States have never authorized . . . any federal court to use foreign laws to essentially make new law or establish some rights or deny rights here in the United States."[16] At congressional hearings on the issue, witnesses have referred to the judiciary's use of international and foreign sources as impeachable and "subversive."[17] In his recent confirmation hearings, Chief Justice John Roberts condemned the practice for expanding judicial discretion and granting unaccountable foreign judges influence over American lawmaking.[18] And Attorney General Alberto Gonzales contends that "the use of foreign law poses a direct threat to legitimacy, including to the legitimacy of the Court itself."[19]

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12. *See, e.g.*, Roger P. Alford, *Misusing International Sources To Interpret the Constitution*, 98 AM. J. INT'L L. 57 (2004); Joan Larsen, *Importing Constitutional Norms from a "Wider Civilization":* Lawrence *and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO L.J. 1283 (2004) (discussing *Lawrence* as "potentially revolutionary"); Richard Posner, *The Supreme Court 2004 Term, Forward: A Political Court*, 119 HARV. L. REV. 31, 90 (2005) (condemning *Roper* as "a naked political judgment"); Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on* Atkins *and* Lawrence, 98 AM. J. INT'L L. 69 (2004); Ernest Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 149 (2005) (criticizing *Roper* for employing foreign authority to expand "the Eighth Amendment denominator"); Peter Rubin, Remarks at American Constitution Society Supreme Court Roundup (July 1, 2003), *available at* http://www.acslaw.org/pdf/SCOTUStrans.pdf (describing the *Lawrence* citations to the European Court of Human Rights as "remarkable" and "extraordinary").

13. *See, e.g.*, Linda Greenhouse, *The Supreme Court: Overview; In a Momentous Term, Justices Remake the Law, and the Court*, N.Y. TIMES, July 1, 2003, at A1 (noting that the Court had "displayed a new attentiveness to legal developments in the rest of the world and to the Court's role in keeping the United States in step with them").

14. Various bills and resolutions have been introduced objecting to the use of foreign legal sources in constitutional analysis. *See, e.g.*, H.R. Res. 97, 109th Cong. (2005) (expressing the sense of the House that "judicial determinations regarding the meaning of the Constitution of the United States should not be based on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws or pronouncements inform an understanding of the original meaning of the laws of the United States"). H.R. Res. 97 had 65 co-sponsors, including Judiciary Committee Chair James Sensenbrenner and then-House Majority Leader Tom Delay. *Accord* S. Res. 92, 109th Cong. (2005); *see also* The Constitution Restoration Act of 2004, S. 2082, 108th Cong. §§ 201, 302 (2004) (threatening judges with impeachment for, inter alia, considering foreign sources); H.R. Res. 568, 108th Cong. (2004); Constitutional Preservation Resolution, H.R. Res. 446, 108th Cong. (2003) ("[T]he Supreme Court should base its decisions on the Constitution and the Laws of the United States, and not on the law of any foreign country or any international law or agreement not made under the authority of the United States.").

15. American Justice for American Citizens Act, H.R. 4118, 108th Cong. § 2(5) (2004).

16. Tom Curry, *A Flap Over Foreign Matters at the Supreme Court: House Members Protest Use of Non-U.S. Rulings in Big Cases*, MSNBC NEWS, Mar. 11, 2004, http://msnbc.msn.com/id/4506232/.

17. *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing on H.R. 568 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. (2004); *see also Hearing on H.R. 97 and the Appropriate Role of Foreign Judgments in the Interpretation of American Law Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2005).

18. Emily Bazelon, *Moments of Truth: What John Roberts Really Thinks*, SLATE, Sept. 15, 2005, http://www.slate.com/is/2126311/?nav=navoa.

19. Alberto Gonzales, U.S. Att'y General, Foreign Law and Constitutional Interpretation, Address at the University of Chicago Law School (Nov. 9, 2005) (excerpts available at Washington

Many participants in the debate over the Court's use of international and foreign sources appear to share a common assumption: that the invocation of such sources is *new*.[20] The Justices' explanations for their new willingness to look abroad are multiple: the post-World War II proliferation of foreign constitutional courts that are adjudicating similar questions,[21] globalization,[22] and the universality of basic human rights.[23] Justice Scalia identifies the Court's first use of foreign sources "for the purpose of interpreting the Constitution" as the 1958 Eighth Amendment case of *Trop v. Dulles* and criticizes the recent Court for expanding the practice "beyond the area of the Eighth Amendment."[24] Although Justice Ginsburg traces the legitimacy of the enterprise to the Declaration of Independence and the Framers' desire to comply with the law of nations,[25] like Justice Scalia, she attributes judicial invocation of foreign sources to the "pathmarking" *Trop* plurality opinion.[26]

The present controversy over resort to international and foreign sources has focused on the Court's recent due process and death penalty jurisprudence.[27] A

Post: Campaign for the Supreme Court, http://blogs.washingtonpost.com/campaignforthecourt/ (Nov. 9, 2005, 17:08 EST)) [hereinafter Gonzales Address].

20. *See, e.g.*, O'Connor, Remarks, *supra* note 6, at 4. (contending that the Court "historically . . . [has] declined to consider international law and the law of other nations when interpreting our own constitution" and seeing "the first indicia of change" in *Atkins v. Virginia*, 536 U.S. 304 (2002)); Rehnquist, *supra* note 6, at 412 ("For nearly a century and a half, courts in the United States exercising the power of judicial review [for constitutionality] had no precedents to look to save our own, because our courts alone exercised this sort of authority. . . . But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process."). *See also* Charles Fried, *Scholars and Judges: Reason and Power*, 23 HARV. J.L. & PUBL. POL'Y 807, 819 (2000) (warning that consideration of foreign authority would "expand" the "canon" of "authoritative materials" in constitutional decision making.)

21. *See* Rehnquist, *supra* note 6, at 412; Ginsburg, Looking Beyond, *supra* note 6, at 2.

22. *See* Breyer, *supra* note 6, at 266 (referring to "commercial, technological, and political . . . 'globalization'"); O'Connor, Remarks, *supra* note 6, at 1 ("The reason [why judges should look to foreign sources], of course, is globalization. No institution of government can afford any longer to ignore the rest of the world.").

23. *See* Breyer, *supra* note 6, at 2; Ginsburg, Looking Beyond, *supra* note 6, at 2-3 ("National, multinational and international human rights characters and tribunals today play a key part in a world with increasingly porous borders.").

24. *See* Scalia, *supra* note 11, at 307 (discussing *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion)); *see also* Gearan, *supra* note 11, at A07 (containing remarks by Justice Scalia dating the resort to foreign material at least to 1958 and describing the trend as "inconsistent").

25. *See* Ginsburg, Looking Beyond, *supra* note 6, at 5-7. Harold Koh and Gerald Neuman have argued that resort to international law has original or historical roots. *See* Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 43-45 (2004) (noting support for resort to foreign authority from the founding era); Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82, 83-84 (2004) (identifying the Court's historical reliance on foreign and international sources in a variety of contexts); *see also* Steven Calabresi & Stephanie Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 109 (2005) (arguing that the use of foreign sources in *Roper* was a "return to traditional methods of analysis"); *cf.* Judith Resnik, *Law's Migration: From* Shelley v. Kraemer *to CEDAW and Kyoto—American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. (forthcoming 2006) (noting the tension between invocations of international human rights and American exceptionalism in nineteenth-century domestic movements).

26. Ginsburg, Looking Beyond, *supra* note 6, at 14.

27. Compare, for example, Justice Scalia's majority opinion upholding the constitutionality of the death penalty for persons age 16 or older at the time of the crime, Stanford v. Kentucky, 492 U.S. 361, 370 n.1 (1989) (emphasizing "that it is *American* conceptions of decency that are dispositive"), with Justice Stevens's plurality opinion invalidating the death penalty for persons age 15 at the time of the

broader view of U.S. constitutional history, however, indicates that international law has always played a substantial, even dominant, role in broad segments of U.S. constitutional jurisprudence.

Much less noticed after the flap over *Atkins*, *Lawrence*, and *Grutter*, for example, was the Court's extensive resort to international law in *Hamdi v. Rumsfeld*.[28] Justice O'Connor's plurality opinion in *Hamdi* looked to the international law of war regarding both the President's constitutional authority to detain citizens as enemy combatants[29] and the inherent limits on the scope of that power.[30] Although O'Connor also found that constitutional due process limited the President's power to detain, even here her opinion gave a nod toward international law by suggesting, without deciding, that due process might be satisfied by a military tribunal procedure akin to that established pursuant to Article 5 of the Third Geneva Convention.[31] Thus, the plurality considered international standards in defining both the scope of executive power and minimum individual rights protections established by the Constitution. The plurality's approach was not uncontroversial, but few Justices questioned the propriety of O'Connor's resort to international rules.[32]

One could seek to explain away the decision in *Hamdi* by arguing that international law is relevant to constitutional provisions with obvious foreign relations implications—clauses "that textually anticipate recourse to international law," as Roger Alford has put it.[33] This would not, however, explain the *Hamdi* plurality's consideration of international standards in its *due process* analysis. Moreover, as this Article demonstrates, the Court's historical resort to

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crime, Thompson v. Oklahoma, 487 U.S. 815, 830 n.31 (1988) ("We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual.") (citing Trop v. Dulles, 356 U.S. 86, 102 & n.35 (1958), Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977), and Enmund v. Florida, 458 U.S. 782, 796-97 n.22 (1982)).

28. 542 U.S. 507 (2004). For further discussion, *see infra* notes 143-155 and accompanying text.

29. *Id.* at 520.

30. *Id.*

31. *Id.* at 538; *see* Geneva Convention Relative to the Treatment of Prisoners of War art. 5, Aug. 12, 1949, 6 U.S.T. 3316, 3322, 75 UNT.S. 135, 140.

32. Chief Justice Rehnquist joined O'Connor's opinion without comment. Justices Scalia and Stevens would have held that the Constitution barred detaining U.S. citizens on U.S. soil pursuant to the laws of war, but did not object to application of international law beyond that context. 542 U.S. at 565-66 (Scalia, J., dissenting) (citing *Ex parte* Milligan, 71 U.S. 2 (1866)); *see also id.* at 575 n.5 (Scalia, J., dissenting) ("That captivity may be consistent with the principles of international law does not prove that it also complies with the restrictions that the Constitution places on the American Government's treatment of its own citizens."). Indeed, Scalia suggested that individuals outside U.S. territory could be subject to such detentions. *Id.* at 577 (Scalia, J., dissenting). Justices Souter and Ginsburg criticized the Government's invocation of war powers by questioning whether the United States had even been obeying the international laws of war it invoked. *Id.* at 549-50 (Souter, J., concurring part, dissenting in part, and concurring in the judgment). Justice Thomas disapproved of the plurality's reliance upon the Geneva Conventions to *limit* the president's powers, but otherwise found the executive's action consistent with international rules. *Id.* at 598 & n.6 (Thomas, J., dissenting).

33. Alford, *supra* note 12, at 58 n.10; *see also* Ramsey, *supra* note 12, at 71 & n.14 (conceding that international sources are "relevant . . . where the Constitution directly appeals to matters of international relations such as declaring war, making treaties, and enforcing the law of nations"). Attorney General Alberto Gonzales also asserted this view in a recent address. *See* Gonzales Address, *supra* note 19 (asserting that the Framers "imported into the Constitution certain terms and concepts from international law—such as 'Offenses Against the Law of Nations,' 'Letters of Marque and Reprisal,' 'Consuls,' and 'Treaties'" and that the use of international law in constitutional analysis should be limited to these concepts).

international sources has not been limited to the Constitution's foreign relations clauses.

This Article seeks to challenge and redirect contemporary debate regarding the role of international law in constitutional interpretation based upon an examination of historical Supreme Court practice. The Article has three goals: It first marshals the weight of evidence regarding the Supreme Court's historical use of international law in constitutional analysis, to rebut the claim that the practice is new. It then analyzes the ways that the Court has used international law from a legitimacy perspective, and finally draws lessons from the historical practice to offer preliminary suggestions regarding the normatively appropriate use of international law.

To some extent, the paper proceeds from the principle famously articulated by Old Ezra, who, when asked if he believed in infant baptism, responded, "'Believe in it? Why, man, I've seen it done!'"[34] I do not contend that history and usage resolve the current controversy over resort to international law. Historical practice may become anachronistic or difficult to translate into new contexts, and, Oliver Wendell Holmes's venerable observation notwithstanding, the life of the law is not only experience. History and practice do, however, illuminate the issue. In particular, I argue that the historical practice answers the legitimacy objection that international law is "foreign" to the American constitutional tradition.

Part II accordingly offers a thorough, though not exhaustive, account of the Supreme Court's approaches to considering international law in constitutional analysis. The section focuses on the justifications that the Court has offered for legitimating the practice. I argue that the Court traditionally has understood our constitutional design as inviting consideration of international law in three fundamental ways. *First*, in its strongest form, the Constitution *directly invokes international law* or concepts of international law in clauses ranging from the treaty and war powers to commerce and citizenship. *Second*, the Court has employed international law as a *background principle* of constitutional construction, invoking international legal principles to limit the Constitution's territorial application, to define powers "inherent" in national sovereignty, and to inform principles of federalism. *Finally*, the Court has looked to international law to construe individual rights provisions, including in cases in which international law establishes governmental interests implicating constitutional rights, and in cases involving rights under the Just Compensation Clause, involuntary servitude, "cruel and unusual punishments," and substantive and procedural due process, which the Court has read as incorporating common values regarding the basic rights of the person. *Atkins*, *Lawrence*, and *Roper* fall into this final category of cases. Although the Court's invocation of international opinion in the due process and Eighth Amendment cases has sparked the greatest controversy, Part II argues that the use of international law in this context is fully consistent with the general historical tradition. Indeed, international law has played a more robust role in a number of other contexts, including the federalism and inherent powers cases.

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34. Henry Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1967-68 (2003). Though of uncertain origins, Old Ezra has taken on a life of his own in constitutional discourse. Richard Fallon is acquainted with Old Ezra, and John Hart Ely inquired after his health. *Id.* at 1967 n.241.

Part III examines the insights that the cases offer for the current debate over the legitimacy of resort to international law in constitutional analysis. As a threshold matter, the cases flatly refute two current assumptions: that international law has no role in constitutional analysis and that judicial resort to international law is new. The cases demonstrate that since the nation's founding, the Court has resorted to international law in constitutional analysis in a wide, and at times surprising, array of contexts. The practice is sufficiently continuous over time and broad in scope that it cannot be dismissed as episodic.[35] The Court's frequent and longstanding resort to international law clearly belies the suggestion that the Constitution *per se* prohibits consideration of international norms. At a minimum, those who assert international law's irrelevance to constitutional analysis must confront and explain these cases. Even for those who concede international law's relevance to constitutional analysis regarding certain subjects, such as foreign relations,[36] the cases suggest that using subject matter to identify the contexts in which international law is relevant is an elusive, if not impossible, task.

In contrast to the sharp rhetoric on today's Court, few jurists in the past have adopted the absolutist view of American constitutional exceptionalism embraced by Justices Scalia and Thomas. To be sure, justices at times have objected to the use of international law, but their objections generally have derived from interpretation of a particular constitutional provision or international rule, rather than from a blanket prohibition against considering international law in determining constitutional meaning. In other words, the Court's historical use of international law has been instinctive and generally uncontroversial in a wide range of contexts, including in the interpretation of individual rights. Indeed, despite his stated opposition to the practice, even Justice Scalia has recognized that the Full Faith and Credit Clause is informed by "principles developed in international conflicts law."[37] In other words, it is the critics of judicial resort to international sources, not the proponents, who are the innovators here.

The cases further demonstrate that the Court generally has recognized international law as an evolving concept and has applied contemporary rules of international law rather than limiting its analysis to norms prevailing at the nation's founding. International law also has not entered constitutional debate as a new (and therefore potentially illegitimate) interpretive device, but through the ordinary tools of constitutional interpretation—original understanding, text, structure, history, doctrine, and prudential concerns.[38]

Equally notably, and contrary to the Court's use of international law as merely persuasive authority in cases such as *Roper* and *Lawrence*, in some contexts, international law has been applied as a result of the binding obligations it imposes. For cases implicating foreign relations, cases where governmental interests derive from international law, and in some cases involving national or

35. *See* Ramsey, *supra* note 12, at 72 n.17 (dismissing examples of historical resort to international law as "(1) interpretations of structural provisions, (2) instances in which domestic rights were denied, or (3) scattered and unexplained recent practice").

36. *See supra* note 33.

37. Sun Oil Co. v. Wortman, 486 U.S. 717, 723 (1988).

38. This discussion is informed by the work of my colleague Philip Bobbitt. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 4 (1982); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11-12 (1991) (identifying six modes of constitutional interpretation: history, text, structure, doctrine, prudentialism, and ethos).

state sovereign powers, the justification for using international law arises, at least in part, from its binding legal character. This is not to say that the Court has applied international law because it was bound to do so at the constitutional level. Instead, the Court has recognized that the need to comply with the United States's international legal obligations can justify giving weight to international rules.

On the other hand, the cases demonstrate that international law at times has been used opportunistically and that resort to international law historically has been a mixed bag for those who advocate its use to advance individual rights. In many contexts, international law has been invoked to expand governmental power at the expense of basic liberties. The cases also do not directly confront more fundamental questions regarding the legitimate use of international law or attempt to reconcile the use of international law with the nature of democratic governance. In short, although the cases demonstrate the relevance of international law to constitutional analysis, they leave unanswered the question of *when* resort to international law is appropriate and *how* relevant international law principles should be properly reconciled with the nature, structure, and terms of our domestic Constitution. This neglect is also visible in the scholarly literature. In the furor over whether international authority should be used at all, little scholarly attention has been devoted to the question of how international authority may be used *well*.[39]

The latter part of the Article seeks to answer these difficult normative questions. Part IV examines and rebuts objections to the use of international law on the grounds that it is anti-democratic. The section argues that the democracy deficit critique is based on a misunderstanding of both the nature of constitutional analysis and the historical role of international law in our constitutional traditions. In particular, the historical cases demonstrate the fallacy of a fundamental legitimacy objection: that international law is foreign and thus not part of the American constitutional tradition. Instead, international law traditionally has been an accepted instrument for constitutional construction—it is not a foreign "other," but is part of our law, and part of our canon of constitutional authorities.

In light of the problems highlighted in Parts II through IV, Part V offers four tentative principles for determining the appropriate relationship between international law and constitutional analysis. The section asserts that international law is neither presumptively relevant nor irrelevant to constitutional construction,[40] and that the propriety of applying international rules must be resolved on a case-by-case basis, with due consideration of both the constitutional provision at issue and the relevant international rule. Accordingly, the section proposes that in addressing the role of international law in any particular constitutional context, a Court first should consider the Constitution's receptiveness to the international rule, using traditional approaches to constitutional analysis. This requires examination of whether the particular constitutional provision at issue poses some textual or interpretive barrier to

39. Frank I. Michelman, *Integrity-Anxiety?*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 241, 269 (Michael Ignatieff ed., 2005) (underscoring that political legitimacy in the use of foreign authority will turn on "people's confidence in the objectivity of the processes of official decision making").

40. On this point, I am in accord with Vicki Jackson. *See* Jackson, *supra* note 25 (advocating a neutral, "engagement" approach to consideration of foreign sources).

internalization of the international rule, and whether some other aspect of the constitutional design—including structure, purpose, and operative individual rights protections—partially limits or bars the rule's operation. A court then should consider three questions relating to the nature of the international rule itself: (1) how uniformly accepted and well defined the international norm is and whether states have complied with it in practice; (2) the extent to which the norm has been accepted or rejected by the United States; and (3) any limitations imposed by international law itself on the operation of the international rule and changes in the applicable norm as international law evolves. I argue that a focus on these preconditions will encourage courts to apply international authorities in an objective and normatively legitimate manner.

The scope of this Article is limited to contexts in which the Court has invoked international law to provide substantive meaning to constitutional provisions. The argument does not consider, or turn upon, the separate question of whether international law is directly enforceable through the federal common law,[41] since international law is considered here only as an interpretive tool. The Article does, however, recognize that international law has entered constitutional analysis as a fellow traveler with the common law,[42] as well as through its own independent force.

The focus here is on resort to *international law*, in the form of either treaties, customary international law,[43] or general international or public law,[44] rather than on the *comparative* practices of individual foreign states.[45] To a limited extent, the Article also includes consideration of cases invoking the uniform practices of "civilized" states. This approach is due to both definitional and methodological difficulties involved in isolating the Court's use of international law. As Jeremy Waldron has eloquently observed, the law of nations, which played a prominent role in many nineteenth-century cases and from which modern customary international law derives, originally approximated a "common law of mankind," combining principles now understood separately as international law, common law, and natural law into "a body of law purporting to represent what various domestic legal systems share in the way of common

41. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (arguing that customary international law is not enforceable as federal common law).

42. Sosa v. Alvarez-Machain, 542 U.S. 692, 720 (2004) ("[T]orts in violation of the law of nations were understood to be within the common law").

43. Customary international law is evidenced by widespread and consistent state practice, taken under a sense of legal obligation (*opinio juris*). *See* Bruno Simma, *International Human Rights and General International Law: A Comparative Analysis*, *in* 4 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW, bk. 2, at 153, 216-21 (1995) (discussing the nature of customary international law).

44. International law can be derived from the "general principles common to the major legal systems of the world." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987); *see also* Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 (recognizing as a source of international law "the general principles of law recognized by civilized nations"); HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 167-72 (1958) (discussing application of general international law by the International Court of Justice); Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82, 107 (1992) (arguing that "general principles" of international law may be generated through acceptance by states at the international level).

45. It also does not include cases invoking only British common law traditions, which have a distinct authoritative pedigree in American constitutional analysis.

answers to common problems."[46] The comprehensive law of nations (or *jus gentium*, as Waldron portrays it) addressed not merely "issues between sovereigns but . . . legal issues generally—[including] contract, property, crime, and tort."[47] This fact, combined with the recognition that evidence of state practice was, and remains, a primary indicator of the rules of international law, that "general principles" accepted by nations are an aspect of international law, and that the Court itself frequently is unclear about whether it is invoking international or comparative law, makes it extremely difficult to draw bright line rules between invocations of international law and widespread comparative state practice. The characteristic historically unifying these sources of norms, however, was the *consensus* that they reflected as "law common to all nations."[48] Today, where a foreign or international law norm is not itself legally binding on the United States, it is the consensus of states regarding shared common values that gives the norm its persuasive force. Accordingly, to the extent that the Court is ambiguous about whether it is relying on widespread state practice or a form of international law, I identify the cases as relying on international "practice."

Resort to international law in constitutional analysis raises some of the same questions implicated by use of individual comparative examples,[49] and to that extent, the arguments herein can be analogized to the comparative context. But use of the comparative practices of individual states for constitutional analysis also raises additional difficulties, such as the potential for misinterpretation of a culturally contingent foreign practice and legitimacy concerns arising from selective and anecdotal use.[50] These concerns are less implicated by the use of widely accepted foreign practices and international rules, such as customary and general international law and widely accepted multilateral treaties.[51]

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46. Jeremy Waldron, *Foreign Law and the Modern* Jus Gentium, 119 HARV. L. REV. 129, 132-33 (2005); *see also* EMER DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, at lvi (Joseph Chitty ed., Lawbook Exchange 2005) (1854) (describing the law of nations as "the law of Nature applied to Nations").

47. Waldron, *supra* note 46, at 132.

48. *Id.* at 133.

49. The role of comparativism in constitutional analysis has been well canvassed in recent years. *See, e.g.*, Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639 (2005); Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819 (1999); Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, *2* INT'L J. CONST. L. 1 (2004); Vicki C. Jackson, *Comparative Constitutional Federalism and Transnational Judicial Discourse*, 2 INT'L J. CONST. L. 91 (2004); Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15 (2004); Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 37 LOY. L.A. L. REV. 271 (2003) [hereinafter Jackson, *Narratives*]; Vicki C. Jackson, *Transnational Discourse, Relational Authority, and the U.S Court: Gender Equality*, 51 DUKE L.J. 223 (2001); Christopher McCrudden, *A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499 (2000); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999).

50. Rex Glensy, *Which Countries Count?* Lawrence v. Texas *and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT'L L. 358 (2005) (setting forth a framework for identifying appropriate comparative sources in constitutional analyis); *see also* Waldron, *supra* note 46, at 144-45 (distinguishing between consideration of the *jus gentium* "as a dense and mutually reinforced consensus" and citation to the practice of an individual foreign state).

51. Consideration of regional international legal regimes and regional foreign consensus, as the Court did in *Lawrence*, does raise selectivity concerns regarding which region's rules are relevant. *See* discussion *infra* note 615 and accompanying text.

Likewise, the focus is on situations where international law helps provide the rule of decision in constitutional analysis. The analysis thus does not address situations in which the Court looks to foreign usage to distinguish a domestic rule[52] or to test a likely policy outcome.[53] The Article instead squarely confronts the heart of the current controversy by examining contexts in which international law is affirmatively invoked to inform the rule of decision in constitutional construction. The thesis of the Article is that international law is an integral part of our constitutional tradition, and when applied in a principled manner, it can inform and enrich our constitutional analysis.

II. THREE APPROACHES TO INTERNATIONAL LAW IN CONSTITUTIONAL ANALYSIS

This section examines the justifications that the Supreme Court has offered for employing international law to inform constitutional analysis. I argue that the Supreme Court has understood our constitutional design and traditions as inviting consideration of international authorities in three contexts: (A) cases where the Constitution expressly refers to international law or a concept of international law; (B) cases where international law is used as a background principle to identify the territorial scope of the Constitution, the sovereign powers of the national government, or to delineate structural relationships within the federal system; and (C) individual rights cases. The purpose of this section is primarily descriptive: It explores the various contexts in which the Court has employed international law in constitutional analysis, the methodological justifications offered for the practice, and the practice's implications, to set up the examination of legitimacy in the second half of the piece.

A. *Express Reference to International Law or a Concept of International Law*

In its strongest form, the Constitution textually commands consideration of international law through Article I, § 8's grant to Congress of the power to define and punish "Offenses against the Law of Nations,"[54] and through its mechanisms for making and enforcing treaties.[55] Both explicitly reference international law: the law of nations references what is now loosely translated as customary international law,[56] while treaties are themselves positive repositories and

52. *See* Larsen, *supra* note 12, at 1288-89.

53. *See* Koh, *supra* note 25, at 45-46 (discussing resort to foreign rules to shed "empirical light" on constitutional questions) (quoting Printz v. United States, 521 U.S. 898, 977 (Breyer, J., dissenting)); Larsen, *supra* note 12, at 1289-91.

54. U.S. CONST. art. I, § 8, cl. 10.

55. The Constitution gives the President power to make treaties with the advice and consent of two-thirds of the Senate, U.S. CONST. art. II, § 2, cl. 2 [hereinafter Treaty Clause]; prohibits states from entering into treaties, *id.* art. I, § 10, cl. 1; establishes federal judicial power over treaties, *id.* art. III, § 2, cl. 1; and makes treaties supreme over state law, *id.* art. VI, cl. 2.

56. Waldron, *supra* note 46, at 135 (discussing the relationship between the law of nations and international law). As Louis Henkin has observed: "The Law of Nations . . . included more than is now subsumed in 'international law.' At that time, the term covered principles of maritime and international commercial law and perhaps some rules applicable to international conflict of laws. In the intervening years, these subjects have largely become domestic matters governed by domestic law, except to the extent that they are the subject of international agreements."). Louis Henkin, *A Century of Chinese Exclusion*, 100 HARV. L. REV. 853, 853 n.2 (1987); *see also* MARK WESTON JANIS, THE AMERICAN TRADITION OF INTERNATIONAL

instruments of international law. The Constitution also addresses concepts of international law through terms that, while they do not themselves constitute international law, are substantially defined by international rules. These include references to "war," "admiralty," "citizenship," and in early cases, "commerce" and "contract." The Supreme Court has construed each of these constitutional concepts in light of international rules.

1. *Direct References to International Law*

a. *Offenses Against the Law of Nations*

The question whether Congress has properly exercised its authority to define and punish offenses against the law of nations under the Offenses Clause necessarily requires consideration of what constitutes an offense against the law of nations. The Court has construed congressional power under the Clause in light of international law to uphold military tribunals[57] and laws regarding piracy,[58] counterfeiting,[59] and protecting embassies,[60] among others.[61] International law plays a robust role in this context, supplying the substantive rule against which Congress's constitutional authority is measured. International law, in other words, is not merely persuasive in this context; it is controlling. From a legitimacy perspective, however, this practice seems unproblematic, given the Constitution's explicit textual invitation.

LAW: GREAT EXPECTATIONS 1789-1914, at 1-24 (2004) (discussing conceptual evolution from law of nations to international law); Edwin Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 26-33 (1952) (comparing the scope of the law of nations to modern public international law).

57. Yamashita v. Styer, 327 U.S. 1, 16 (1946) ("Congress, in the exercise of its constitutional power to define and punish offenses against the law of nations, of which the law of war is a part, has recognized the 'military commission' appointed by military command . . . as an appropriate tribunal for the trial and punishment of offenses against the law of war."); *Ex parte* Quirin, 317 U.S. 1, 28 (1942); *see also* Madsen v. Kinsella, 343 U.S. 341, 355 n.22 (1952); Hirota v. MacArthur, 338 U.S. 197, 199-215 (1948) (Douglas, J., concurring).

58. In *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820), the Supreme Court upheld the validity of an 1819 federal statute authorizing the death penalty for any person who "shall, upon the high seas, commit the crime of piracy, as defined by the law of nations." *Id.* at 157. The statute was challenged for failing to provide a more precise definition of piracy. Based on the writings of public law scholars, the Court concluded that "the crime of piracy is defined by the law of nations with reasonable certainty" to be enforced, without more, through the 1819 act. *Id.* at 160.

59. United States v. Arjona, 120 U.S. 479 (1887) (upholding the constitutionality of a federal statute criminalizing the counterfeiting of foreign securities). The Court found that customary international law protected foreign currency and securities from counterfeiting, and that "[a] right secured by the law of nations to a nation, or its people, is one the United States . . . are bound to protect." *Id.* at 487.

60. Boos v. Barry, 485 U.S. 312, 316, 323 (1988) (identifying the Offenses Clause as a basis for congressional legislation regarding crimes against diplomats).

61. United States v. Flores, 289 U.S. 137 (1933) (upholding Congress's power to criminalize conduct of citizens on U.S. vessels in foreign waters). For further discussion, see Beth Stephens, *Federalism and Foreign Affairs: Congress's Power To "Define and Punish . . . Offenses Against the Law of Nations,"* 42 WM. & MARY L. REV. 447 (2000).

b. *The Treaty Power*

The Constitution's references to treaty making and enforcement necessarily brought with them international rules governing treaties and treaty making,[62] and resort to international law in construing the treaty power has a lengthy history. The Supreme Court has looked to international law to determine the appropriate subjects for treaty making, at times with implications for individual rights impacted by exercise of the treaty power. It also has looked to international law to delineate the powers of the several states and the executive to enter international instruments that are not treaties, such as compacts and sole executive agreements. The Court has further recognized that international powers and obligations relating to treaty making are structurally divided within the U.S. constitutional system, and that the Constitution both incorporates international rules governing treaties and imposes domestic limits on them. The Court occasionally has offered comity[63] as a justification for applying international rules in this context, in order to avoid conflicts with other nations. But, as with the Offenses Clause, international laws are not viewed as purely advisory or persuasive. The Court instead has read the Treaty Clause as affirmatively incorporating international rules to the extent allowed by the Constitution.

In addition to the implications of these decisions for individual rights, the Court's approach of tying the treaty power to what the international community considers an appropriate subject for treaty making grants significant influence to international law, since the national government's constitutional authority under the treaty power substantively expands (within the bounds allowable by the Constitution) as the international community recognizes new areas as appropriate for treaty making.[64]

i. *Substantive Scope of the Treaty Power*

In determining the scope of the treaty power, the Court has viewed the Treaty Clause as a distinct grant of substantive power to the national government to enter treaties on any subject generally recognized as appropriate by the international community. In *Ware v. Hylton*, Justice Iredell recognized that "the subject of treaties . . . is to be determined by the law of nations" and construed a treaty as terminating any pre-existing sovereign power of the states to confiscate

62. Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 571 (1840) (Taney, C.J.) (Constitution's reference to a "treaty . . . mean[s] an instrument written and executed with the formalities customary among nations."); *see also* David Golove, *Treaty Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1133 (2000) (tracing the origins of the Treaty Clause and observing that "its scope . . . was to be determined in accordance with international practice and the law of nations").

63. "Comity" refers to "the recognition which one nation allows within its territory to the [legal] acts of another nation, having due regard both to international duty and convenience, and to the rights of . . . persons who are under the protection of its laws." Hilton v. Guyot, 159 U.S. 113, 163-64 (1895). While not a legal obligation, principles of comity urge that U.S. laws be construed to avoid conflicts with the laws of another state. *Cf.* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403, cmt. g. (1987).

64. *Cf.* Curtis Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 454 (1998) ("What is considered 'international' will undoubtedly vary over time, as world conditions and relationships between nations change."). David Golove has demonstrated that the Court in *Missouri v. Holland* was fully aware of this implication. Golove, *supra* note 62, at 1076-79.

the property of British nationals.[65] In the 1828 case of *American Insurance Company v. 356 Bales of Cotton*, Chief Justice Marshall applied "[t]he usage of the world" to conclude that the treaty power included the power to acquire new territory.[66] The 1840 case of *Holmes v. Jennison*[67] recognized that the federal treaty power included power over international extradition. The case involved Vermont's surrender of an individual for trial in Canada. Chief Justice Taney asserted in a plurality opinion that:

> The power to make treaties is given by the Constitution in general terms . . . and consequently, it was designed to include all those subjects, which in the ordinary intercourse of nations had usually been made subjects of negotiation and treaty; and which are consistent with the nature of our institutions, and the distribution of powers between the general and state governments.[68]

Taney thus importantly acknowledged both that the treaty power was informed by international rules and that the Constitution limited the operation of those rules in a manner consistent with other domestic constitutional institutions. Taney concluded that because "the rights and duties of nations [regarding extradition] are a part of the law of nations, and have always been treated as such by the writers upon public law," the power was necessarily included in the treaty power.[69]

De Geofroy v. Riggs held that the protection of alien property was a "fitting subject for" treaty making.[70] Expanding upon Chief Justice Taney's observation about the relationship between the treaty power and the Constitution, Justice Field offered a sweeping role for international practice to inform the scope of the treaty power, within constitutional constraints:

> It would not be contended that [the treaty power] extends so far as to authorize what the constitution forbids, or a change in the character of the government, or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent. . . . [But] with these exceptions, it is not perceived that there is any limit to the questions which can be adjudged touching any matter which is properly the subject of negotiation with a foreign country.[71]

Finally, *Missouri v. Holland* suggested that the treaty power expanded the substantive lawmaking powers otherwise available to the national government. The Court declined to assume that "'a power which must belong to and

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65. 3 U.S. (3 Dall.) 199, 261 (1796) (Iredell, J.).

66. 26 U.S. (1 Pet.) 511, 542 (1828) ("The Constitution confers absolutely on the government of the Union, the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty."). The proposition was not as obvious as it may seem, since Jefferson, at least, had disputed the government's constitutional authority to acquire new territory at the time of the Louisiana Purchase. *See* Sarah Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1, 168-171 (2002). Jefferson's Treasury Secretary, Albert Gallatin, on the other hand, had argued that the treaty power incorporated "the power enjoyed by every nation of extending their territory by treaties." Letter from Albert Gallatin to Thomas Jefferson (Jan. 13, 1803), *in* SELECTED WRITINGS OF ALBERT GALLATIN 211, 213-14 (E. James Ferguson ed., 1967).

67. 39 U.S. (14 Pet.) 540 (1840). Although there was no majority opinion for the Court, Justices Story, McLean, and Wayne concurred in Chief Justice Taney's opinion.

68. *Id.* at 569.

69. *Id.*

70. 133 U.S. 258, 266 (1890).

71. *Id.* at 267.

somewhere reside in every civilized government'" could not be found under the Treaty Clause.[72]

The Court has not assumed that the U.S. treaty power doggedly follows international practice, however, and has recognized that the constitutional structure modified traditional international treaty practices to some extent. Thus, in *Foster v. Nielson*, Chief Justice Marshall read the Supremacy Clause as establishing a presumption that treaties were domestically self-executing. International practice in the founding era generally did not recognize treaties as establishing privately enforceable rights. But Marshall noted that the Supremacy Clause established "a different principle" that rendered treaties self-executing under appropriate circumstances.[73]

Haver v. Yaker similarly held that the U.S. constitutional system established a different presumption about the domestic date of effectiveness of a treaty than the prevailing international rule. "[A]s a principle of international law," the Court observed, "a treaty is considered as concluded and binding from the date of its signature . . . [and] the exchange of ratifications has a retroactive effect, confirming the treaty from its date."[74] Under the Constitution, however, because individual citizens had no means of knowing the content of a treaty while it was pending before the Senate, "it would be wrong in principle to hold [the individual] bound by it, as the law of the land, until it was ratified and proclaimed."[75]

International law also has influenced the interpretation of individual rights implicated by exercise of the treaty power. The 1891 case of *In re Ross*[76] upheld the establishment by treaty of U.S. consular courts overseas, based on the fact that establishment of such tribunals historically had been an important function of the treaty power internationally.[77] In addition to considering international practice in determining the scope of the treaty power, however, Justice Field also invoked international norms to hold that Fifth and Sixth Amendment jury protections did not apply in consular proceedings. Field's analysis relied in part on a principle of strict territoriality—that the constitutional amendments did not apply abroad[78]—which itself derived from international law. But Field also directly invoked international practice in construing the Fifth and Sixth Amendments. Citing "the uniform practice of civilized governments for centuries to provide consular tribunals in . . . [non-] Christian countries,"[79] Field reasoned that the drafters of

72. 252 U.S. 416, 433 (1920); *see also* United States v. Lara, 541 U.S. 193, 201 (2004) (Treaties "authorize Congress to deal with 'matters' with which otherwise 'Congress could not deal.'") (quoting Missouri v. Holland, 252 U.S. 416, 433 (1920), and citing LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 72 (2d ed. 1996)).

73. Foster v. Neilson, 27 U.S. (2 Pet.) 253, 259 (1829) (Marshall, C.J.); *cf.* Taylor v. Morton, 23 F. Cas. 787 (C.C.D. Mass. 1855) (No. 13,799) ("Ordinarily, treaties are not rules prescribed by sovereigns for the conduct of their subjects, but contracts, by which they agree to regulate their own conduct. [But] [t]his provision of our constitution [the Supremacy Clause] has made treaties part of our municipal law.").

74. Haver v. Yaker, 76 U.S. (9 Wall.) 32, 34 (1869).

75. *Id.* at 35.

76. 140 U.S. 453 (1891).

77. *Id.* at 462-63.

78. *Id.* at 464. *See infra* Part II.B.1 (discussing territoriality). The *Ross* holding was abandoned in *Reid v. Covert*, 354 U.S. 1 (1953), which held that Fifth and Sixth Amendment protections applied to the peacetime capital trial of a U.S. civilian abroad.

79. *Id.* at 464. Field noted that the European practice of establishing consular tribunals for seamen abroad predated the Middle Ages. *Id.* at 462-63.

the Constitution must have intended to incorporate existing international practices regarding consular tribunals, and that Fifth and Sixth Amendment protections accordingly must not have been intended to apply.[80] Field viewed his approach as protecting rights, because consular courts shielded Americans from barbaric foreign legal proceedings.[81] The net effect of his approach, however, was to employ international practice to deny constitutional protections.

Downes v. Bidwell likewise looked to international rules of conquest to hold that the acquisition of territory by treaty necessarily brought with it the power to "prescribe upon what terms the United States will receive its inhabitants, and what their status shall be."[82] The Court thus held that the United States's acquisition of territory by treaty brought powers to govern colonies recognized under international law that were only minimally constrained by other aspects of the Constitution.

ii. *Power To Enter Other International Agreements*

The Court also has looked to international law to define constitutional authority to enter into other forms of international agreements, such as agreements by states under the Compact Clause and sole executive agreements.

The primary textual basis under the Constitution for allowing international agreements that do not receive Senate advice and consent is the Compact Clause. That provision, which was designed to deny the states certain rights enjoyed by international sovereigns, flatly forbids states from entering any "Treaty, Alliance or Confederation," but permits states, with congressional approval, to enter into "agreements" or "compacts."[83] The Clause thus appears to recognize the possibility of international agreements under the Constitution other than Article II "treaties." It raises the question of what types of international agreements are absolutely denied to the states and what types are allowable with congressional consent, as well as the question whether the national government can enter international agreements that do not receive Senate advice and consent.

The Court has looked to international law to determine the scope of state power under the Compact Clause. In *Holmes v. Jennison*, Chief Justice Taney construed the Clause's language in light of Emmerich de Vattel's *Law of Nations*,[84] which had differentiated between "treaties" (which involved ongoing relationships such as military alliances), and "agreements, conventions, and pactions" (which involved individual discrete acts).[85] Taney used this analysis to establish that extradition was an exclusively federal power. In *Poole v. Fleeger's Lessee*, Justice Story looked to international law to hold that the Compact Clause

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80. *Id.* at 464-65.

81. *Id.* at 465.

82. 182 U.S. 244, 279 (1901); *see infra* notes 294-304 and accompanying text.

83. U.S. CONST. art I, § 10, cl. 1.

84. *See* VATTEL, *supra* note 46. Vattel was an eighteenth-century writer whose views were influential on the Framers. David Armitage, *The Declaration of Independence and International Law*, 59 WM. & MARY Q. 1, 15 (2002). For a discussion of Vattel's influence on nineteenth-century Supreme Court jurisprudence, see GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 9 & n.20 (1996).

85. Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 573 (1840); *see also* New Hampshire v. Maine, 426 U.S. 363 (1976); North Carolina v. Tennessee, 235 U.S. 1 (1914); Wharton v. Wise, 153 U.S. 155 (1894).

had preserved for the several states (with the consent of Congress) the international law authority of sovereigns to resolve boundary disputes.[86] The modern Supreme Court also has suggested that Vattel's "distinction[s] . . . may have informed the drafting of Art. I, § 10."[87]

Whatever refined international law distinctions may have been originally invoked by the language of the Compact Clause, however, were lost during the nineteenth century.[88] In the 1893 case of *Virginia v. Tennessee*,[89] Justice Field crafted the Court's modern Compact Clause analysis, which relies on domestic concerns to provide that an agreement by a state requires consent only if it enhances the political power of the states vis-à-vis the federal government. The Compact Clause is thus a constitutional provision that may well have incorporated international law concepts at the time of the framing, but in which international law has been supplanted by domestic concerns as both international and constitutional law have evolved.

The Court also has looked to international law and constitutional text to conclude that the Constitution contemplated sole executive agreements in some circumstances. In *United States v. Curtiss-Wright Export Co.*, Justice Sutherland proclaimed that while the Constitution did not recognize a power to enter international agreements other than treaties, the power nevertheless existed as a consequence of nationhood.[90] In *Weinberger v. Rossi*, the Supreme Court differentiated between the definition of a treaty under international law and under the U.S. constitutional system.[91] "Under principles of international law," Justice Rehnquist wrote, "the word ordinarily refers to an international agreement concluded between sovereigns, regardless of the manner in which the agreement is brought into force."[92] By contrast, the Constitution only recognized as "treaties" instruments that had been consented to by two-thirds of the Senate.[93] Rehnquist nevertheless assumed, in apparent reliance on the broader international practice, that the President may enter into certain agreements without complying with the formalities of the Treaty Clause.[94] Finally, *Dames & Moore v. Regan* applied the Court's test developed for identifying the scope of the *treaty* power to uphold a

86. 36 U.S. (11 Pet.) 185, 209 (1837) ("It cannot be doubted, that it is a part of the general right of sovereignty, belonging to independent nations, to establish and fix the disputed boundaries between their respective territories; and the boundaries so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof. . . . This is a doctrine universally recognized in the law and practice of nations. It is a right equally belonging to the states of this Union, unless it has been surrendered under the constitution of the United States.").

87. In *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 461-62 & n.12 (1978), the Court quoted Vattel at length and reasoned that "[t]he Framers clearly perceived compacts and agreements as differing from treaties," and apparently viewed them as terms of art, which may have reflected precisely defined categories under the contemporary literature of international law. The Court noted that Blackstone's *Commentaries* relied on Vattel for a similar distinction. *Id.* at n.13.

88. *United States Steel Corp.*, 434 U.S. at 464. Justice Story crafted his own theory about the meaning of the Compact Clause in his *Commentaries* in 1833.

89. 148 U.S. 503, 519 (1893).

90. 299 U.S. 304, 318 (1936).

91. 456 U.S. 25 (1982).

92. *Id.* at 29 & n.5 (citing article 2 of the Vienna Convention on the Law of Treaties and a 1980 draft of the RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, which stated that "international law does not distinguish between agreements designated as 'treaties' and other agreements").

93. *Id.* at 29-30.

94. *Id.* at 30 n.6.

sole executive agreement. The Court reasoned that because agreements to settle claims between citizens of one nation and a foreign government were an "'established international practice reflecting traditional international theory,'"[95] the President should have power to enter such agreements *without* Senate advice and consent.

In sum, the Court has read the Offenses, Treaty, and Compact Clauses as incorporating international rules. The cases have recognized a fairly powerful role for international law and practice in this context to grant or modify substantive legislative powers of the national government. But they also have recognized that constitutional structure limits the domestication of international rules.

2. *Reference to Concepts of International Law*

A number of constitutional provisions reference concepts defined by international law and have been understood as inviting consideration of international rules. The most obvious and frequent candidates for this approach are cases addressing such terms as "war," "admiralty," or "ambassador,"[96] which facially address concepts defined by international law and directly implicate relations with foreign nations. The Court has read these provisions as broadly invoking international rules and has justified its approach, in part, by the need to promote harmony in the international system. The Court also, however, to some extent has understood concepts such as "citizen," "commerce," and "contract" as informed by international norms, based not on their implications for foreign relations, but on their embodiment of universal concepts.

a. *War Powers*

The rules of warfare are among the oldest rules of international law, and resort to international law to provide meaning to constitutional war powers[97] has a long historic pedigree. This section examines the practice in cases involving wartime confiscations of enemy property, the establishment of military commissions, and individual rights. But international law also has been used to uphold the draft[98] and the suspension of statutes of limitations in wartime.[99]

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95. 453 U.S. 654, 679 (1981).

96. *In re* Baiz, 135 U.S. 403, 419 (1890) ("Under section 2, art. II, of the Constitution, the President is vested with the power to 'appoint ambassadors, other public ministers, and consuls,' and by section 3 it is provided that 'he shall receive ambassadors and other public ministers.' These words are descriptive of a class existing by the law of nations."); *cf.* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 431 (1793) (Supreme Court enjoys all jurisdiction of suits against Ambassadors "as a court of law can have or exercise consistently with the law of nations."); *id.* at 475 (noting that "Ambassadors, or other public Ministers and Consuls . . . are officers of foreign nations, whom this nation are bound to protect and treat according to laws of nations").

97. A number of enumerated provisions in Articles I and II of the Constitution address the authority to commence, regulate, and pursue military action. *See* U.S. CONST. art. I, § 8, cl. 11 (powers to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water); *id.* art. I, § 8, cl. 12 (raise and support armies); *id.* art. I, § 8, cl. 13 (provide and maintain a navy); *id.* art. I, § 8, cl. 14 (make rules for the government and regulation of land and naval forces); *id.* art. I, § 8, cl. 15 (call forth the militia); *id.* art. I, § 8, cl. 16 (govern the militia when in service of the United States); *id.* art. II, § 2, cl. 1 (President's commander in chief power).

98. Arver v. United States, 245 U.S. 366, 378 & n.1 (1918) (upholding the right to compel military service under the powers to declare war and raise armies and citing Vattel and the practices of thirty-six countries).

i. *Wartime Confiscations*

In *Brown v. United States*,[100] Chief Justice Marshall rejected the executive's power to seize enemy property during the War of 1812 on the grounds that the "modern law of nations"[101] did not automatically confiscate enemy property in wartime. Marshall urged that the War Declaration Clause should be construed to comport with this international rule:

> In expounding that constitution, a construction ought not lightly to be admitted which would give to a declaration of war an effect in this country it does not possess elsewhere, and which would fetter that exercise of entire discretion respecting enemy property, which may enable the government to apply to the enemy the rule that he applies to us.[102]

Marshall thus argued that concerns of international comity justified the resort to international law: a declaration of war should not be read to automatically authorize the confiscation of alien property where, under modern usage, other states did not automatically do so. Marshall also suggested an originalist explanation for the resort to international law—that the international rule being applied had been "received throughout the civilized world" at the time of the framing.[103]

In dissent, Justice Story agreed that the Constitution gave the United States all war powers "which, by the modern law of nations, are permitted and approved."[104] Story simply disagreed with the majority's interpretation of international law, which he believed unqualifiedly recognized the right to seize enemy property.[105] He also believed that Congress, by declaring war, had already authorized the President to exercise those international powers.[106]

The Court again looked to international law in upholding President Lincoln's Civil War blockade in the *Prize Cases*.[107] All members of the Court agreed that, once a legal state of war was established, the scope of presidential power to wage war was governed by the international laws of war.[108] The Justices

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99. Stewart v. Kahn, 78 U.S. (11 Wall.) 493, 507 (1870) (holding that statute tolling the statute of limitations in federal cases due to the Civil War was a constitutional exercise of the international law principle that claims are suspended in wartime); *cf.* Hanger v. Abbott, 73 U.S. (6 Wall.) 532 (1867) (relying on international law to hold that wartime suspends operation of statutes of limitations).

100. 12 U.S. (8 Cranch) 110 (1814).

101. *Id.* at 128. Marshall's construction to some extent merged principles of international law (that states may confiscate enemy property) with principles of modern practice. He contended that the modern usage of states was not to confiscate such property immediately at the outbreak of the war, and that this usage had mitigated the harshest operation of the international rule. *Id.* at 122-25.

102. *Id.* at 125.

103. *Id.*

104. *Id.* at 145 (Story, J., dissenting).

105. *Id.* at 133-34 (Story, J., dissenting) (citing Vattel); *id.* at 140-44 (Story, J., dissenting).

106. *Id.* at 147 (Story, J., dissenting) ("[T]he war may be carried on according to the principles of the modern law of nations . . . ."). Once Congress declared war, the President would "have a right to employ all the usual and customary means acknowledged in war, to carry it into effect," including the right to "authorize the capture of all enemies' property, wherever, by the law of nations, it may be lawfully seized." *Id.* at 145 (Story, J., dissenting).

107. 67 U.S. (2 Black) 635 (1863).

108. *Id.* at 666 ("The right of prize and capture has its origin in the '*jus belli,*' and is governed and adjudged under the law of nations.").

looked to writings of Vattel and later publicists[109] for the substance of the laws of war and to establish that inhabitants of rebellious states could be considered "enemies."[110] The four dissenting justices agreed that the national government's war powers included those recognized by the law of nations, that these powers applied to civil wars,[111] and that a de facto war existed.[112] The dissenters simply would have held that the international law powers of belligerency could only be activated by Congress.

In short, all Justices on the Court in both *Brown* and the *Prize Cases* agreed that the scope of the President's constitutional warmaking authority was defined by the law of nations. The primary disagreement in both cases turned on whether or not Congress had properly triggered that authority through a declaration of war or other legislation.

Miller v. United States[113] relied on the international laws of war to uphold, against a Fifth and Sixth Amendment challenge, a Civil War statute authorizing confiscation of rebel property. The parties conceded that if the statute were an exercise of the war powers, Fifth and Sixth Amendment criminal protections would not apply. In concluding that most of the statute was a proper exercise of Congress's war powers, Justice Strong observed that under international law "any property which the enemy can use . . . is a proper subject of confiscation."[114] This "undoubted belligerent right" was confirmed by Congress's constitutional power to make rules respecting captures on land and water.[115] The Court cited Wheaton's international law treatise and the *Prize Cases* to conclude that this right of belligerency applied equally in a civil war,[116] and analogized from the law of nations to hold that individuals who aided the enemy in a civil war "were enemies within the laws and usages of war" whose property was subject to confiscation.[117] The Court accordingly concluded that the legislation was a constitutional exercise of the war powers and was not limited by the Fifth and Sixth Amendments.

Justice Field, joined by Justice Clifford in dissent, agreed that Congress's war powers allowed it to confiscate rebel property pursuant to the international laws of war,[118] but disagreed that the statutes were a legitimate exercise of that

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109. *Id.* at 668 (citing Lord Stavell's invocation of "the best writers on the law of nations"); *see also id.* at 687 (Nelson, J., dissenting) ("The legal consequences resulting from a state of war between two countries at this day are well understood, and will be found described in every approved work on the subject of international law."); *id.* at 688 (Nelson, J., dissenting) (quoting Wheaton). The litigants had cited historical and contemporary international law authorities. *See id.* at 650 (discussing Wheaton, Phillimore, and Halleck); *id.* at 654 (discussing Wheaton and Grotius).

110. *Id.* at 670-74.

111. *Id.* at 688 (Nelson, J., dissenting).

112. *Id.* at 689-90 (Nelson, J., dissenting).

113. 78 U.S. (11 Wall.) 268 (1870).

114. *Id.* at 306.

115. *Id.* at 305.

116. *Id.* at 307 & n.49.

117. *Id.* at 313; *see also id.* at 312 ("[N]o recognized usage of nations excludes from the category of enemies those who act with, or aid or abet and give comfort to enemies, whether foreign or domestic, though they may not be residents of enemy's territory."). The Court bolstered this conclusion with an originalist argument, observing that the states had adopted a similar practice during the revolutionary war and that the practice had not been prohibited by the Framers. *Id.* at 313.

118. *Id.* at 315-16 (Field, J., dissenting) ("Whatever any independent civilized nation may do in the prosecution of war, according to the law of nations, Congress, under the Constitution, may authorize to be done, and nothing more.").

authority. Field argued at length (and in disagreement with Chief Justice Marshall's opinion in *Brown v. United States*) that the modern law of nations only authorized the seizure of private property of permanent inhabitants of the enemy's country.[119] Field concluded that the statutes at issue exceeded Congress's powers under the international law of war and thus were criminal statutes triggering Fifth and Sixth Amendment protections.[120]

ii. *Military Commissions*

Like *Miller*, Supreme Court decisions examining the power to establish military commissions indicate a Court struggling to reconcile the relationship between international norms informing the constitutional war powers and the competing protections of the Bill of Rights.

Ex parte Milligan[121] famously rejected the government's efforts to rely on the "laws and usages of war" to justify the trial of a U.S. citizen by military commission during the Civil War. The Court found that the laws of war were irrelevant to the question before it:

> It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed.[122]

The Court concluded that the Constitution precluded resort to powers deduced from international law to prosecute a citizen by military tribunal when the regular courts were open.[123]

The World War II case of *Ex parte Quirin*,[124] however, looked to international law to uphold trials by military commission for persons charged with violations of the laws of war, including U.S. citizens. The *Quirin* Court held that "[f]rom the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals."[125] Despite *Milligan*'s conclusion that a civilian could not be tried by military process when the ordinary courts were open, *Quirin* held that "the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the

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119. *Id.* at 317-18.

120. *Id.* at 323.

121. 71 U.S. (4 Wall.) 2, 121 (1866).

122. *Id.*

123. A decade later in a statutory construction case, Justice Field relied on international rights of belligerence and occupation to hold that U.S. military tribunals had exclusive jurisdiction to try military personnel for violations of the laws of war when armies were in enemy territory. Coleman v. Tennessee, 97 U.S. 509, 515-16 (1878). Justice Clifford argued in dissent that state court jurisdiction should be upheld under the international rule that soldiers were bound by the laws of the country where they are found. *Id.* at 540 (Clifford, J., dissenting).

124. 317 U.S. 1 (1942). The case arose under Congress's powers to make rules for the armed forces, U.S. CONST. art. I, § 8, cl. 14, and to define and punish offenses against the law of nations, *id.* art. I, § 8, cl. 10; and the Commander in Chief power, *id.* art. II, § 2, cl. 1. *See* 317 U.S. at 26.

125. 317 U.S. at 27-28. The Court also looked to treaties and customary international law rules to define the substantive charges triable by military tribunal. *Id.* at 31 n.8, 35 n.12 (citing laws of Great Britain and treatises on international law and the laws of war).

Constitution to try offenses against the law of war by military commission."[126] The Court awkwardly sidestepped *Milligan* on the grounds that the prior case had not involved a prosecution for violations of the laws of war.[127] Thus, *Quirin* and its progeny[128] upheld the constitutionality of military trials pursuant to the laws of war (at least where authorized by Congress) and found that constitutional individual rights protections did not limit the operation of those international norms.

iii. *War Powers and Constitutional Limitations*

International rules of warmaking have influenced the Court's interpretation, not only of the scope of the enumerated war powers, but of constitutional limitations that implicate exercise of the war powers. The result frequently, though not invariably, has been to deny the protection of individual rights. As discussed below, just compensation under the Fifth Amendment Takings Clause has been construed in light of the laws of war, and just compensation has been denied in some wartime contexts.[129] And in the territory cases, international rules of war and conquest have been applied to limit the constitutional protections afforded to newly-acquired territories.[130]

To some extent, the Court's jurisprudence has attempted to avoid conflict between constitutional rights and powers recognized under the international laws of war by policing the boundaries of proper exercises of the war powers. As indicated above, in *Miller* and *Quirin*, Fifth and Sixth Amendment criminal protections were found inapplicable to proper exercises of the war powers.[131] In *Johnson v. Eisentrager*,[132] the Court relied in part on international law to conclude that constitutional habeas corpus[133] did not extend to enemy aliens held overseas pursuant to the judgment of a military tribunal and who had no territorial connection to the United States. Justice Jackson contended that the practice derived from "the common law and the law of nations"[134] and that his ruling

126. *Id.* at 45. The Court based this decision on the facts that the tribunals were not Article III courts, the existence in the Fifth Amendment of a textual exception for "cases arising in the land and naval forces" and prudential arguments.

127. *Id.* at 45. The distinction was somewhat disingenuous, since Milligan had been prosecuted for, inter alia, "conspiracy against the Government of the United States," "[i]nciting insurrection," and "[v]iolation of the laws of war." *Ex parte Milligan*, 71 U.S. (4 Wall.) at 4.

128. *See, e.g.*, Yamashita v. Styer, 327 U.S. 1, 12 (1946) (looking to international law in part to conclude that the government could conduct military trials after the cessation of hostilities); *accord* Johnson v. Eisentrager, 339 U.S. 763, 786, 787 & n.13 (1950) (citing the Treaty of Versailles for the proposition that military officials have jurisdiction to punish offenses against the laws of war, as well as international publicists regarding what constitutes a violation of the laws of war).

129. *See, e.g.*, Juragua Iron Co. v. United States, 212 U.S. 297 (1909) (invoking laws of war to establish that presence of plaintiffs' property in Cuba made plaintiff an enemy whose property could be destroyed without just compensation); Young v. United States, 97 U.S. 39, 60-61 (1877) (The United States, "in passing the Abandoned and Captured Property Act, availed itself of its just rights as a belligerent, and at the same time recognized to the fullest extent its duties under the enlightened principles of modern warfare."). *See infra* Part II.C.1.b.

130. *See infra* Part II.B.2.b (discussing territories and individual rights).

131. *See also* Johnson v. Eisentrager, 339 U.S. 763, 782-83 (1950) (Fifth and Sixth Amendment protections did not apply to trial by military commission).

132. *Id.*

133. U.S. CONST. art. I, § 9, cl. 2.

134. 339 U.S. at 776.

preserved "inherent distinctions recognized throughout the civilized world."[135] He invoked principles of comity in support of his interpretation, reasoning that enemy foreign states were unlikely to grant habeas review to U.S. soldiers in equivalent circumstances.[136] He also argued from both originalism and contemporary practice that extraterritorial application of the U.S. Constitution to active, convicted enemy aliens was unsupported. It could not have been contemplated by the Framers, and "[t]he practice of every modern government [was] opposed to it."[137]

On the other hand, where belligerent rights have not been properly exercised, the Court has found violations of constitutional rights. Thus, the Court in *Ex parte Milligan*[138] held that the military trial of a civilian on U.S. soil was not a proper exercise of the war powers where the regular courts were open and that Fifth and Sixth Amendment criminal protections were therefore applicable. In other cases, the Court found that improper exercise of belligerent rights during the Civil War violated the Contract and Privileges and Immunities Clauses.[139] And *Kennedy v. Mendoza-Martinez* found that denationalization for evasion of military service was a punishment covered by the Fifth and Sixth Amendments.[140]

Resort to the international laws of war to construe both the scope of the national government's warmaking authority and the constitutional limitations on that authority has continued to this day. The current administration has looked to the international laws of war to claim that the President has constitutional authority to establish military tribunals and to detain enemy combatants, including U.S. civilians,[141] while detainees in the United States and elsewhere have argued that their rights under Fifth Amendment due process should include, at a minimum, protections recognized under the Geneva Conventions.[142]

In *Hamdi v. Rumsfeld*,[143] the Supreme Court plurality credited both positions to some degree. The case presented the threshold statutory question of whether Congress had authorized the detention of U.S. citizens as enemy combatants in a manner that would overcome the prohibition against detaining citizens set forth in the Non-Detention Act.[144] *Hamdi*, however, also posed a

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135. *Id.* at 769.

136. *Id.* at 779 (noting that granting habeas to enemy aliens overseas would produce no corresponding benefit to U.S. soldiers, since outside the "English speaking peoples in whose practice nothing has been cited to the contrary, the writ of habeas corpus is generally unknown"); *id.* at 783 n.11 (citing Magna Carta for principle of comity in treatment of enemy aliens in wartime).

137. *Id.* at 785.

138. 71 U.S. (4 Wall.) 2, 121 (1866).

139. *See, e.g.*, Keith v. Clark, 97 U.S. 454, 461-62 (1878) (Miller, J.) (citing Wheaton, who in turn cites Grotius and Puffendorf) (confederate state law violated Contract Clause under international rule that "[a]s to public debts . . . a mere change in the form of the government . . . does not affect their obligation."); Williams v. Bruffy, 96 U.S. 176 (1877) (Field, J.) (invalidating confederate law under the Privileges and Immunities and Contract Clauses because confederacy was not an independent sovereign under international rules regarding sovereignty and belligerent rights).

140. 372 U.S. 144 (1963). *See also infra* notes 179-181 and accompanying text.

141. *Cf.* Hamdi v. Rumsfeld, 542 U.S. 507, 552 (2004) (Souter, J., concurring) (noting "the weakness of the Government's mixed claim of inherent, extrastatutory authority under a combination of Article II of the Constitution and the usages of war").

142. *See e.g.*, Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005).

143. 542 U.S. 507 (2004).

144. 18 U.S.C. § 4001(a) (2000). The government contended that Congress had authorized the detention of U.S. citizens through its September 2001 Authorization for Use of Military Force, Pub. L.

latent constitutional question. The President claimed that even if Congress had not authorized the detention, he had independent constitutional authority as Commander in Chief to order Hamdi's detention. In rejecting this claim and holding that Hamdi's detention was subject to constitutional due process, the majority of the Court necessarily held both that the President lacked independent constitutional power to detain Hamdi in the manner asserted, and that Congress and the President, at least when acting in concert, had constitutional authority to order the detention of enemy combatants.

Justices Souter, Ginsburg, Scalia, and Stevens all found that Congress's 2001 Authorization of Military Force did not constitute authorization for the military detention of alleged citizen enemy combatants, for reasons that are overwhelmingly convincing. Justice O'Connor's plurality opinion, however, found that the detention was statutorily authorized, and then looked to the international laws of war to uphold the President's authority to detain citizens as enemy combatants. The plurality opinion invoked treaties and customary international law to find that "longstanding law-of-war principles"[145] recognized the right to prevent enemy combatants from returning to the battlefield during the duration of an armed conflict, and that the President's exercise of the power was consistent with this rule. The detention of enemy combatants for this purpose was "so fundamental and accepted an incident to war"[146] as to be implicitly authorized by Congress.

O'Connor's opinion next recognized in principle that international law also limited the scope of the President's detention power. At least for purposes of the *Hamdi* case, O'Connor limited the power to detain enemy combatants to persons who took up arms against the United States and were seized on the battlefield in Afghanistan.[147] In other words, O'Connor defined the power to detain combatants in terms of traditional principles of international armed conflict, rather than the administration's more nebulous conception of a war on terror. She invoked the Geneva and Hague Conventions for the propositions that "detention may last no longer than active hostilities."[148] Furthermore, international law limited the power to the purpose of preventing return to the battlefield. O'Connor's opinion suggested that detention could not be utilized for purposes of punishment or revenge, since these purposes were not authorized by the laws of war.[149] Finally, "indefinite detention for the purpose of interrogation is not authorized."[150] Justice

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No. 107-40, 115 Stat. 224 (2001) (authorizing the President to "use all necessary and appropriate force" against "nations, organizations, or persons" associated with the September 11, 2001 terrorist attacks).

145. 542 U.S. at 519-20 (plurality opinion).

146. *Id.* at 518-19 (plurality opinion). In interpreting the laws of war on this point, the plurality looked to, inter alia, *Ex parte Quirin*, case law of the Nuremberg Military Tribunal, and the Lieber Code. *Id.*

147. *Id.* at 516 (plurality opinion) ("[F]or purposes of this case," defining enemy combatant as "an individual who . . . was 'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan, and who 'engaged in an armed conflict against the United States' there.").

148. *Id.* at 520 (plurality opinion).

149. *Id.* at 518 (plurality opinion) ("The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again.").

150. *Id.* at 521 (plurality opinion). O'Connor's possible divergence from recognizing limits imposed by international law was her failure to require explicitly that Hamdi be afforded a tribunal to determine his status as a POW under Article V of the Third Geneva Convention, since Hamdi's claims placed his status as an enemy combatant "in doubt." It appears, however, that Hamdi did not raise the question of possible POW status before the Court. Hamdi simply raised the Geneva Convention process

Thomas apparently also interpreted O'Connor's opinion as employing international law limits to constrain the government's warmaking power.[151]

Justice Souter's opinion would have gone further in enforcing international law limits on any power to detain combatants deduced from international law. Justice Souter, joined by Justice Ginsburg, pointedly objected to the administration's desire to claim powers to detain enemy combatants recognized by the international law of armed conflict, without also accepting the protections afforded Hamdi and other alleged Taliban fighters by those same rules (e.g., the obligation to offer detainees a process to determine their POW status under Article 5 of the Third Geneva Convention).[152] The opinion is particularly interesting because it not only recognizes the restraints imposed by international law, but contends that the United States could not enjoy powers deduced from international law unless it also complies with those limits.

Finally, the plurality gave a nod toward international standards in determining the procedural protections afforded citizen enemy combatants. Justice O'Connor's plurality opinion in *Hamdi* applied the traditional *Mathews v. Eldridge* analysis to hold that the President was not entitled to detain alleged enemy combatants based on conclusory and untested factual findings. Due process instead granted citizen-detainees a constitutional right to notice and an opportunity to rebut the factual basis for their detention.[153] Moreover, such detainees "unquestionably" had the right to counsel on habeas.[154] O'Connor suggested, however, without deciding, that the requirements of due process might be satisfied by a military tribunal procedure akin to that afforded pursuant to Article 5 of the Third Geneva Convention to determine whether an individual is a prisoner of war.[155] Thus, the plurality looked to an international standard as setting forth the possible minimum individual rights protections required by the Constitution.

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to demonstrate that under international law, he would have been afforded an opportunity "to assert that he was not a combatant at all." Brief for Petitioner at 17-18, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696). More detailed questions regarding Hamdi's status and its implications for the conditions under which he might be detained were left for another day.

151. 542 U.S. at 588 (Thomas, J., dissenting) (criticizing the plurality for "diminish[ing] the Federal Government's war powers by reference to a treaty").

152. *Id.* at 551 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) ("Thus, there [was] reason to question whether the United States [was] acting in accordance with the laws of war it claim[ed] as authority.").

153. *Id.* at 533 (plurality opinion).

154. *Id.* at 539 (plurality opinion).

155. The plurality opinion stated: "There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal. Indeed, it is notable that military regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention. See Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, § 1-6 (1997)." *Id.* at 538 (plurality opinion); *see also id.* at 550 (Souter, J., dissenting in part and concurring in the judgment) (objecting to the plurality's reliance on "the military regulation, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Reg. 190-8, §§ 1-5, 1-6 (1997), adopted to implement the Geneva Convention, and setting out a detailed procedure for a military tribunal to determine an individual's status").

b. *Admiralty*

The law maritime was another venerable field of the law of nations at the founding that has thrived under the American constitutional system.[156] As early as *Chisholm v. Georgia*, Chief Justice Jay observed in dicta that rights and privileges under the Court's admiralty and maritime jurisdiction were regulated by treaties and the law of nations, a view that has been sustained in the Court's jurisprudence.[157]

The role of international law and practice in this area is particularly notable since the Court early rejected the restrictive approach of the English courts to the scope of admiralty jurisdiction in favor of the broader approach favored by the majority of nations. Thus, in the 1847 case of *Waring v. Clarke*, the Court asserted that "the grant of admiralty power to the courts of the United States was not intended to be limited or to be interpreted by what were cases of admiralty jurisdiction in England when the constitution was adopted."[158] Instead, the Clause was to be read according to "the general admiralty law," even with respect to the extension of admiralty jurisdiction to internal waters.[159]

In the 1870 case of *New England Mutual Marine Insurance Co. v. Dunham*, Justice Bradley held that a claim for marine insurance fell within the federal courts' Article III admiralty jurisdiction, since marine insurance was "a part of the general maritime law of the world" and foreign admiralty courts universally had enforced such claims.[160] The relationship between the Constitution's admiralty jurisdiction and international law was perhaps best articulated by Chief Justice Hughes in 1934. According to Hughes, the Constitution's grant of admiralty and maritime jurisdiction "presupposed a 'general system of maritime law' which was familiar to the lawyers and statesmen of the country, and contemplated a body of law with uniform operation . . . . The framers of the Constitution did not contemplate that the maritime law should remain unalterable," but recognized that changes to the law would necessarily occur "within a sphere restricted by the concept of the admiralty and maritime jurisdiction."[161]

The admiralty cases are particularly interesting in that they explicitly reject the proposition that constitutional admiralty jurisdiction should be tied to English law at the time the Constitution was adopted, in favor of asserting the role of the

156. Edwin Dickinson,The *Law of Nations as Part of the National Law of the United States II*, 101 U. PA. L. REV. 792, 803-06 (1952); *see also* Ariel N. Lavinbuk, Note, *Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court's Docket*, 114 YALE L.J. 855, 877 (2005).

157. 2 U.S. (2 Dall.) 419, 475 (1793); *accord* Washington v. W.C. Dawson & Co., 264 U.S. 219, 228 (1924) (McReynolds, J.) ("[T]he Constitution adopted the law of the sea as the measure of maritime rights and obligations."); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 335 (1816) (describing admiralty jurisdiction as an area in which "the principles of the law and comity of nations often form an essential inquiry").

158. 46 U.S. (5 How.) 441, 459 (1847).

159. *Id.*; *see also* The Genesee Chief, 53 U.S. (12 How.) 443, 454 (1851) (Taney, C.J.) (upholding constitutionality of a federal statute regulating navigation in interstate waters as a proper exercise of admiralty jurisdiction); New Jersey Steam Navigation Co. v. Merchant Bank, 47 U.S. (6 How.) 344, 392 (1848) (Nelson, J.) (rejecting English rule to uphold a contract for transport of goods by sea as maritime, and recognizing the court as "a maritime court instituted for the purpose of administering the law of the seas"); *cf.* De Lovio v. Boit, 7 F. Cas. 418, 443 (C.C.D. Mass. 1815) (No. 3,776) (Story, J.) (upholding admiralty jurisdiction over marine insurance).

160. 78 U.S. (11 Wall.) 1, 34 (1870).

161. Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 42-43 (1934) (citations omitted).

U.S. courts, in dialogue with other nations, as participants in the recognition and development of an evolving general transnational jurisprudence of admiralty. Under the terms of the Admiralty Clause, Congress could refine the domestic meaning of admiralty. But judicial determinations of both the content of admiralty law and the scope of the government's admiralty jurisdiction were to be made in reliance upon the general practices of foreign states and the law of nations.

c. *Citizenship*

The Court at various times has looked to international law to define the nature, rights, and obligations of citizenship, and the government's corresponding authority to regulate citizenship.[162] Justice Story observed in an early (non-constitutional) case that political rights deriving from national allegiance "do not stand upon the mere doctrines of municipal law . . . but stand upon the more general principles of the law of nations."[163] In the 1852 case of *Kennett v. Chambers*, Chief Justice Taney observed that the duty of a citizen to be at war with its government's enemy was "universally acknowledged by the laws of nations."[164]

Chief Justice Taney and Justice Daniel invoked international practices in *Dred Scott v. Sandford* to conclude that persons of African descent could not be citizens of the United States within the meaning of Article III jurisdiction. Taney asserted that in "the state of public opinion . . . which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence," persons of African descent were "an inferior race . . . [who] had no rights which the white man was bound to respect."[165] Taney, however, viewed the role of international practice as limited to informing original understanding, and argued that any subsequent change in public or international opinion was irrelevant:

> No one, we presume, supposes that any change in public opinion or feeling in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction . . . than they were intended to bear when the instrument was framed and adopted.[166]

Because Dred Scott was not a citizen of Missouri, Taney concluded, the Court had no jurisdiction.[167] In dissent, Justice McLean rebutted Taney's contention that decedents of Africans could not be citizens by noting that United States treaties had bestowed citizenship on persons of all races.[168]

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162. The Constitution addresses powers and rights regarding citizenship, inter alia, in Congress's power to establish a uniform rule of naturalization, U.S. CONST. art. I, § 8, cl. 4, the Article IV Privileges and Immunities Clause, *id.* art. IV, § 2, cl. 1, and the Natural Born Citizenship Clause of the Fourteenth Amendment, *id.* amend. XIV, § 1.

163. Shanks v. Dupont, 28 U.S. (3 Pet.) 242, 248 (1830). The case resolved questions of nationality resulting from the revolution.

164. 55 U.S. (14 How.) 38, 50 (1852).

165. 60 U.S. (19 How.) 393, 407-08 (1857); *see also id.* at 475-76 (Daniel, J., concurring) ("[T]he African nego race never have been acknowledged as belonging to the family of nations."). For further discussion of the use of international law in the case, see Mark Janis, *Dred Scott and International Law*, 43 COLUM. J. TRANSNAT'L. L. 763 (2005).

166. 60 U.S. (19 How.) at 426.

167. *Id.* at 426-27.

168. *Id.* at 533 (McLean, J., dissenting).

In *United States v. Wong Kim Ark*, a majority of the Court rejected the government's contention that the Fourteenth Amendment's natural born citizenship provision should be read to apply a claimed international law principle of *jus sanguinis* (citizenship by blood).[169] In *Mackenzie v. Hare*, however, the Court upheld a statute denaturalizing women who married foreign nationals, relying in part on international law principles.[170] The Court observed that the arguments before the Court took "a wide range through the principles of the common law and international law and their development and change," and based its holding on the international and common law principle of merger resulting from marriage and concerns about the potential for international conflict caused by transnational marriage.[171] *Blackmer v. United States*[172] upheld judicial power to subpoena a U.S. citizen from abroad, citing both international law and English cases for government's authority to regulate its citizens. *Perkins v. Elg*[173] looked to international law to conclude that transport of a minor to a foreign country did not produce a renunciation of citizenship under the Fourteenth Amendment. Chief Justice Hughes cited international writers both to recognize the possibility of dual nationality and for the fact that expatriation required a voluntary renunciation of allegiance, which was not present in the case.[174] *Perez v. Brownell*,[175] which was decided the same day as the Eighth Amendment case of *Trop v. Dulles*, upheld the constitutionality of an act of Congress denationalizing a citizen for voting in a foreign election. Justice Frankfurter concluded that the act was necessary and proper to Congress's undefined foreign relations powers, since, among other things, international principles of state responsibility entitled a state to attribute a foreign national's political interference to that person's government.[176] In dissent, Chief Justice Warren invoked international practice for the consequences accompanying statelessness, as he did in *Trop*,[177] and noted that while "[n]early all sovereignties recognize that acquisition of foreign nationality ordinarily shows a renunciation of citizenship," voting in a foreign election did not reach this level.[178] Finally, *Kennedy v. Mendoza-Martinez*[179] found that denationalization

169. 169 U.S. 649 (1898); *see also infra* notes 745-748 and accompanying text.

170. 239 U.S. 299 (1915).

171. *Id.* at 308-09 & n.1. The case upheld Congress's power to denationalize citizens as a power derived from sovereignty. *Id.* at 311 ("As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers."); *see also* Perez v. Brownell, 356 US. 44, 69 n.20 (1958) (Warren, C.J., dissenting) (observing that *MacKenzie* "expressed the well-understood principle that a wife's nationality 'merged' with that of her husband's" and citing Moore's and Hackworth's international law treatises). The authority of *MacKenzie* was challenged by a series of later cases, including *Trop v. Dulles*, 356 U.S. 86, 102 (1958), and *Afroyim v. Rusk*, 387 U.S. 253 (1967).

172. 284 U.S. 421, 437 & nn.2, 4 (1932) ("Nor can it be doubted that the United States possesses the power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires it.").

173. 307 U.S. 325, 329 (1939) (citing Oppenheim, Moore, Hyde, and Fenwick's international law treatises).

174. *Id.* at 334. Hughes also noted that U.S. practice had long recognized that removal of a minor did not constitute voluntary expatriation warranting loss of citizenship. *Id.* at 329.

175. 356 U.S. 44 (1958).

176. *Id.* at 59.

177. *Id.* at 64.

178. *Id.* at 68 & n.17.

179. 372 U.S. 144 (1963).

for evasion of military service was a punishment that required Fifth and Sixth Amendment protections. Justice Goldberg cited international authorities at length to establish the adverse consequences of statelessness,[180] as well as comparative authority going back to the Romans for the proposition that forfeiture of citizenship historically was imposed as punishment.[181]

d. *Commerce and Contract*

At the time the Constitution was drafted, international law had long regulated international commerce through the law merchant, which was understood as substantially incorporated into the common law.[182] Resort to international law thus might be expected—and in fact appears—in judicial interpretations of the Foreign Commerce Clause.[183] But references to international rules also appear in early constructions of the *interstate* commerce power.[184] In *Gibbons v. Ogden*, Chief Justice Marshall recognized that the commerce power derived from international rules that predated the Constitution and had been delegated by the sovereign states to Congress through the Commerce Clause:

> [I]t has been said, that the constitution does not confer the right of intercourse between State and State. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true. The constitution found it an existing right, and gave to Congress the power to regulate it.[185]

Marshall further argued that commerce among nations necessarily included power over navigation, that the commerce power would have been so understood at the Constitution's adoption, and applied this principle to interstate commerce.[186]

In a separate opinion, Justice Johnson concluded that "the definition and limits of [the power to regulate commerce] are to be sought among the features of international law."[187] Johnson reasoned that the international power over

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180. *Id.* at 160-61 (quoting Oppenheim for the proposition that stateless individuals "enjoy, in general, no protection whatever. . . . As far as the Law of Nations is concerned, there is . . . no restriction whatever to cause a State to abstain from maltreating to any extent such stateless individuals"); *see also id.* at 161 n.16 ("The drastic consequences of statelessness have led to reaffirmation in the United Nations Universal Declaration of Human Rights, Article 15, of the right of every individual to retain a nationality.") (citing United Nations documents and various international law treatises).

181. *Id.* at 168; *accord* United States v. Ju Toy, 198 U.S. 253, 270 (1905) (Brewer, J., dissenting) (citing Vattel and domestic and English sources for the proposition that banishment is punitive and that citizenship rights accordingly cannot be denied without a criminal trial).

182. Dickinson, *supra* note 156, at 795-96; *see also* William Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1518-20 (1984) (discussing the role of the law merchant in early American law).

183. *See, e.g.*, Japan Line v. Turner, 441 U.S. 434, 447, 449 (1979) (differentiating interpretation of the Foreign Commerce Clause in light of U.S. treaty obligations and the "custom of nations"); The Vessel 'Abby Dodge' v. United States, 223 U.S. 166, 176 (1912) (holding that foreign commerce power applies to ships engaged in commercial activity "in the waters which, by the law of nations, would be regarded as common property of all").

184. *See* Dickinson, *supra* note 156, at 803 (noting that "[t]he more learned of the lawyer-delegates to the Constitutional Convention anticipated for [the law merchant] a continuing and uniform progress in the United States as part of the national law"); *see also* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 316 (1992) ("'Commerce' in the eighteenth century had usually referred exclusively to international trade. Now it was being equated with all the exchanges taking place within the country . . . .").

185. 22 U.S. (9 Wheat.) 1, 211 (1824).

186. *Id.* at 190.

187. *Id.* at 227.

commerce originally had been possessed by the several states, as international sovereigns, and had been transferred to the national government by the Constitution.[188] International law references also appear in other Antebellum decisions construing the Interstate Commerce Clause.[189]

Several early justices adopted a similar approach with respect to the Article I, § 10 Contract Clause, prohibiting the states from impairing the freedom of contract.[190] And the former Chief Justice of the Massachusetts Supreme Court observed in his 1801 treatise that the law of contracts depended on the "*jus gentium* (the general law of nations) for its origin and its expositions, rather than on any municipal regulations of particular countries."[191]

As Edwin Dickinson has demonstrated, the use of international law in such cases reflects, in part, the era's conception of the law of nations as "universal law."[192] In part, it presumably also reflects the absence at the nation's founding of any alternative legal model for construing concepts such as interstate commerce. At any rate, as the nation developed a thriving system of internal commerce and domestic rules for regulating it, "the law of merchants . . . fast slipp[ed] into the limbo of forgotten history" in this context.[193]

* * * * *

Both originalism and prudential concerns could justify the use of international law in the Offenses Clause, treaty, war powers, admiralty, and other foreign relations contexts. Where constitutional clauses implicate relations with foreign governments in matters traditionally governed by international law, playing by international rules helps both to avoid international conflict and to ensure that the United States is not hobbled in its international relations.

Even here, however, it is not obviously appropriate to assume that powers under the constitutional system are coterminous with those allowable under international law, since other aspects of the constitutional system may limit those powers. Much about the war and treaty powers under the Constitution, for example, differentiates the United States from historical international practice. Exercise of the U.S. war and treaty powers is limited structurally through the

188. Johnson concluded that "the sense of mankind, the practice of the world, the contemporaneous assumption, and continued exercise of the power, and universal acquiescence" established that navigation was "the essence of, the power to regulate commerce." *Id.* at 230-31.

189. *See, e.g.*, Norris v. City of Boston (The Passenger Cases), 48 U.S. (7 How.) 283, 416 (1849) (The Framers "were familiar with the many valuable works upon trade and international law which were written and published . . . [and] [t]heir knowledge . . . may well be invoked to measure the constitutional power of Congress to regulate commerce."); Thurlow v. Massachusetts, 46 U.S. (5 How.) 504, 623, 628 (1847) (Woodbury, J., concurring) (citing international authorities for the proposition that state power to tax alcohol is "justifiable on principles of international law" and not denied to states by the Commerce Clause); Groves & Graham v. Slaughter, 40 U.S. (15 Pet.) 449, 512 (1841) (Baldwin, J., concurring) (looking to U.S. treaties to demonstrate that slaves were viewed at the framing as property subject to the Commerce Clause).

190. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 258-59 (1827) (right to contract derives from the law of nations but may be regulated by municipal law); *id.* at 282 (Johnson, J.) (obligation to perform a contract arises from a combination of moral law, universal law, and the laws of society).

191. Fletcher, *supra* note 182, at 1518-19 (quoting JAMES SULLIVAN, THE HISTORY OF LAND TITLES IN MASSACHUSETTS 337-38 (1801)).

192. Dickinson, *supra* note 156, at 803.

193. *Id.* at 799; *see also* Fletcher, *supra* note 182, at 1520 (noting that by 1810 the law merchant was being supplanted by a uniquely American law).

division of power between the President and legislature. Congress declares war, raises armies, makes rules governing the land and naval forces, and grants letters of marque and reprisal; the President is the Commander in Chief. The President "makes" treaties, with the advice and consent of two-thirds of the Senate. Exercise of these powers also is substantively limited by the Constitution's individual rights provisions, such as habeas corpus and the Bill of Rights, as seen in *Ex parte Milligan* and *Hamdi*.[194] Thus, just because the power to take a particular action would exist under international law does not necessarily mean that it is allowable under the Constitution. Nevertheless, reading constitutional provisions to incorporate international norms at times has led the Court to decline recognizing constitutional limits on the exercise of those powers, as it did in *Ex parte Quirin*, *In re Ross*, and *Miller v. United States*.[195]

The Court's approach to international law in these cases straddles the line between law that is binding and persuasive. On the one hand, the Court recognizes the Offenses and Treaty Clauses as directly referencing international rules that are obligatory on the United States. On the other hand, it also recognizes those rules as persuasive, since prudence supports construing the treaty power to comport with those international rules where doing so is consistent with the constitutional design, in order to allow the United States to function on an equal playing ground with other nations.

Concern for avoiding conflict with other nations was an explicit motivation behind Chief Justice Marshall's interpretation of the War Declaration Clause in *Brown v. United States*. The Court's invocation of the laws of war is perhaps more intriguing in Civil War cases, where the Court was addressing domestic disputes. Although the confederacy held itself out as a separate nation, the Court treated the war as an internal conflict and searched for authority for holding that the international laws of war applied in this context. The justification here was not that failing to abide by the laws of war would provoke international conflicts (at least not in suits where foreign sovereign interests were not implicated). Instead, the Court appeared to understand all the national government's delegated war powers as inherently defined by the international laws of war. Moreover, as with the cases discussed in the next section, the laws of war offered a set of proven and workable rules for resolving disputes in analogous contexts that the Court found persuasive.

The citizenship, commerce, and contract cases are particularly interesting because although they involve concepts known to international law, they do not necessarily implicate foreign relations. Unlike the immigration cases discussed below, the question of the rights and duties of a citizen does not invariably implicate relations with other governments (as in the cases addressing stripping of citizenship as punishment for a crime). And matters of private contract and interstate commerce involving domestic trade had no foreign relations implications. The early contract and commerce cases offer a particularly

194. *See also* Reid v. Covert, 354 U.S. 1 (1957) (treaty power limited by Fifth and Sixth Amendments).

195. *See Ex parte* Quirin, 317 U.S. 1 (1942) (Fifth and Sixth Amendments do not apply to trial by military commission); *In re* Ross, 140 U.S. 453 (1891) (Fifth and Sixth Amendments do not limit extraterritorial actions under the treaty power); Miller v. United States, 78 U.S. (10 Wall.) 268 (1870) (Fifth and Sixth Amendment protections do not apply to wartime seizures).

illuminating example of the fluidity with which early jurists understood the general law and the law merchant to inform constitutional law. The citizenship, commerce, and contract cases therefore reflect the extent to which the Court has understood constitutional terms that do not directly implicate foreign affairs as absorbing concepts of international law, particularly concepts of public or universal law, which though not binding on anyone, were understood as applicable to all.

B. *International Law as a Background Principle for Constitutional Analysis*

This section examines contexts in which the Supreme Court has understood the Constitution as inviting consideration of international law as a background principle in constitutional analysis. The cases do not involve construction of constitutional terms directly known to international law. They instead involve resort to international law for background concepts of territorial jurisdiction and sovereignty that are not explicitly set forth in the constitutional text. These include resort to international law in interpreting the territorial scope of the Constitution's application, in construing the implied and inherent sovereign powers of the national government, and in delineating horizontal and vertical relationships between governments in the federal system.

The Court's resort to international law in these contexts proceeds from the assumption that the constitutional system implicitly received and distributed certain powers of government and rights of individuals that were recognized under international law, and involves a mixture of resort to international law as binding and persuasive authority. To some extent, international rules were applied because they were binding as part and parcel of the rights of sovereignty. To some extent, however, principles of territoriality and rules regarding the rights of, and relations among, sovereigns, were imported from the general international law or public law to define national and state powers because they were established and workable rules that the Court found persuasive.

1. *Territoriality*

Background international rules regarding territorial jurisdiction have heavily influenced the Court's constitutional jurisprudence. Territorial principles appear in cases defining U.S. international boundaries and the territorial jurisdiction of the national government and the states, as well as cases imposing limits on the extraterritorial application of constitutional provisions. To some extent, principles of comity motivate the Court's use of international rules here, out of a desire to avoid conflicts with the laws of other sovereigns.

Territorial sovereignty was a foundational nineteenth-century international law concept, which established that the sovereign's legal jurisdiction to regulate conduct was coterminous with its territory. As Chief Justice Marshall observed in *The Schooner Exchange*, the "full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign

rights as its objects."[196] The international rule could be distilled, in its most simplistic form, to the principle that sovereigns enjoyed "absolute and complete jurisdiction within their respective territor[y]" and absolutely no power outside of it.[197]

The most straightforward application of international rules regarding territoriality arises where the Constitution explicitly references territory. *Cunard S.S. Co. v. Mellon*,[198] for example, applied international law principles to construe the Eighteenth Amendment's textual prohibition on the movement of liquor in "all territory subject to" U.S. jurisdiction. The Court concluded that both international and domestic law supported the Amendment's application to foreign vessels that were temporarily docked in U.S. ports,[199] but that these same rules barred the Amendment's application to U.S. vessels on the high seas.[200] Justice Sutherland dissented on the grounds that the majority had misconstrued the international rule, but did not object to the relevance of that rule to the Eighteenth Amendment.[201]

In other contexts, the Court has employed international law as a background principle to read territorial limitations into constitutional provisions that have no geographic limitation on their face.[202] In particular, the Court has looked to international law principles to deny extraterritorial reach to individual rights. In this context, the relevance of international law generally derives, not from the constitutional language used, but from the context in which a constitutional question arises. When application of the Constitution implicates questions of territorial jurisdiction and extraterritoriality, international rules have been injected to determine the geographic scope of either a constitutional prohibition or governmental power.

In *In re Ross*, the Treaty Clause was read to allow extraterritorial prosecution of a U.S. citizen in U.S. consular courts, while Fifth and Sixth Amendment procedural protections were construed as stopping at the water's edge.[203] *Neely v. Henkel*[204] likewise held that Fifth and Sixth Amendment

196. The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 137 (1812).

197. *Id.* at 136.

198. 262 U.S. 100, 122-24 (1923).

199. The *Cunard* Court stated: "It now is settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays and other enclosed arms of the sea along its coast and a marginal belt of the sea extending from the coast line outward a marine league, or three geographic miles. 1 Moore International Law Digest § 145; 1 Hyde International Law §§ 141, 142, 154; Wilson International Law § 54 (8th ed.); Westlake International Law 187 (2d ed.); Wheaton International Law 282 (5th Eng. ed.) (Phillipson); 1 Oppenheim International Law §§ 185-189, 252 (3rd ed.). This, we hold, is the territory which the Amendment designates as its field of operation; and the designation is not of a part of this territory but of 'all' of it." *Id.* at 122-23 (citations to U.S. government sources omitted).

200. *Id.* at 123.

201. Sutherland urged that international law did not recognize jurisdiction over foreign ships temporarily in port, and that under "principles of international comity," the Amendment should be read to comport with this rule. *Id.* at 132 (Sutherland, J., dissenting). Sutherland also suggested that the Court's interpretation was inconsistent with original intent, since the drafters would not have contemplated the Amendment's application to foreign vessels temporarily present. *Id.* at 133 (Sutherland, J., dissenting).

202. Only a few provisions are facially limited to actions within the "States," the "United States," or U.S. jurisdiction.

203. 140 U.S. 453, 363 (1891). *See supra* notes 76-81 and accompanying text.

204. 180 U.S. 109 (1900).

protections could not apply extraterritorially to a trial by the U.S. military in occupied Cuba.[205] *United States v. Curtiss-Wright Export Corp.* asserted a general territorial restriction on the Constitution's application abroad,[206] and *Johnson v. Eisentrager* invoked territoriality to support the holding that constitutional habeas corpus did not apply to enemy aliens abroad.[207]

A strict territoriality vision of the Constitution is difficult to reconcile with the constitutional text. Few constitutional provisions impose any geographic limitation on their operation, and international law accordingly has functioned here to impose territorial restrictions on the Constitution's operation where no textual restriction existed. The practice also reflects a misapplication (or abuse) of principles of territoriality under international law. In *The Schooner Exchange*, Chief Justice Marshall acknowledged that the principle of strict territoriality had been relaxed somewhat internationally, even at that date.[208] Furthermore, even in the heyday of rigid territorial understandings of state jurisdiction when extraterritorial jurisdiction over a state's nationals was disputed,[209] nothing in international law denied the power of states to impose duties on their *own officials* outside their borders. Nevertheless, judicially-imposed territorial restrictions on the Constitution's application to actions of U.S. officials abroad have persisted. By recognizing the government's right to act extraterritorially but denying the extraterritorial application of constitutional limits, the practice represents a prominent example of the Court's use of international law to limit, rather than to promote, individual rights.

2. *Nationhood and Sovereignty*

The word "sovereign" does not appear in the Constitution, and yet the Supreme Court has applied international law in recognition of the fact that the Founders self-consciously sought to establish a sovereign nation, and to bestow on that nation many (though not all) of the rights and duties of sovereignty recognized under the law of nations. International concepts of sovereignty thus have formed a backdrop for constitutional analysis. The Court's approach has manifested itself in various forms. At times, the Court has construed constitutional text as implicitly referencing powers or duties of sovereigns recognized under international law. And in the "inherent powers" cases, the Court, controversially, has read international sovereign powers into the Constitution in the absence of, or in lieu of, enumerated constitutional authority. Of all the cases discussed in this article, international law plays the most forceful role in constitutional analysis in the inherent powers cases. The most problematic feature of these cases, however, is their abandonment of the enumerated powers doctrine and their willingness to

205. *Id.* at 122 (concluding that the Constitution's provisions "have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country").

206. 299 U.S. 304, 318 (1936) ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens . . . .").

207. See discussion *supra* Part II.A.2.a.iii.

208. 11 U.S. (7 Cranch) 116, 136 (1812) ("[A]ll sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.").

209. See Cleveland, *supra* note 66, at 23 n.106 (discussing extraterritorial authority over citizens).

employ international law to expand unenumerated governmental authority at the expense of express individual rights.

a. *Enumerated Powers*

i. *The Power to Borrow Money*

The late nineteenth-century Court looked to international sovereign powers to uphold Congress's power to borrow money through legal tender. Noting in *Juilliard v. Greenman* that nothing in the Constitution expressly authorized Congress to borrow money, Justice Gray looked to the general international powers of sovereign states to inform the Constitution's provisions.[210] Gray suggested an originalist basis for considering international practice, arguing that the power to borrow money and to designate legal tender had been "a power universally understood to belong to sovereignty, in Europe and America, at the time of the framing."[211] But Gray also contended that this practice remained the contemporary norm.[212] He concluded that since the power was "one of the powers belonging to sovereignty in other civilized nations, and not expressly withheld from Congress by the Constitution," it was reasonably implied from Congress's enumerated powers over commerce, debts, and money.[213]

Gray's methodology in identifying international practice was not particularly rigorous. He limited his consideration of "universal[]" practice to the United States and Europe and cited only an English case enforcing the right of the Austrian government. In dissent, Justice Field accordingly rejected the majority's affirmation of a power to borrow money "[u]ntil some authority beyond the alleged claim and practice of the sovereign governments of Europe be produced" to support it.[214]

Perry v. United States,[215] on the other hand, looked in part to international law to impose limits on governmental authority. In holding that the constitutional power to borrow money on credit[216] prohibited the government from disavowing its debts, Chief Justice Hughes cited the international law treatises of Oppenheim,

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210. 110 U.S. 421, 447 (1884). In the earlier legal tender case, *Knox v. Lee*, 79 U.S. (12 Wall.) 457 (1872), the Court had observed in dicta that Congress's enumerated power to coin money and regulate its value could be "intended to confer upon Congress that general power over the currency which has always been an acknowledged attribute of sovereignty in every other civilized nation than our own," *id.* at 545, but had upheld the power simply as an emergency Civil War measure, *id.* at 540-44. In concurrence, Justice Bradley had asserted an even more forceful originalist argument based on international sovereign powers. Bradley contended that the United States was "invested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally considered to belong to every government" and that at the time the Constitution was adopted, it had been the longstanding practice of "most, if not all, civilized governments," to borrow funds "to meet the various exigencies to which all nations are subject." *Id.* at 556 (Bradley, J., concurring). Bradley's analysis was based on the concept of inherent powers, and was invoked in the two most significant inherent powers decisions relating to immigration, *Chae Chan Ping v. United States*, 130 U.S. 581, 605 (1889), and *Fong Yue Ting v. United States*, 149 U.S. 698, 705-06 (1893). *See also infra* Part II.B.2.b.1 (discussing immigration cases).

211. *Juilliard*, 110 U.S. at 447.

212. *Id.*

213. *Id.* at 449-50.

214. *Id.* at 459; *see also id.* at 467.

215. 294 U.S. 330 (1935).

216. U.S. CONST. art. I, § 8, cls. 2, 5.

Hall, and Hyde for the proposition that the duty to honor debts "is recognized in the field of international engagements."[217] He also noted that although contracts with sovereigns might not be judicially enforced without their consent, they nevertheless were enforceable before international tribunals.[218] Hughes viewed the Fourteenth Amendment's public debt provision as confirming this international principle.[219]

ii. *Foreign Taxation*

In a series of cases, the Supreme Court has rejected claims that the Fifth Amendment Due Process Clause limited the authority of the national government to tax assets that might also be subject to the taxation power of a foreign government. Although the cases address the power to tax the assets of foreign nationals, conflict with the powers of other sovereigns appears to have been only a secondary concern in this context. Instead, like the inherent powers cases discussed below, the Court's use of international rules appears motivated primarily by a desire to ensure that the U.S. government enjoyed the full powers possessed by other international sovereigns.

United States v. Bennett addressed U.S. taxation of foreign, but not domestic, yachts owned by citizens. The Plaintiff argued that the law was "so in conflict with obvious principles of justice, and so inconsistent with every conception of representative and free government" as to violate the Due Process Clause.[220] Chief Justice White observed that the plaintiffs' argument rested on the mistaken assumption that the Constitution "had the effect of destroying obvious powers of government instead of preserving and distributing such powers."[221] White held that the rules imposed by the Fourteenth Amendment on extraterritorial taxation by states[222] were motivated by the need to preserve territorial relations within the constitutional system, and thus were inapplicable to the national government, whose taxation power "embrace[s] all the attributes which appertain to sovereignty in the fullest sense."[223] Nothing in the Fifth Amendment denies to the government "the exertion of powers which inherently belong to it by virtue of its sovereignty."[224]

Burnet v. Brooks[225] made the Court's reliance on international rules to uphold foreign taxation even more explicit. In addressing a Fifth Amendment challenge to taxation of the domestic assets of a foreign estate, Chief Justice Hughes observed that "[w]e determine national power in relation to other countries and their subjects by applying the principles of jurisdiction recognized

217. *Perry*, 294 U.S. at 353 n.3.

218. *Id.*

219. *Id.* at 354. U.S. CONST. amend. XIV § 4 cl. 1. ("The validity of the public debt . . . shall not be questioned.").

220. 232 U.S. 299, 304-05 (1914).

221. *Id.* at 306.

222. *See, e.g.*, First Nat'l Bank of Boston v. Maine, 284 U.S. 312, 326 (1932) (forbidding extraterritorial taxation by states under the Fourteenth Amendment).

223. 232 U.S. at 306.

224. *Id.* at 306.

225. 288 U.S. 378, 405-06 (1933) (rejecting due process challenge to U.S. estate tax on U.S. financial assets of a foreign national who lived abroad).

in international relations."[226] The U.S. could tax foreign assets consistent with principles of international jurisdiction[227] "unless [some] limitation is necessarily found to be imposed by its own Constitution."[228] Hughes rejected the contention that the Fifth Amendment imposed such a limit, reasoning, as in *Bennett*, that the domestic rule prohibiting multiple taxation by the states was not applicable to relations between the United States and other sovereigns.[229]

b. *Inherent Powers*

International law has played the most robust role in constitutional interpretation in the inherent powers cases. In these cases, the Court has looked to international powers of sovereignty as a source of governmental authority to act, not in the process of interpreting an enumerated power, but as a substitute for textual constitutional authority. The Court has accordingly derived government power from powers it identifies as inherent in all sovereign states, based directly on principles of international law. Many of the cases, including those involving Native Americans and the rights of territorial inhabitants, do not directly involve relations with other nations. The Court's primary justification for invoking international rules in this context thus is less to avoid conflict with other nations than to ensure that the U.S. government enjoys the powers of other sovereigns.

The most notorious articulation of the inherent powers approach is found in *United States v. Curtiss-Wright Export Corp.*,[230] in which the Court held that a joint resolution authorizing the President to criminalize foreign arms sales did not violate the non-delegation doctrine.[231] Justice Sutherland asserted for the Court that the government's foreign affairs authority derived, not from the Constitution, but from sovereignty and international law. "The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties," he wrote, "if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality."[232] *Curtiss-Wright* accordingly purported to sever the relationship between constitutional text and the foreign affairs powers, and to relegate governance of U.S. operations in the international sphere entirely to "treaties, international understandings and compacts, and the principles of international law."[233]

Much of the reasoning in *Curtiss-Wright* is dicta, and the opinion has been appropriately condemned for resorting to international law in lieu of construing a

226. *Id.*

227. Hughes observed at some length that both English and international practice supported the existence of this power. *Id.* at 396-400. Because jurisdiction to tax could lie with more than one sovereign, efforts had been made to negotiate a number of international agreements to avoid multiple taxation among sovereigns, but these efforts themselves acknowledged a preexisting power of sovereigns to tax under "recognized principles of jurisdiction." *Id.* at 400.

228. *Id.*

229. *Id.* at 405 ("The Constitution creates no such relation between the United States and foreign countries as it creates between the states themselves.").

230. 299 U.S. 304, 318 (1936).

231. *Id.* at 329.

232. *Id.* at 318.

233. *Id.*

constitutional provision.[234] But the Court has also relied on inherent sovereign powers derived from international law to establish national quasi-constitutional or extra-constitutional authority in a variety of areas, including immigration and the governance of Native American tribes and territorial inhabitants, as well as the power of eminent domain (which is discussed with just compensation, *infra*). In each of these contexts, the Court has looked to international law, not to inform constitutional text, but to supplant it.

The cases in this category are distinctive for the robust role given to international law, since in the absence of constitutional text, international law frequently provides the entire rule of decision. But their international and constitutional methodology is highly problematic. The Court has enforced powers derived from international law without recognizing the limits inhering in the same international rules. The Court also has given little thought to how the international rules were received into the constitutional design and whether the Constitution imposed some limits on the international rule. The inherent powers cases thus reflect robust application of international law in disregard of protections under both international law and the Constitution. The distinctive legitimacy problem they raise, however, is not the use of international law, but the abandonment of the enumerated powers doctrine.

i. *Immigration*

The inherent powers approach characterized the classical late nineteenth-century decisions upholding governmental power to exclude or deport aliens. In *Chae Chan Ping v. United States*,[235] for example, the Court upheld the constitutional authority of Congress to bar aliens from entering the United States. Although the Court previously had held that Congress's power to regulate immigration derived from the Foreign Commerce Clause,[236] Justice Field now held for the Court that the power derived from sovereignty: "That the government of the United States . . . can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence."[237] Rather than attempt to locate this authority in the enumerated powers of the national government, Field suggested a structural argument: the Constitution had bestowed on the national government all the foreign relations powers possessed by independent nations, and these necessarily included the power to regulate aliens.[238] In short, "the power of exclusion of foreigners [was]

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234. *See* Cleveland, *supra* note 66, at 5-7.

235. 130 U.S. 581 (1889).

236. Edye v. Robertson, 112 U.S. 580, 600 (1884) ("[C]ongress [has] the power to pass a law regulating immigration as a part of commerce of this country with foreign nations."); New York v. Compagnie Générale Transatlantique, 107 U.S. 59, 60 (1883); Chy Lung v. Freeman, 92 U.S. 275, 280 (1875); Henderson v. Mayor of New York, 92 U.S. 259, 270-71 (1875).

237. *Chae Chan Ping*, 130 U.S. at 603-04; *see also id.* at 606 (describing the right to defend against foreign aggression as "the highest duty of every nation").

238. The *Chae Chan Ping* Court stated: "[T]he United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. The powers to declare war, make treaties,

an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the [C]onstitution."[239] Field also implicitly construed the authority as sufficiently powerful to override a returning resident alien's claim that his exclusion violated due process.[240]

Two later decisions, *Nishimura Ekiu v. United States*[241] and *Fong Yue Ting v. United States*,[242] again asserted that Congress's immigration authority derived from international law, with only the barest nod toward the Constitution. *Ekiu* rejected an alien's due process challenge to her exclusion based on unreviewable executive discretion. Justice Gray reaffirmed the power to exclude aliens with an expansive invocation of Vattel and Phillimore's treatises on international law:

> It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. Vat. Law Nat. lib. 2 §§ 94, 100; 1 Phillim. It. Law, (3d Ed.) c. 10 § 220. In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations.[243]

Like Field, Gray employed a structural justification for the Constitution's receipt of inherent power. He reasoned that because international law recognized the authority of states to exclude aliens, and because the Constitution gave the national government powers over foreign relations,[244] the authority to exclude aliens must be possessed by the national government.

Fong Yue Ting extended the government's power to exclude aliens to uphold the deportation of long-term lawful residents. The decision both expanded on the Court's reliance on international law and further distanced that analysis from the Constitution. The opinion opened by quoting the international law language from *Ekiu* and *Chae Chan Ping*, and then devoted three full pages to international law sources, including the works of Vattel, Ortolan, Phillimore, and Bar.[245] Having established that authority to exclude aliens existed under international law, the Court once again did not consider how, or whether, the international rule had been received by the Constitution. Instead, it turned directly to the question "whether the manner in which congress [had] exercised the right . . . [was] consistent with the Constitution."[246] Gray again invoked international treatises and foreign decisions to assert that although resident aliens were entitled to the protection of a nation's laws, they remained subject to a government's authority to expel them.[247] He found nothing in the Due Process Clause that limited the exercise of the power.[248] In short, the Court made no attempt to lodge

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suppress insurrection, repel invasion, [and] regulate foreign commerce . . . are all sovereign powers." *Id.* at 604.

239. *Id.* at 609.
240. *Id*; *see also* Cleveland, *supra* note 66, at 130.
241. 142 U.S. 651, 659-60 (1892).
242. 149 U.S. 698 (1893).
243. *Ekiu*, 142 U.S. at 659.
244. *Id.*
245. *Fong Yue Ting*, 149 U.S. at 707-09.
246. *Id.* at 711.
247. *Id.* at 724.
248. *Id.* at 730.

the power in constitutional text, and defined the power as sufficiently broad and plenary to override the alien's claims of individual rights.

Fong Yue Ting provoked strenuous dissents from Justices Brewer and Field and Chief Justice Fuller. The dissenters' objection was threefold. First, they rejected the contention that international law allowed the arbitrary expulsion of resident aliens, since it was not clear that international law actually recognized as broad a sovereign authority over aliens as the Court asserted.[249] Second, they argued that even if the majority was correct in its interpretation of international law, there was no reason to conclude that the government's limited, delegated powers under the Constitution were intended to incorporate the practices of despotic nations recognized by international law. As Justice Field put it, "even if that power were exercised by every government of Europe, it would have no bearing on these cases . . . . The government of the United States is one of limited and delegated powers. It takes nothing from the usages or the former action of European governments, nor does it take any power by any supposed inherent sovereignty."[250] Finally, they argued that any power deduced from international law must be limited by constitutional due process and other express individual rights protections.[251]

Later cases nevertheless followed suit.[252] *Harisiades v. Shaughnessy*[253] rejected First Amendment and Due Process challenges to an act deporting aliens for prior membership in the Communist Party. Justice Jackson reasoned that protections available under international law correspondingly weakened the constitutional protections afforded an alien.[254] Jackson also concluded that international law recognized the right of a sovereign to expel aliens after long residence as "a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state."[255] Jackson's opinion appeared to acknowledge that international rules regarding the power to expel domiciled

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249. *Id.* at 734-37 (Brewer, J., dissenting) (citing Vattel, Grotius, and Phillimore). In particular, the Court's decision in *Fong Yue Ting* ignored limits that international law imposed on sovereign power over denizens and other long term residents. For further discussion, see Cleveland, *supra* note 66, at 83-87 (discussing nineteenth-century international rules regarding regulation of aliens); James A.R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804, 809 (1983) (collecting views of international publicists and concluding that "[b]efore the late nineteenth century, there was little, in principle, to support the absolute exclusion of aliens").

250. *Fong Yue Ting*, 149 U.S. at 757 (Field, J., dissenting); *id.* at 737-38 (Brewer, J., dissenting); *id.* at 762 (Fuller, C.J., dissenting).

251. *Id.* at 737 (Brewer, J., dissenting) ("[W]hatever rights a resident alien might have in any other nation, here he is within the express protection of the constitution, especially in respect to those guarantees which are declared in the original amendments."); *id.* at 755-56 (Field, J., dissenting).

252. *See, e.g.*, United States *ex. rel.* Turner v. Williams, 194 U.S. 279, 290 (1904) (asserting that "[w]hether rested on the accepted principle of international law . . . or on the power to regulate commerce with foreign nations," an act prohibiting admission of an alien anarchist did not violate the First Amendment); Lem Moon Sing v. United States, 158 U.S. 538 (1895).

253. 342 U.S. 580 (1951) (Jackson, J.).

254. Jackson observed that an alien's dual status allowed him to "derive advantages from two sources of law—American and international," and that international law and treaties provided protections not afforded to citizens, such as the potential for diplomatic protection by his government, protection from military service, and treaty privileges. *Id.* at 585-86 (citing to the 1907 Hague Conventions, art. 23).

255. *Id.* at 587-88 & n.14 (citing to international law treatises by Oppenheim, Moore and Wheaton, and *Fong Yue Ting*).

aliens were becoming more protective.[256] He nevertheless adhered to the Court's existing rule, stating that "such is the traditional power of the Nation over the alien and we leave the law on the subject as we find it."[257] In other words, international law had once recognized the power and nothing in the Constitution limited how Congress now chose to exercise it.

ii. *Native Americans*

International law doctrines regarding the status of aboriginal peoples and powers of discovery and conquest have played an important role in the recognition of a plenary federal power over Native American tribes. Although not itself a constitutional case, the 1823 case of *Johnson v. M'Intosh*[258] rooted the foundations of this doctrine squarely in international law principles of discovery. Chief Justice Marshall concluded that the United States had acquired sovereign authority over Native Americans based on the principle of discovery: that a discovering power had "the exclusive right . . . to appropriate the lands occupied by the Indians."[259] Marshall devoted approximately half of his 33-page opinion to establishing Europe's "universal recognition"[260] of this principle[261] and further invoked the "principle of universal law" that treated Indian lands as "vacant"[262] to justify a sovereign federal power over them.

By the time of the decision in *M'Intosh*, the legitimacy of the discovery doctrine under international law had been severely questioned,[263] and in *Worcester v. Georgia*,[264] Marshall himself ridiculed the "extravagant and absurd idea" that discovery gave European states power over Native American tribes.[265] Marshall instead relied on a different proposition from international law—Vattel's discussion of the relationships between powerful and weak states[266]—to conclude that Native American sovereignty barred any intervention by the State of

256. In a footnote, Justice Jackson cited the 1920 edition of Oppenheim's *International Law*, with a "*but cf.*" to the same discussion in the 1948 edition of Oppenheim's treatise. *Harisiades*, 342 U.S. at 588 n.14. The relevant text of the two treatises differs. The 1920 edition provides that "in strict law, a State can expel even domiciled aliens without so much as giving the reasons" and that "the refusal of the expelling State to supply the reasons for expulsion to the home State of the expelled alien does not constitute an illegal, but only a very unfriendly act" which nevertheless might warrant retorsion. 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 499 (3d ed. 1920). In notable contrast, the 1948 version provided that "[a]lthough a State may exercise its right of expulsion according to discretion it must not abuse its right by proceeding in an arbitrary manner." 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 631-32 (7th ed. 1948).

257. *Harisiades*, 342 U.S. at 588.

258. 21 U.S. (8 Wheat.) 543 (1823).

259. *Id.* at 584.

260. *Id.* at 574.

261. *Id.* at 572-84.

262. *Id.* at 595-96.

263. The discovery doctrine was disputed among legal publicists from its inception, and by the 1800s was not accepted as a basis for asserting a claim of territorial possession. *See* Cleveland, *supra* note 66, at 29-30; *see also* Howard R. Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, 27 BUFF. L. REV. 637, 651-53 (1978). Indeed, Chief Justice Marshall's manipulation of the discovery doctrine may have been orchestrated to reward land speculators and Marshall's friends. LINDSAY G. ROBERTSON, CONQUEST BY LAW (2005).

264. 31 U.S. (6 Pet.) 515 (1832).

265. *Id.* at 544. Discovery "regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession . . . as aboriginal occupants." *Id.* (citation omitted).

266. *Id.* at 561.

Georgia.[267] Like the vertical federalism cases discussed below, *Worcester* thus is notable for looking to international rules regarding relations among sovereigns to limit state government authority.

Worcester, however, did not end the discovery doctrine's influence on U.S.-Indian relations. In dicta in *United States v. Rogers*,[268] Chief Justice Taney asserted that the discovery doctrine and the tribes' aboriginal status gave Congress plenary authority to extend criminal jurisdiction over Indian tribes.[269] His discussion ultimately received judicial sanction in *United States v. Kagama*,[270] which upheld plenary congressional power to adopt a criminal code for tribes. Writing for the Court in *Kagama*, Justice Miller expressly rejected reliance on any enumerated constitutional clause.[271] Instead, Justice Miller reasoned that federal authority over Indian country derived from discovery,[272] and that as a result, "Congress may by law punish any offense committed there."[273]

After *Kagama*, the Court upheld, over Fifth Amendment due process and takings objections, Congress's plenary authority to determine tribal citizenship, to dissolve tribal jurisdiction, and to allot or lease tribal lands without tribal consent.[274] In 1955, the Court invoked the doctrines of discovery, conquest, and "aboriginal" title[275] to hold that the government could take lands held under original Indian title without just compensation. The right of the tribes to occupy territory after conquest, the Court reasoned, was merely "a right of occupancy which . . . may be terminated . . . by the sovereign itself without any legally enforceable obligation to compensate the Indians."[276] The Court traced its analysis directly to the international discovery doctrine:

> This position of the Indian has long been rationalized by the legal theory that discovery and conquest gave the conquerors sovereignty over and ownership of the lands thus obtained. 1 Wheaton's International Law, c. V. The great case of *Johnson v. McIntosh* . . . confirmed . . .

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267. *Id.* ("The Cherokee nation, then, is a distinct community occupying its own territory . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter.").

268. 45 U.S. (4 How.) 567, 571-72 (1846).

269. Justice Taney wrote: "The native tribes who were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied. On the contrary, the whole continent was divided and parceled out, and granted by the governments of Europe as if it had been vacant and unoccupied land, and the Indians continually held to be, and treated as, subject to their dominion and control." Accordingly, 'Congress may by law punish any offense committed there, no matter whether the offender be a white man or an Indian.'" *Id.* at 572; *see also* Martin v. Waddell, 41 U.S. (16 Pet.) 367, 409 (1842) (Taney, C.J.) ("[A]ccording to the principles of international law, . . . the Indian tribes in the new world were regarded as mere temporary occupants of the soil, and the absolute rights of property and dominion were held to belong to the European [discoverer].").

270. 118 U.S. 375 (1886).

271. *Id.* at 378-79 (rejecting reliance on constitutional references to "Indians not taxed" and the Indian Commerce Clause).

272. *Id.* at 380-82 (citing United States v. Rogers, 45 U.S. (4 How.) 567 (1846); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823)).

273. 118 U.S. at 381.

274. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (rejecting Fifth Amendment challenge to Congress's power to allot property without tribal consent); Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902) (rejecting Fifth Amendment challenge to Congress's authority to lease property without tribal consent); Stephens v. Cherokee Nation, 174 U.S. 446 (1899) (upholding Congress's authority to determine tribal citizenship, subject tribes to federal jurisdiction, and dissolve tribes).

275. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955).

276. *Id.* at 279.

> that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest.[277]

The Court concluded that "Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law."[278]

iii. *Territorial Governance and Individual Rights*

A third significant grouping of inherent powers cases involves U.S. authority to govern newly-acquired territories. Unlike the territorial jurisdiction cases addressed above, these cases involved the government's substantive power to legislate over territorial inhabitants. The Court, moreover, employed the inherent powers approach less consistently in the territory cases than in the immigration and Native American contexts. Although all the territory cases invoke international law, some apply international law through an inherent powers approach, while others do so in construing the enumerated Treaty and Territory Clauses.[279]

International law has been influential in establishing the relationship between newly acquired territory and U.S. domestic law, and in particular in determining the constitutional authority Congress exercised there and the constitutional protections enjoyed by territorial inhabitants. In evaluating to what extent the Constitution applied to the Florida territory in *American Insurance Co. v. 356 Bales of Cotton*,[280] Chief Justice Marshall invoked the international principle of conquest—that laws regarding political allegiance transferred immediately upon the transfer of sovereignty, while other laws continued in force until altered by the new sovereign.[281] Marshall ultimately found it unnecessary to resolve whether this rule of international law governed the Constitution's application to the Florida territory. *Leitensdorfer v. Webb*,[282] however, later upheld the authority of a territorial government to resolve property claims under the principle of the law of nations that conquest did not terminate private rights.[283]

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277. *Id.* at 279-80 (internal citation omitted).

278. *Id.* at 285; *see also* Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 354 (1945) (differentiating between recognized and unrecognized Indian lands, and holding only the latter compensable); United States v. Santa Fe Pac. R.R. Co., 314 U.S. 340, 347 (1941) (discussing Congress's "supreme" power to extinguish original Indian title).

279. U.S. CONST. art. II, § 2, cl 2. and art. IV, § 3, cl. 2.

280. 26 U.S. (1 Pet.) 511 (1828).

281. Chief Justice Marshall wrote: "The usage of the world is . . . to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed; either on the terms stipulated in the treaty of cession, or on such as its new master shall impose . . . The same Act which transfers their country transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse, and general conduct of individuals, remains in force, until altered by the newly created power of the state." *Id.* at 542.

282. 61 U.S. (20 How.) 176 (1857).

283. *Id.* at 177 (citing Vattel); *accord* New Orleans v. Steamship Co., 87 U.S. (20 Wall.) 387 (1874) (military government of New Orleans had authority under international laws of conquest to execute lease effective after occupation terminated). *But see id.* at 402 (Field, J., dissenting) (lease invalid under international law principle that agreements made by the conquerer continue only while he retains control); Pollard v. Hagan, 44 U.S. (3 How.) 212, 225 (1845) (invoking international law to hold

In *Fleming v. Page*,[284] Chief Justice Taney determined that military occupation alone did not make a territory part of the United States.[285] The plaintiffs contended that under the law of nations, military occupation transferred full sovereignty to the conquering power, and that the territory thus was part of the United States.[286] Chief Justice Taney agreed that the United States's military occupation enjoyed the powers recognized by the international laws of war and that under the rules of conquest the territory "[was] undoubtedly . . . subject to the sovereignty and dominion of the United States."[287] But Taney also found that the constitutional system had separated and distributed powers arising from international law, and that only Congress had authority to extend the borders of the United States to a new territory or to subject such a territory to U.S. laws.[288] And Congress, to date, had exercised only "the rights of war," not the right of territorial acquisition. To Taney, the question accordingly "did not depend upon the law of nations, but upon our own Constitution and acts of Congress."[289] Like Marshall in *American Insurance*, Taney thus agreed that international rules regarding conquest and territorial governance had been domesticated through the Constitution. As in the war powers cases of *Brown v. United States* and the *Prize Cases*, the controversy before the Court was reduced to the question of whether the proper branch of the national government (the executive or Congress) had exercised the international power.

In *Jones v. United States*,[290] the Court invoked international rules regarding discovery, and international publicists such as Vattel, Wheaton, Halleck, Phillimore, and Calvo,[291] to hold that the United States could acquire and adopt criminal legislation for overseas possessions:

> By the law of nations, recognized by all civilized States, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest; and when citizens or

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that a conquering power holds new territory "subject to the constitution and laws of its own government, and not according to those of the government ceding it").

284. 50 U.S. (9 How.) 603 (1850).

285. *Id.*

286. *Id.* at 608 (summarizing argument for plaintiffs).

287. *Id.* at 614.

288. Chief Justice Taney wrote: "[I]t is unnecessary to notice particularly the passages from eminent writers on the laws of nations which were brought forward in the argument. They speak altogether of the rights which a sovereign acquires, and the powers he may exercise in a conquered country, and they do not bear upon the question we are considering. For in this country the sovereignty of the United States resides in the people of the several States, and they act through their representatives, according to the delegation and distribution of powers contained in the Constitution. And the constituted authorities to whom the power of making war and concluding peace is confided, and of determining whether a conquered country shall be permanently retained or not, neither claimed nor exercised any rights or powers in relation to the territory in question but the rights of war." *Id.* at 617-18.

289. *Id.* at 615; *cf.* Cross v. Harrison, 57 U.S. (16. How.) 164, 193 (1853) (upholding the United State's power to impose tariffs on territory under military occupation as a "lawful exercise of a belligerent right over conquered territory" under international law).

290. 137 U.S. 202, 212-13 (1890). The Court's opinion had methodological roots in ambiguous language in *American Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 546 (1828) (upholding Congress's power to establish non-Article III territorial courts, in which judges did not hold life tenure, either "in virtue of the general right of sovereignty which exists in the government," or as a result of the Territory Clause), and *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 42 (1890) (upholding Congress's power to dissolve the Mormon Church, over due process objections, as a power of "national sovereignty, [which] belong[s] to all independent governments").

291. *Jones*, 137 U.S. at 212.

> subjects of one nation . . . [take possession of unoccupied] territory . . . the nation . . . may exercise such jurisdiction and for such period as it sees fit over territory so acquired.[292]

The Court concluded that this international law principle "affords ample warrant for the legislation of [C]ongress,"[293] without relying on any enumerated provision.

Downes v. Bidwell,[294] the most famous of the *Insular Cases* arising in the aftermath of the Spanish-American War, addressed whether Puerto Rico was part of the "United States" for purposes of the Uniformity Clause.[295] The case, however, had much more sweeping implications for the constitutional protections that would be afforded to territorial inhabitants.

International law played an important role in the opinions of both Justices Brown and White. Writing alone to announce the judgment of the Court, Justice Brown asserted a pure inherent powers argument. Brown assumed that the United States should have powers to acquire and govern territories as colonies commensurate with those of other nations. "If it be once conceded that we are at liberty to acquire foreign territory," he wrote, "a presumption arises that our power with respect to such territories is the same power which other nations have been accustomed to exercise."[296] Brown then found that nothing else in the Constitution limited the exercise of that power.[297]

Justice White's plurality opinion differed from Justice Brown's by assuming that federal power to govern territories derived from the Constitution.[298] His approach thus at least theoretically relied on international law to inform enumerated provisions, rather than relying on inherent powers uncoupled from the Constitution's text. But White also applied this approach extremely broadly. White urged that international law recognized a sovereign authority to govern conquered territories as it saw fit[299] and then assumed that equivalent powers must be possessed by the United States.[300]

White also viewed operation of the international rules as constrained to some extent by the Constitution. White proposed a theory of "incorporation" to argue that territories "incorporated" into the United States by Congress would enjoy full constitutional protections, while for "unincorporated" territories (like Puerto Rico), only fundamental rights would apply.[301] White did not, however,

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292. *Id.* at 212. The Court also cited English and U.S. cases for the proposition that legal or de facto sovereignty over a territory was a political question. *Id.* at 212, 215-16.

293. *Id.* at 212.

294. 182 U.S. 244 (1901).

295. U.S. CONST. art. I, § 8, cl. 1 ("[A]ll Duties, Imposts, and Excises shall be uniform throughout the United States").

296. *Downes*, 182 U.S. at 285.

297. *Id.* at 285-86. Having denied constitutional protection for the territories, Brown suggested that "certain natural rights" might nevertheless restrain government action. They apparently would do so, however, only through principles "inherent in the Anglo-Saxon character," not through legal obligation. *Id.* at 280-83.

298. *Id.* at 290 (White, J., concurring) (power derives from either the power to acquire territory or the Territory Clause).

299. *Id.* at 300, 302 (White, J., concurring) (citing American Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511 (1828)).

300. 182 U.S. at 302 (White, J., concurring). The contrary view that the Constitution prevented the United States from acquiring territory that was not subject to full constitutional protections rested "on the erroneous assumption that the United States under the Constitution is stripped of those powers which are absolutely inherent in and essential to national existence." *Id.* at 310-11 (White, J., concurring).

301. *Id.* at 288-91 (White, J., concurring). *But see* Christina Duffy Burnett, *United States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 855-60 (2005) (arguing that

specify which provisions of the Constitution he considered fundamental.[302] Thus, White conceived of Congress as enjoying a power over conquered peoples that was essentially coterminous with that enjoyed by all sovereign nations and which was limited, if at all, only by certain unidentified "fundamental" provisions of the Constitution.

The four dissenters[303] strenuously rejected the Court's resort to international practice to determine basic constitutional rights. Chief Justice Fuller argued that whatever the power of the United States to act internationally, the governance of a U.S. territory was a matter of *internal* relations that the Constitution controlled:

> [I]n all international relations, interests, and responsibilities the United States is a separate, independent, and sovereign nation; but it does not derive its powers from international law.... The source of national power in this country is the Constitution of the United States; and the government, as to our internal affairs, possesses no inherent sovereign power not derived from that instrument, and inconsistent with its letter and spirit.[304]

The dissenters accordingly saw the majority Justices' reliance on international rules—whether in interpreting U.S. constitutional authority or as a replacement for it—as an impermissible attempt to undermine constitutional protections.

Justice White's incorporation theory was finally embraced by a majority of the Court in *Dorr v. United States*,[305] which held that the constitutional right to jury trial was not fundamental and thus did not apply to the (unincorporated) Philippines. The *Dorr* Court rejected Justice Brown's resort to inherent, extraconstitutional sources of authority to acquire and govern territory, and instead located the power in the enumerated War, Treaty, and Territory Clauses.[306] The Court nevertheless read these provisions as granting powers largely equivalent to those of foreign sovereigns.[307] The *Dorr* Court offered a dubious originalist rationale for its construction of the Territory Clause, reasoning that the Framers must have recognized a power to hold territory that was not covered by all constitutional provisions.[308]

Thus, the *Insular* decisions ultimately reflected a compromise between the extreme inherent powers position that the Constitution did not limit U.S. action at all in the new possessions and the view that structural and substantive

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the distinction between incorporated and unincorporated was not adopted to limit constitutional protections to the insular territories, but to ensure that U.S. control over the territories could be relinquished).

302. Fundamental constitutional rights did not include the right to grand or petit juries. *See* Balzac v. Puerto Rico, 258 U.S. 298 (1922) (right to criminal jury trial did not apply to Puerto Rico); Dorr v. United States, 195 U.S. 138 (1904) (right to jury trial did not apply to Philippines); Hawaii v. Mankichi, 190 U.S. 197 (1903) (Fifth and Sixth Amendment rights to grand and petit jury did not apply to Hawaii). Justices White, Brown, and McKenna apparently did not consider the prohibition against double jeopardy fundamental. *See* Kepner v. United States, 195 U.S. 100, 134 (1904) (Holmes, J., dissenting) (arguing that the prohibition against double jeopardy should not apply to the Philippines, despite its statutory application by Congress).

303. Chief Justice Fuller and Justices Harlan, Brewer, and Peckham dissented.

304. *Downes*, 182 U.S. at 369 (Fuller, C.J., dissenting); *see also id.* at 386 (Harlan, J., dissenting) ("[I]t is said . . . we may solve the question of the power of Congress under the Constitution by referring to the powers that may be exercised by other nations. I cannot assent to this view.").

305. 195 U.S. 138, 144 (1904).

306. *Id.* at 142. The Court has continued this practice. *See, e.g.*, Harris v. Rosario, 446 U.S. 651 (1980) (deriving congressional power from the Territory Clause).

307. *Dorr*, 195 U.S. at 140, 146.

308. *Id.* at 143.

constitutional limitations applied in full. Nevertheless, the powers attributed to the United States through the Territory Clause derived largely from international law. The Court's ultimate solution was to infuse the Constitution with powers deduced from international law, mediated by some limited constitutional protections.

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The pure inherent powers approach, unhinged from constitutional text, is disfavored today. The Court has "constitutionalized" the doctrine to some extent by bringing the source of governmental authority back into the folds of enumerated constitutional powers. Just as the power to govern territories ultimately was lodged in the Territory Clause, federal power to regulate Native American affairs has been attributed to the Territory,[309] Treaty, and Indian Commerce Clauses,[310] while the immigration power has been derived from the Naturalization[311] and Foreign Commerce Clauses.[312] The "constitutionalization," however, remains incomplete. As recently as 2004, the Supreme Court identified the federal Indian power as resting, in part, not on "affirmative grants of the Constitution," but upon inherent powers that were "necessary concomitants of nationality."[313] In immigration cases, the Court also has continued to seek authority in unspecified "foreign affairs" powers[314] and to invoke "ancient principles of the international law of nation-states" to withhold constitutional protection from aliens.[315]

Moreover, the constitutionalization of the source of federal power has not severed those powers' ties to international doctrine or significantly altered their plenary scope. The international law source of governmental authority in these areas has been relocated in constitutional text, and the harshest implications of the international doctrines have been moderated somewhat. But rationales that allowed the exercise of governmental power based on doctrines of inherent powers and international law now simply parade as enumerated text. Modern courts continue to apply these doctrines to deny other constitutional protections and defer expansively to federal action, without any recognition of the international law origins of the principles they are applying. The Court consistently has failed to apply relevant international law limitations or to acknowledge changes in international rules as international law evolves. Constitutionalization also has not brought any searching reconsideration of the Court's assumption that constitutional limitations operate much more weakly in these contexts.

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309. *See, e.g.*, United States v. Celestine, 215 U.S. 278, 284 (1909) (relying on the Territory Clause to hold that federal courts have jurisdiction to try crimes committed on Indian lands).

310. *See, e.g.*, United States v. Lara, 541 U.S. 193, 200 (2004) ("This Court has traditionally identified the Indian Commerce Clause and the Treaty Clause as sources of [federal Indian] power."); Morton v. Mancari, 417 U.S. 535, 551-52 (1974) (rejecting any extraconstitutional basis for the federal Indian authority, locating the power in the Treaty and Indian Commerce Clauses, and holding that the power was "drawn both explicitly and implicitly from the Constitution itself").

311. I.N.S. v. Chadha, 462 U.S. 919, 940 (1982) (relying on the Naturalization Clause).

312. Toll v. Moreno, 458 U.S. 1, 10 (1982); *see also* Mathews v. Diaz, 426 U.S. 67 (1976).

313. *Lara*, 541 U.S. at 201 (citing United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 315-22 (1936)).

314. *Toll*, 458 U.S. at 10.

315. Kleindienst v. Mandel, 408 U.S. 753, 765 (1972).

From a legitimacy perspective, the inherent powers cases are the most troubling of those considered in this Article. Even here, however, the legitimacy concerns arise, not from the Court's consideration of international law, but from its international and constitutional methodology. In both the immigration and Indian cases, for example, the Court applied doctrines that were problematic as a matter of international law. But it is the Court's abandonment of the concept of enumerated and limited powers—its importation of international law while failing to consider how the international rule was received and limited by the constitutional system—that is both the most distinctive feature of these cases and the most problematic.

3. *Structural Analogy for the Federal System*

National sovereignty is not the only area of the Constitution in which international rules have been applied to define sovereign powers. The constitutional system sought to divide sovereignty both horizontally and vertically, and the contested place of sovereignty in the federal system has had broad implications for the relationship between the Constitution and international law. In construing horizontal federal relations among the states as well as delineating vertical powers between the state and national governments, the Court has looked to international rules governing relations among sovereign nations as a background principle informing constitutional meaning. In this context, international rules were applied either because the states were viewed as independent bearers of certain sovereign rights and duties under international law, or because international rules regarding sovereign relations were viewed as rules from an analogous context—the loose association of nation states within the global legal system—that the Court found persuasive. In either case, international law has been seen as offering established and workable rules for governing relations among sovereigns that seemed an appropriate model to inform the federal system.

The approach is not uncontroversial. As Douglas Laycock has noted in the choice of law context, "[m]any constitutional provisions [were] designed to foster national unity and to move interstate relations away from the international model."[316] "With respect to all these matters the states were forbidden to treat each other like foreign countries. . . . Relations among American states were a new thing under the sun, and a choice-of-law system for those states must come from the Constitution."[317] On the other hand, Thomas Lee has argued that the Constitution applies the rules of international relations to structural relations

316. Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 259 (1992). These provisions include the Privileges and Immunities, Full Faith and Credit, Extradition, Free Navigation, Supreme Court Original Jurisdiction over Disputes Between States, the Prohibitions on State War Making and Import and Export Taxes, and the Fugitive Slave Clauses.

317. *Id.* at 260.

among the states.[318] Other scholars have simply overlooked the contributions of international law in the federalism context.[319]

Nevertheless, the Court has employed international rules in cases involving interstate relations under Fourteenth Amendment due process, the Full Faith and Credit Clause, the Supreme Court's original jurisdiction, and the Tenth and Eleventh Amendments, as well as in a variety of cases governing vertical relations between the states and the national government.

a. *Fourteenth Amendment Due Process*

Notable among the Court's international federalism cases is the first-year civil procedure classic *Pennoyer v. Neff*,[320] in which the Court invoked public law international rules regarding territorial jurisdiction to interpret the reach of state personal jurisdiction. Justice Field began his analysis by observing that although the Constitution limited the sovereignty of states to some degree, in all other respects the several states "possess and exercise the authority of independent States, and the principles of public law . . . are applicable to them."[321] Field accordingly based his analysis of the ability of state courts to exercise jurisdiction over out-of-state defendants on "two well-established principles of public law": (1) "that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory," and (2) that "no State can exercise direct jurisdiction and authority over persons or property without its territory."[322] These principles, the Court concluded, precluded the exercise of jurisdiction over the defendant absent personal service of process or appearance. Although the Fourteenth Amendment Due Process Clause had not gone into effect at the time the claim arose, Justice Field invoked the Amendment as consistent with his views.[323] *Pennoyer* thus involved construction of what most would consider a "domestic" constitutional clause and looked to international law to limit the state's ability to infringe on individual rights. Indeed, although involving procedural rather than substantive due process, *Pennoyer* addressed the same text for which the Court's resort to international sources proved so controversial in *Lawrence*.

Justice Field authored *Pennoyer* in the aftermath of the Civil War, when the modern implications of that conflict for the powers of the several states were not fully understood. The propriety of the analogy to international rules therefore may have been more obvious at that time. Nevertheless, while the rule in *Pennoyer*

318. Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027, 1051-61 (2002).

319. *See* Calabresi & Zimdahl, *supra* note 25, at 906-07 (arguing that the Supreme Court historically has not cited foreign authority in federalism cases). The error may arise from failure to recognize the unique contribution of *international* law in this area. Vicki Jackson has correctly observed that, due to the distinctive nature of national federal relationships, comparative constitutional law may be less helpful in the federalism context than for individual rights analysis. Jackson, *Narratives*, *supra* note 49, at 272.

320. 95 U.S. 714 (1877).

321. *Id.* at 722.

322. *Id.* (citing Justice Joseph Story on the international conflict of laws and Wheaton's international law treatise); *see also id.* at 720 (describing "a principle of general, if not universal, law" that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum . . . an illegitimate assumption of power . . . .").

323. *Id.* at 733.

was later replaced by the minimum contacts doctrine,[324] the concept of state territorial sovereignty laid down in that case continues to permeate (and plague) modern U.S. personal jurisdiction jurisprudence.[325]

b. *Full Faith and Credit*

The language of the Full Faith and Credit Clause is mandatory ("*Full* faith and credit *shall* be given in each State . . ." absent congressional modification),[326] and James Wilson persuasively argued at the Constitutional Convention that the Clause was designed to require "more than what now takes place among all Independent Nations."[327] Accordingly, resorting to background international rules in this area has been controversial to the extent that the Clause has been read to impose substantive limits on the state laws that are entitled to full faith and credit, particularly in the application of a "public policy" exception.[328] Nevertheless, the Clause is meaningless without an established system of conflict of law principles to inform it, which the Founders arguably believed was provided by the law of nations.[329] These include the principle that a judgment of a sister state shall not be enforced if the sister state did not have jurisdiction.[330] Consistent with this approach, the Court traditionally, though not invariably,[331] has employed

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324. *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980) ("The sovereignty of each State . . . implie[s] a limitation on the sovereignty of all of its sister States—a limitation . . . in both the original scheme of the Constitution and the Fourteenth Amendment."). For a critique of *Pennoyer*'s reliance on international conflict of law rules, see Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1115-16 (1981); *see also* Jay Conison, *What Does Due Process Have To Do with Jurisdiction?* 46 RUTGERS L. REV. 1071 (1994) (tracing the evolution of nineteenth-century conflicts doctrine leading to *Pennoyer*).

325. Friedrich K. Juenger, *A* Shoe *Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027, 1031-36 (1995) (noting that Chief Justice Stone's opinion in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), "did not eschew the notion of territorial sovereignty" and that the Court in subsequent decisions has remained "preoccupied with sovereignty on the one hand and fairness on the other.")

326. U.S. CONST. art. IV, § 1 (emphasis added); *see also* Milwaukee County. v. M.E. White Co., 296 U.S. 268, 276-77 (1935) (asserting that "[t]he very purpose of the full-faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws . . . of the others, and to make them integral parts of a single nation throughout which" enforcement of an obligation "might be demanded as of right"); Mills v. Duryee, 11 U.S. (7 Cranch) 481 (1813) (holding that Full Faith and Credit Clause and implementing statute require full recognition of sister state judgments).

327. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 489 (Max Farrand ed., rev. ed. 1966).

328. Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE. L.J. 1965, 1972 (1997) (noting that the public policy exception was incorporated from a rule of customary international law).

329. Max Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 788-89, 816 (1955); *see also* Laycock, *supra* note 316, at 297-98. Justice Story's writings on the conflict of laws also addressed international and interstate questions interchangeably. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (Melville M. Bigelow ed., 8th ed. 1833).

330. Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691, 704-05 & n.10 (1982).

331. Broderick v. Rosner, 294 U.S. 629, 643 (1935) ("[T]he constitutional limitation imposed by the full faith and credit clause abolished, in large measure, the general principle of international law by which local policy is permitted to dominate rules of comity."); Hilton v. Guyot, 159 U.S. 113, 180-82 (1895) (noting that the Full Faith and Credit Clause was adopted to ensure uniform enforcement of judgments among the several states, in contrast to international practice, where a foreign judgment generally was only prima facie evidence of the claim).

international law to supply the background principles informing the parameters of the Full Faith and Credit Clause.

Indeed, the decision in *Pennoyer* built upon a line of cases regarding the sovereign powers of states developed under the Full Faith and Credit clause.[332] In the early case of *McElmoyle v. Cohen*, Justice Wayne portrayed the Full Faith and Credit Clause as an effort by the Framers to end the uncertainty in choice of law rules that had prevailed both internationally and among the colonies.[333] Wayne nevertheless invoked Story's *Commentaries* for the proposition that "'[t]he Constitution did not mean to confer a *new* power of jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within the state.'"[334] Wayne cited "the now well understood rights of nations to organize their judicial tribunals according to their notions of policy," to uphold the right of a state to apply its own statute of limitations in recognizing an out-of-state judgment.[335]

In *D'Arcy v. Ketchum*,[336] Justice Catron had held that one state court's judgment against an out-of-state defendant who was not served with process was not entitled to full faith and credit in another state, based on the "well-established rules of international law" that foreign states disregard a judgment where the person "has not been served with process nor had a day in court."[337] "[N]ational comity," Catron observed, "is never thus extended."[338] The justification for this approach was originalist: in implementing the Full Faith and Credit Clause, Congress had legislated subject to "the international law as it existed among the States in 1790."[339] Given "the evil intended to be remedied by the Framers," the language of full faith and credit had not intended to alter that existing rule.[340]

Four years before *Pennoyer*, the Court elaborated on this approach in *Thompson v. Whitman*.[341] The case raised the question of whether a state was required to grant full faith and credit to an out-of-state judgment where the sister state had lacked jurisdiction. Justice Bradley recognized that in the absence of the Full Faith and Credit Clause, jurisdiction obviously could be raised as an objection, since "as to a foreign judgment it is perfectly well settled that the inquiry is always open, whether the court by which it was rendered had jurisdiction. . . ."[342] He concluded that despite the absolute obligation it imposed to enforce out-of-state judgments, the Full Faith and Credit Clause preserved the power to inquire into the jurisdiction of the sister court.[343]

The 1890 case of *Grover & Baker Sewing Machine Co. v. Radcliffe*,[344] in turn, relied on *Pennoyer* to hold that the Full Faith and Credit Clause did not require recognition of an out-of-state judgment based on the exercise of

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332. Pennoyer v. Neff, 95 U.S. 714, 729-33 (1877) (discussing Full Faith and Credit cases).
333. McElmoyle v. Cohen, 38 U.S. (13 Pet.) 312, 324-25 (1839) (emphasis added).
334. *Id.* at 327.
335. *Id.*
336. 52 U.S. (11 How.) 165 (1850).
337. *Id.* at 174.
338. *Id.*
339. *Id.* at 176.
340. *Id.* at 176.
341. 85 U.S. (18 Wall.) 457 (1873).
342. *Id.* at 461.
343. *Id.* at 462-63.
344. 137 U.S. 287 (1890).

extraterritorial jurisdiction without notice to the defendant. Justice Fuller observed that matters of state jurisdiction or sovereignty were "international" rather than "municipal" questions, and that the principle that states did not enjoy extraterritorial jurisdiction was "the familiar, reasonable, and just principle of the law of nations."[345] The rationale again was based in part on an originalist conception of state sovereignty: Fuller found it "scarce supposable that the Framers of the Constitution designed to abrogate [the law of nations rule] between States which were to remain as independent of each other, for all but national purposes, as they were before the evolution."[346] Fuller also observed that "international law" recognized constructive notice as binding upon persons domiciled within a state, but ineffective beyond state limits.[347] He concluded that a state court judgment based on such notice was not entitled to full faith and credit.[348]

Huntington v. Attrill[349] addressed whether a judgment enforcing another state's penal law was entitled to Full Faith and Credit. Justice Gray turned to international law, noting that the case implicated "the fundamental maxim of international law . . . [that] 'The courts of no country execute the penal laws of another.'"[350] The definition of a penal law itself was "not [a question] of local, but of international law."[351] Gray opined that the Full Faith and Credit Clause and the concomitant U.S. laws giving it effect were not intended to authorize jurisdiction of a penal suit that "cannot, on settled rules of public and international law, be entertained by the judiciary of any other State. . . ."[352]

The 1906 case of *Haddock v. Haddock*[353] applied international law and practice to conclude that a state was not required to give Full Faith and Credit to a divorce decree entered by another state with jurisdiction over only one marital party. The question posed by the case was whether a state's inherent power over the marriage of its own citizens created an exception to the *Pennoyer* rule.[354] Chief Justice White answered the question in the negative: Under "principles of international law [a marriage] was entitled to obligatory extraterritorial effect."[355] The Full Faith and Credit Clause had not altered pre-constitutional practice, and when the Constitution was adopted, it had never been suggested that a government had power to dissolve a marriage solely because one party was

345. *Id.* at 296 (relying on the Pennsylvania Supreme Court decision of Chief Justice Gibson in *Steel v. Smith*, 7 W. & S. 447 (1844), and quoting Vattel, Burge, and Story).

346. *Id.*

347. *Id.* at 297 (quoting Weaver v. Boggs, 38 Md. 255 (1873)).

348. *Id.* at 298.

349. 146 U.S. 657 (1892).

350. *Id.* at 666 (quoting The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825)). *See id.* at 670 (describing "the international rule which forbids such laws to be enforced in any other country"); *id.* at 669 (quoting Blackstone's report of Chief Justice DeGrey's statement of the general rule of international comity that "[c]rimes are in their nature local and the jurisdiction of crimes is local").

351. *Id.* at 683. Gray then looked mainly to U.S. and English law for examples of what should be considered penal.

352. *Id.* at 685.

353. 201 U.S. 562 (1906).

354. *Id.* at 572-73.

355. *Id.* at 582 (citing FRANCIS WHARTON, A TREATISE ON THE CONFLICT OF LAWS 441, § 209 (3d ed. 1905)).

domiciled within its borders.[356] White observed that the practice in England and continental Europe remained consistent with this rule.[357]

The Court's reliance on international law now provoked dissent from four members of the court, who objected, inter alia, to the Court's return "to the old doctrine of comity," which they believed the Full Faith and Credit Clause was intended to supercede.[358] The dissenters thus offered a view that, rather than incorporating international rules regarding jurisdiction and conflicts of law, the Full Faith and Credit Clause established distinct domestic rules for managing interstate relations.

In the modern era, Justice Scalia's opinion in *Sun Oil Co. v. Wortman*[359] demonstrates the international law approach to the Full Faith and Credit Clause. The case reaffirmed the holding in *McElmoyle v. Cohen* that a forum state could constitutionally apply its own statute of limitations, despite the contrary approach to diversity cases adopted under the *Erie* doctrine.[360] Justice Scalia implied that the statement by James Wilson at the Constitutional Convention "display[ed] an expectation that [the Full Faith and Credit Clause] would be interpreted against the background of principles developed in international conflicts law."[361] Scalia observed that state cases immediately following ratification "show that courts looked without hesitation to international law for guidance in resolving . . . which State's law governs the statute of limitations," and uniformly applied the statute from the forum where the suit was pending.[362] "Obviously, judges writing in the era when the Constitution was framed and ratified thought the use of the forum statute of limitations to be proper in the interstate context," Scalia reasoned. "Their implicit understanding that the Full Faith and Credit Clause did not preclude reliance on the international law rule carries great weight."[363] The Court accordingly rejected the suggestion that the contrary rule regarding application of statutes of limitations in diversity cases should alter the full faith and credit rule.[364]

Justices Brennan, Blackmun, and Marshall all objected to the majority's reliance on "tradition" rather than the Court's established "interest-contacts" test under the Full Faith and Credit Clause. Like the dissenters in *Haddock*, they argued that "[t]he very purpose of the Full Faith and Credit Clause was to alter the status of the several states as independent foreign sovereignties."[365]

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356. *Id.* at 576.

357. *Id.* at 579 (quoting Le Mesurier v. Le Mesurier, (1895) A.C. 517, 527 (P.C.) ("When the jurisdiction of the court is exercised according to the rules of international law," as when both parties are domiciled there, "its decree dissolving their marriage ought to be respected by the tribunals of every civilized country. . . . On the other hand, a decree of divorce [where jurisdiction is based solely on a rule of municipal law peculiar to the forum] cannot, when it trenches upon the interests of any other country . . . claim extraterritorial authority."). White observed that "[w]hile the continental and English authorities were not alluded to in the argument," they nevertheless help illustrate the question before the Court. *Id.* at 581-82.

358. *Id.* at 627-28 (Brown, J., dissenting).

359. 486 U.S. 717 (1988).

360. *Id.* at 722 (citing McElmoyle v. Cohen, 38 U.S. (13 Pet.) 312, 327-28 (1839)).

361. *Id.* at 723.

362. *Id.* at 724; *see also* Le Roy v. Crowninshield, 15 F. Cas. 362, 365, 371 (Mass. 1820).

363. 486 U.S. at 725.

364. *Id.* at 726-29.

365. *Id.* at 740 (Brennan, J., concurring in part and concurring in the judgment) (quoting Milwaukee County v. M.E. White Co., 296 U.S. at 276-77 (1935)). Brennan further noted that the rule

c. *Supreme Court Original Jurisdiction*

The grant of original jurisdiction in the Supreme Court over controversies between states was a novel innovation which in essence established the Court as an international tribunal with power to resolve disputes between sovereigns.[366] The Court accordingly has looked to international rules to determine whether controversies between states, and between states and a citizen of another state, are properly subject to the Court's Article III, § 2 original jurisdiction.

In *Wisconsin v. Pelican Ins. Co.*,[367] the Court held that its original jurisdiction did not include a state's effort to extraterritorially enforce its own penal laws. As in the later Full Faith and Credit case *Huntington v. Attrill*, which Justice Gray also authored, Gray reasoned that, despite the constitutional text's apparently comprehensive grant of jurisdiction, the Constitution "was not intended to confer . . . jurisdiction of a suit or prosecution by the one State . . . [that] could not, on the settled principles of public and international law, be entertained by the judiciary of the other State at all."[368] He cited international treatises for the proposition that a state's penal laws cannot apply extraterritorially,[369] asserted that this had always been the U.S. rule,[370] and concluded that the Framers could not have intended all cases enforcing a judgment from another state to fall within the Court's original jurisdiction.[371]

In *Kansas v. Colorado*,[372] the Court upheld its exclusive original jurisdiction to resolve water rights controversies between states and implied that the scope of this jurisdiction was determined in part by international law. In a dispute with Kansas over use of the Colorado river waters, Colorado claimed that the two states enjoyed the same relationship as two foreign nations. Colorado further proffered a test for original jurisdiction that "only those controversies are justiciable in this court which, prior to the Union, would have been just cause for reprisal by the complaining State . . . under international law."[373]

The Court was sympathetic to Colorado's view of the Court's original jurisdiction.[374] Writing for the Court, Chief Justice Fuller observed that the constitutional system had deprived states of certain rights that they would have enjoyed as sovereigns under international law, such as the ability to enter treaties

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rejected in *Milwaukee* was still the prevailing international conflicts rule. *Id.* at 740 n.3 (citing decisions from the United Kingdom, Canada, South Africa, and foreign statutes).

366. CHARLES WARREN, THE SUPREME COURT AND SOVEREIGN STATES 32 (1924) ("For the first time, there now came into existence a permanent Court, which should have the power to summon before it sovereign States in dispute and to determine their respective rights by a judgment which should be enforceable against them.").

367. 127 U.S. 265 (1888). *Accord* Oklahoma *ex rel.* West v. Gulf, Colorado, & Santa Fe Ry Co., 220 U.S. 290 (1911) (relying on *Pelican Insurance* to reject original jurisdiction over claim by a state seeking to enjoin a private party from violating state criminal laws).

368. *Pelican Insurance*, 127 U.S. at 289.

369. *Id.* at 290-92 ("The rule that the courts of no country execute the penal laws of another applies . . . to all suits in favor of the State for the recovery of pecuniary penalties.").

370. *Id.* at 293-94.

371. *Id.* at 300.

372. 185 U.S. 125 (1902).

373. *Id.* at 143 (claiming, on behalf of Colorado, that this test gives the state exclusive right to use of the river waters as it chooses).

374. *Id.* at 144 (expressing the Court's concern over how to decide what would constitute a just cause of war between two states).

or to engage in warfare,[375] and that in place of these rights, the Constitution had substituted the Supreme Court's original jurisdiction to resolve such disputes.[376] The Court concluded that because Kansas and Colorado could have freely entered a treaty regarding the water dispute as international sovereigns but no longer could do so, the Court should have original jurisdiction.[377] The Court also observed that in resolving disputes between states, it was "[s]itting . . . as an international, as well as a domestic tribunal" and accordingly "appl[ied] Federal law, state law, and international law, as the exigencies of the particular case . . . demand[ed]."[378] When the case returned to the Court a few years later, Justice Brewer reaffirmed that because the Constitution had eliminated the states' ability to resort to either treaties or force, the Constitution gave the Court original jurisdiction to resolve interstate disputes.[379] Nor was the Court's jurisdiction ousted, Brewer noted, "even if, because Kansas and Colorado are States sovereign and independent in local matters, the relations between them depend in any respect upon principles of international law. International law is no alien in this tribunal."[380]

d. *Eleventh Amendment Sovereign Immunity*

The immunity of states from suit has been another rich area for resort to international law.[381] The debate over the relevance of international law to this question was joined early in *Chisholm v. Georgia*,[382] the case that triggered the

375. *Id.* at 140-41 ("[A]s the remedies resorted to by independent states for the determination of controversies raised by collision between them were withdrawn from the States by the Constitution, a wide range of matters . . . was made justiciable by that instrument" (citing Hans v. Louisiana, 134 U.S. 1, 15 (1890)); *id.* at 142 ("If Missouri were an independent and sovereign State all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government," the general government was expected to provide a remedy and did so through the Constitution (quoting Missouri v. Illinois, 180 U.S. 208, 241 (1901)).

376. *Id.* at 141; *see also* Kansas v. Colorado, 206 U.S. 46, 98 (1908) ("If the two States were absolutely independent nations it would be settled by treaty or by force. Neither of these ways being practicable, it must be settled by decision of this court.").

377. 185 U.S. at 145. For another explicit interpretation of the Court's jurisdiction as reaching disputes likely to give rise to war between foreign states, see *Louisiana v. Texas*, 176 U.S. 1, 27 (1900) (Brown, J., concurring in the result) (arguing that an embargo between states should give rise to original Supreme Court jurisdiction, since "[a]n embargo, though not an act of war, is frequently resorted to as preliminary to a declaration of war, and may be treated under certain circumstances as a sufficient *casus belli*").

378. *Id.* at 146-47.

379. Kansas v. Colorado, 206 U.S. at 97 ("Force under our system of Government is eliminated.").

380. *Id.* at 97 (citing The Paquete Habana, 175 U.S. 677, 700 (1900)).

381. For a strong argument that the text of the Eleventh Amendment should be understood as incorporating international rules regarding state immunity from suit, see Lee, *supra* note 318, at 1051-61 (2002).

382. 2 U.S. (2 Dall.) 419 (1793). The controversy, in fact, arose before the Constitution was adopted. *Compare* THE FEDERALIST No. 81 (Alexander Hamilton) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. . . . Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States. . . ."); *with* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, 573 (Jonathan Elliot ed., William S. Hein & Co., Inc. 1996) (1891) (statement of Edmund Randolph) (arguing that the Constitution rejected the international rule, since "whatever the law of nations may say

adoption of the Eleventh Amendment. In recognizing jurisdiction in *Chisholm* to hear a suit between a state and a citizen of another state, the Court divided over the relevance of international law to the question. The Attorney General for the United States argued that the sovereignty of the several states had been diminished by their obligations under the Constitution,[383] and that they therefore did not enjoy the rights of international sovereigns. Even if the states could be considered the equivalents of independent nations, however, he invoked Bynkershoek for the proposition that under the law of nations, a prince could be sued *in rem* in the courts of another sovereign, and that this principle established the state's amenability to suit.[384]

Writing in favor of allowing the suit, Justice James Wilson likewise reasoned that the rights of sovereigns under the law of nations were inapplicable to the question, since the several states were not analogous to the society of nations.[385] Wilson did, however, look to Vattel for definition of a sovereign (which he concluded the American states were not).[386] Even if the states did enjoy the rights of independent sovereigns, Wilson argued, their amenability to suit within the constitutional system was necessary to enforce their rights under international law and to maintain domestic peace.[387] By thus submitting the states to judicial authority, "the law of nations; the rule between contending States; [would] be enforced among the several States, in the same manner as municipal law."[388] Wilson thus viewed the constitutional system as creating special needs in the relations among states that had warranted limiting or abolishing the international sovereign immunity rule.

Justice Iredell recognized that the immunity of the sovereign was a principle of natural law as well as the common law.[389] He also recognized the possibility that international law could serve as a backdrop to the question. With respect to the Attorney General's argument that international law allowed suits against the sovereign, however, he responded:

> No part of the Law of Nations can apply to this case . . . *but that part which is termed 'The Conventional Law of Nations*;' nor can this any *otherwise* apply *than as furnishing rules of interpretation*, since unquestionably the people of the United States had a right to form what kind of union, and upon what terms they pleased, without reference to any former examples. If upon a fair construction of the Constitution of the United States, the power contended for really exists, it undoubtedly may be exercised, though it be a power of the first impression. If it does not exist, upon that authority, ten thousand examples of similar powers would not warrant its assumption.[390]

. . . any doubt respecting the construction that a state may be plaintiff, and not defendant, is taken away by the words where a state shall be a party.").

383. *Chisholm*, 2 U.S. (2 Dall.) at 423.

384. *Id.* at 425-26 n.3.

385. *Id.* at 453 (Wilson, J.) ("From the law of nations little or no illustration of this subject can be expected," since the countries forming the global community constitute "a society, not a NATION.").

386. *Id.* at 457 and n.9.

387. *Id.* at 465; *see also id.* at 474 (Jay, C.J.) ("There was danger that from this source animosities would in time result; and as the transition from animosities to hostilities was frequent in the history of independent States, a common tribunal for the termination of controversies became desirable, from motives both of justice and of policy.").

388. *Id.* at 465 (Wilson, J.).

389. *Id.* at 442 (Iredell, J.).

390. *Id.* at 449 (emphasis added).

This language has been misunderstood as a more general rejection of the relevance of international law to constitutional interpretation. Read closely, however, the passage recognizes that the law of nations could "furnish rules of interpretation" for the Constitution, where consistent with the language of that instrument. Iredell, however, viewed the states as "completely sovereign" and protected from suit "in every instance where [their] sovereignty has not been delegated to the United States . . . ."[391] Iredell found nothing in the language of the Constitution or the Federal Judiciary Act that purported to obliterate the states' preexisting rights, and thus found the Attorney General's argument from international law irrelevant to the case.[392]

After the adoption of the Eleventh Amendment, early decisions viewed the Amendment as incorporating established principles of international law. *New Hampshire v. Louisiana*[393] looked to international law to hold that the Eleventh Amendment barred federal suits by one state on behalf of its citizens against another state, where the citizens themselves had a remedy available in state court. Justice Waite referenced Sir Robert Phillimore for the proposition that "no principle of international law . . . makes it the duty of one nation to assume the collection of the claims of its citizens against another nation, if the citizens themselves have ample means of redress without the intervention of their government."[394] Reasoning from this principle, he noted that the Constitution allowed citizens of one state to sue in state court to obtain relief, and concluded that by affording a direct remedy to citizens, the Constitution "[took] away any indirect remedy . . . through the intervention of his state, upon any principle of the law of nations."[395]

Modern sovereign immunity cases obliquely continue to acknowledge the international law roots of the doctrine. Although the major disagreement between the majority and dissenters in *Seminole Tribe* turned on the majority's reliance on practices under the common law, Chief Justice Rehnquist defended the Court's prior Eleventh Amendment jurisprudence as rooted "not solely in the common law of England, but in the much more fundamental 'jurisprudence in all civilized nations,'"[396] and cited Hamilton in *The Federalist* for the proposition that sovereign immunity "is the general sense and the general practice of mankind."[397] Justice Souter's dissent, in turn, criticized the approach.[398] In *Alden v. Maine*, Justice Kennedy's majority opinion portrayed sovereign immunity as deriving from the sovereignty enjoyed by states before the Constitution, and as confirmed, rather than established, by the Eleventh Amendment.[399] Justice Souter and the other dissenters again retorted that "[t]he doctrine that the sovereign could not be

391. *Id.* at 435.
392. *Id.* at 434-35.
393. 108 U.S. 76 (1883).
394. *Id.* at 90.
395. *Id.* at 91.
396. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 69 (1996) (quoting Hans v. Louisiana, 134 U.S. 1, 17 (1890) (quoting Beers v. Arkansas, 61 U.S. (20 How.) 527, 529 (1857)).
397. *Id.* (citing THE FEDERALIST No. 81 (Alexander Hamilton)).
398. *Id.* at 131.
399. Alden v. Maine, 527 U.S. 706, 713, 728-29 (1999).

sued by his subjects might have been thought by medieval civil lawyers to belong to *jus gentium*, the law of nations, which was a type of natural law . . . ."[400]

e. *Tenth Amendment Reserved Powers*

Despite the controversy in *Printz v. United States*[401] between Justices Scalia and Breyer over the relevance of comparative examples to identifying the essential independence of the states preserved by the Tenth Amendment, international law has played some role in prior Tenth Amendment analysis. *United States v. Bekins*,[402] for example, looked to international law to conclude that a state's consent constituted a sovereign act that eliminated any Tenth Amendment objection to infringement on sovereignty. Citing the international writings of Oppenheim and Hyde, Chief Justice Hughes observed that

> It is of the essence of sovereignty to be able to make contracts and give consents bearing upon the exertion of governmental power. This is constantly illustrated in treaties and conventions in the international field by which governments yield their freedom of action in particular matters in order to gain the benefits which accrue from international accord. . . . The reservation to the States by the Tenth Amendment protected, and did not destroy, their right to make contracts and give consents where that action would not contravene the provisions of the Federal Constitution.[403]

Hughes' analysis thus recognized that to the extent that the rights of the states under the Tenth Amendment derive from their residual character as sovereigns, international rules regarding sovereign powers and relations could be relevant to that analysis.

f. *Vertical Federalism: Allocating Power Between State and National Governments*

The Court also has looked to international law as a background principle to help determine the constitutional distribution of power between the state and national governments. These include cases addressed above, such *Holmes v. Jennison*[404] and *Worcester v. Georgia*,[405] as well as cases addressing state versus federal jurisdiction over territorial waters[406] and cases involving the Commerce Clause,[407] alien property[408] and preemption under the foreign affairs power.[409]

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400. *Id.* at 767 n.6.

401. 521 U.S. 898 (1997). *See infra* notes 750-751 and accompanying text.

402. 304 U.S. 27 (1938).

403. *Id.* at 51-52 (internal citations omitted). The Court has also looked to international law in construing other aspects of state immunity. *See, e.g.*, Beers v. Arkansas, 61 U.S. (20 How.) 527, 529 (1857) ("It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege" and exercise of this power to waive or reinstate immunity is not an unconstitutional impairment of the obligation of contract.).

404. 39 U.S. (14 Pet.) 540 (1840).

405. 31 U.S. (6 Pet.) 515 (1832).

406. *See* Skiriotes v. Florida, 313 U.S. 69, 73 (1941) (holding that Florida may constitutionally criminalize the conduct of its citizens on the high seas, since no rule of international law prohibits a government from regulating the conduct of its own citizens abroad); Manchester v. Massachusetts, 139 U.S. 240, 264 (1891) ("The extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation; and, except so far as any right of control over this territory has been granted to the United States, this control remains with the state."); Crapo v. Kelly, 83 U.S. 610

The Court, for example, has looked to international law to conclude that Congress has primary authority over the regulation of aliens, to the exclusion of contrary state acts. Thus, in *Hines v. Davidowitz*,[410] Justice Black relied on the existence of treaties and customary international rules regarding the treatment of aliens, and the potential for conflict with other nations, as the explanation for placing a strong preemptive authority over the regulation of aliens in the national government.[411] Given these international law and comity[412] concerns, Black concluded that where Congress had acted in the field, state law could not augment or conflict with that action.

In determining whether the state or federal government exercised control over territorial seas beyond the low tide mark in *United States v. California*,[413] the Court looked to the historical evolution of the international law of territorial seas to conclude that the power lay with the federal government. California argued it possessed title to three English miles of adjacent seas, since this had been the entitlement of the thirteen original colonies, the boundary had been recognized by the state constitution when California was admitted to the Union, and California

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(1872) (recognizing the several states as sovereigns receiving international law and invoking international law to define state's territorial jurisdiction over vessels on the high seas).

407. Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 22 (1891) (holding that a state's proportionate taxation of railroad traffic within the state comports with the modern "general principles of law" that "the legislative power of every state extends to all property within its borders," and thus does not violate the Commerce Clause). The dissenters objected to applying the powers enjoyed by independent nations to the states. They argued: "Amongst independent nations, it is true, persons and property within the territory of a nation are subject to its laws, and it is responsible to other nations for any injustice it may do to the persons or property of such other nations. This is a rule of international law. But the states of this government are not independent nations. There is such a thing as a constitution of the United States, and there is such a thing as a government of the United States. . . ." *Id.* at 30 (Bradley, J., dissenting with Field and Harlan, JJ.); Pennsylvania v. Wheeling and Belmont Bridge Co., 54 U.S. 518, 582 (1851) (Taney, C.J., dissenting) (stating that "[e]very independent nation has the exclusive jurisdiction over the navigable waters lying within its territorial limits . . . . This was the situation of the old States prior to the adoption of the Constitution. Each was then an independent sovereign State," and arguing that although the Commerce Clause delegated some of this power to Congress, states retained control where Congress had not legislated).

408. Hauenstein v. Lynham, 100 U.S. 483, 484 (1879) (citing Vattel and noting that, absent a treaty or federal law, the states possess the international law right of governments to give foreigners only the rights to immovable property that they see fit).

409. American Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003) (holding that state law, which required insurance companies that had operated in Europe during World War II to disclose certain information, impermissibly interfered with presidential power to conduct foreign affairs); Zschernig v. Miller, 389 U.S. 429 (1968) (overturning state law prohibiting inheritance by non-resident alien as intruding into foreign affairs).

410. 312 U.S. 52 (1941).

411. Justice Black observed that the U.S. and other countries had entered numerous treaties promising broad rights and privileges to aliens, and "there has grown up in the field of international relations a body of customs defining with more or less certainty the duties owing by all nations to alien residents." *Id.* at 65. He concluded that "[i]n general, both treaties and international practices have been aimed at preventing injurious discriminations against aliens." *Id.* at 64-65. With respect to the rules of custom, Black also pointed out that the State Department has "often successfully insisted foreign nations must recognize [these] as to our nationals abroad." *Id.* at 65. Black cited Oppenheim, Moore, and other writers for the proposition that "[e]very State is by the Law of Nations compelled to grant to aliens at least equality before the law with its citizens, as far as safety of person and property is concerned." *Id.* at 65 n.14. He also observed that the U.S. government had often insisted that foreign governments comply with these rules with respect to U.S. nationals abroad. *Id.* at 65.

412. The treatment of a nation's citizens abroad was "[o]ne of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government," and had provoked grave international controversies. *Id.* at 64.

413. 332 U.S. 19 (1947).

had been admitted on an "equal footing" with other states. The United States government, in turn, claimed dominion over the three-mile territorial sea recognized under modern international law.

Writing for the Court, Justice Black observed that the United States was acting in two capacities in this context: as the protector of the nation, and as "a member of the family of nations."[414] Black observed that the lack of any agreement regarding the reach of territorial seas at the time of the founding, and the international rule's subsequent evolution, undermined the State's claim and bolstered that of the national government. According to Black, a "multitude of references" regarding the international law of territorial waters[415] established that, at the time of independence, "there was no settled international rule or custom among nations recognizing that each nation owned a three-mile water belt along its borders."[416] Thus, it was not possible to say that the original colonies had acquired separate ownership of a three-mile sea belt from the Crown.

International law now, however, recognized a three-mile territorial zone. Justice Black noted that shortly after the nation's founding, the United States had become interested in establishing a clear marginal zone to protect its neutrality, and "[l]argely as a result of [U.S.] efforts," a three-mile territorial zone had been "generally accepted throughout the world."[417] The political branches of the national government now claimed and exercised broad dominion over the three-mile zone, an assertion of sovereign dominion that Black found "binding upon this Court."[418]

Black concluded that assertion of rights in the three-mile belt implicated comity concerns under U.S. international law obligations, since the zone was defined by international law, was subject to regulation by treaty and international negotiation, and conduct within it could provoke international disputes.[419] All of these were "paramount responsibilities of the nation, rather than an individual state"[420] and supported the Court's conclusion that dominion rested in the national government.

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The Court's use of international rules to delineate horizontal relationships within the federal system is not based on a desire to uphold U.S. international

414. *Id.* at 29.

415. *Id.* at 31 & n.10.

416. *Id.* at 32 (noting that although England, Spain, and Portugal at one time made sweeping claims over expanses of ocean, "when this nation was formed, the idea of a three-mile belt over which a littoral nation could exercise rights of ownership was but a nebulous suggestion"). Black found that no treaty or colonial charters with Great Britain or other documents indicated ownership of a three-mile belt, and that no one at the time had laid claim to such title, although the Continental Congress had regulated the capture of ships "within three leagues [about nine miles] of the coasts." *Id.* at 32 n.15. Indeed, the question of ownership of the sea bed had only become important in the twentieth century, when oil was discovered there. *Id.* at 37.

417. *Id.* at 33. Black noted that as late as 1876 "there was still considerable doubt in England" about the rule's scope or existence. *Id.*

418. *Id.* at 33-34 & n.18.

419. *Id.* at 35.

420. *Id.* Justice Frankfurter noted in dissent that the Court did not accept the government's argument that international law gave the government a proprietary ownership of the territory, but limited its holding to recognition of national dominion. *Id.* at 42 (Frankfurter, J., dissenting).

obligations or to preserve harmony in the international system. The focus instead is on maintaining internal harmony. The early Court, to some extent, was operating from the perspective that the several states were quasi-international sovereigns, and that relations among the states should be governed by international rules unless the Constitution provided to the contrary. Original understanding thus played a more prominent role in justifying reliance on international law in construing provisions such as the Full Faith and Credit Clause than in other contexts considered in this article. By the end of the nineteenth century, however, the claim that the states were analogous to international sovereigns had begun to erode.[421] The Court nevertheless continued to apply international rules to govern relations among states and with the national government. This approach could have been simply the result of *stare decisis* once the doctrine had been established. But the Court's practice of analogizing interstate relations to relationships in the international sphere was also uneven.[422] The Court declined to apply international rules to interstate extraditions under Article IV, § 2[423] to the Fugitive Slave Clause,[424] and to aspects of the Full Faith and Credit Clause, rejecting the suggestion in these contexts that relations among the states were analogous to the international sphere. The Court also declined to apply rules of international tax jurisdiction to interstate taxation.[425]

In some cases where the Court relied upon international law, the common law offered an alternative model for resolving the dispute, but the Court rejected that approach.[426] Other cases had no common law analogue. The Court appears to have continued to apply international rules to questions arising in the federal relationship—particularly questions that had no parallel in the common law[427]—

421. *See* Pullmans Palace Car Co. v. Pennsylvania, 141 U.S. 18, 30 (1891) (Bradley, J., dissenting), discussed *supra* note 407. The view that the states remained the dominant instruments of governance in domestic life, however, persisted well after the war and limited the impact of Reconstruction. *See* BERNARD BAILYN ET AL., THE GREAT REPUBLIC 735-41 (1977).

422. *Compare* Crapo v. Kelly, 83 U.S. (16 Wall.) 610, 623 (1872) ("[E]xcept for the purposes and to the extent to which these attributes have been transferred to the United States, the State . . . possesses all the rights and powers of a sovereign State."), *with* New Hampshire v. Louisiana, 108 U.S. 76, 90 (1883) ("All the rights of the states as independent nations were surrendered to the United States. The states are not nations, either as between themselves or towards foreign nations. They are sovereign within their spheres, but their sovereignty stops short of nationality.").

423. Lascelles v. Georgia, 148 U.S. 537 (1893) (citing international treaty rule that person extradicted to stand trial for one offense cannot be tried for another offense does not apply to interstate extradition); Kentucky v. Dennison, 65 U.S. 66, 99-100 (1860) (holding that the Article IV, § 2 Extradition Clause did not incorporate the exception for political crimes recognized in international extradition).

424. Prigg v. Pennslyvania, 41 U.S. (16 Pet.) 539 (1842). In invalidating a state law forbidding the keeping of slaves, Justice Story observed that international law would have allowed Pennsylvania to prohibit slavery, but that the Fugitive Slave Clause had been adopted to supercede the international rule. *Id.* at 611-12 ("By the general law of nations, no nation is bound to recognise the state of slavery, as to foreign slaves found within its territorial dominions . . . . It is manifest, from this consideration, that if the Constitution had not contained this clause, every non-slave-holding state in the Union would have been at liberty to have declared free all runaway slaves coming within its limits . . . .").

425. *See, e.g.*, First Nat'l Bank of Boston v. Maine, 284 U.S. 312, 326 (1932); *supra* note 222.

426. *See, e.g.*, Manchester v. Massachusetts, 139 U.S. 240, 263-64 (1890) (rejecting common law rules regarding the water rights of English counties as the appropriate analogy for the water rights of states).

427. *Cf.* Kansas v. Colorado, 185 U.S. 125, 141 (1901) (citing Hans v. Louisiana, 134 U.S. 1, 15 (1889), and noting that the Constitution created justiciable problems, such as boundary conflicts between states, that were unknown to the common law and to which the common law offered no solution).

because those rules were convenient, well-defined, had proven workable over time, and addressed a problem that appeared roughly analogous to the one confronting the Court. International law, and particularly principles of public law, therefore, offered a ready model for addressing a set of problems that the Court otherwise would have had to craft from whole cloth.[428]

C. *Individual Rights*

The Court's use of international law in construing individual rights has already been considered in a number of contexts above, including the application of Fifth and Sixth Amendment criminal protections,[429] habeas corpus,[430] Fourteenth Amendment citizenship,[431] freedom of contract,[432] due process in the personal jurisdiction[433] and foreign taxation[434] contexts, the application of individual rights in territories,[435] and extraterritorial limits on the scope of individual rights protections.[436] All of those cases properly could be included in this section, but are discussed above due to the contexts in which they arise. This section considers additional individual rights cases, including just compensation under the Fifth Amendment Takings Clause, Thirteenth Amendment involuntary servitude, cases in which international law creates a governmental interest implicating an individual right, cruel and unusual punishment under the Eighth Amendment, and substantive and procedural due process. International law in these cases serves as a background principle informing the Court's search for the fundamental values embodied in constitutional text. It thus functions much like international law in the national sovereignty and federalism cases addressed above. International law is binding to the extent that it creates governmental interests and otherwise is persuasive as evidence of the considered opinion, workable rules, and shared common values of the international community. The individual rights cases also might be understood as reflecting, to some extent, the Constitution's natural law tradition and concepts of universal law. At various times in the nation's history, different individual rights provisions have been recognized as embodying a preexisting sense of the entitlements every person enjoys as a result of being human.[437]

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428. Sun Oil Co. v. Wortman, 486 U.S. 717, 723 (1988) ("[T]his expectation [that international rules of comity would apply to the Full Faith and Credit Clause] was practically inevitable, since there was no other developed body of conflicts law to which courts in our new Union could turn for guidance."); *see also id.* at 727-28 ("If we abandon the currently applied, traditional notions . . . we would embark upon the enterprise of constitutionalizing choice-of-law rules, with no compass to guide us beyond our own perceptions of what seems desirable.").

429. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) (denationalization); *Ex parte* Quirin, 317 U.S. 1 (1942) (military commissions); *In re* Ross, 140 U.S. 453 (1891) (trial of citizen by consular court); Miller v. United States, 78 U.S. (10 Wall.) 268 (1870) (confiscation of enemy property).

430. Johnson v. Eisentrager, 339 U.S. 763 (1950).

431. Perkins v. Elg, 307 U.S. 325 (1939).

432. *See supra* note 190.

433. Pennoyer v. Neff, 95 U.S. 714 (1877).

434. Burnet v. Brooks, 288 U.S. 378 (1933); United States v. Bennett, 232 U.S. 299 (1914).

435. *See* Downes v. Bidwell, 182 U.S. 244 (1901).

436. *See* discussion *supra* Part II.B.1.b.iii.

437. *See, e.g.*, Downes v. Bidwell, 182 U.S. 244, 282-83, 291 (1901) (Brown, J. & White, J.) (suggesting an extraconstitutional, natural law source for fundamental rights); *see also* Logan v. United States, 144 U.S. 263, 286-89 (1892) (discussing United States v. Cruikshank, 92 U.S. 542, 553-54 (1875)) (asserting that certain rights recognized in the Constitution, such as the rights to peaceably

1. *Takings*

The Supreme Court has looked to sovereign powers under international law in construing the power of eminent domain and the duty to provide just compensation. Eminent domain historically has been addressed as an inherent power of both the national and state governments, while the resort to international rules in the Fifth Amendment takings context essentially recognizes the Just Compensation Clause as referencing preexisting concepts of international law and the common law.[438] But due to their close relationship, the questions of eminent domain and just compensation are addressed together here.

a. *Eminent Domain*

The Fifth Amendment Just Compensation Clause implicitly recognizes the existence of the power of eminent domain,[439] and eminent domain could be viewed as necessary and proper to implement other enumerated governmental powers. But the Court traditionally has treated eminent domain as an inherent power, looking to international law and the common law as the source of an inherent national authority to condemn private property for public use. The Just Compensation Clause in turn has been understood as merely imposing an express limitation on the exercise of eminent domain by the national government. As the Court put it in *United States v. Jones*,

> The power to take private property for public uses, generally termed the right of eminent domain, belongs to every independent government. It is an incident of sovereignty, and . . . requires no constitutional recognition. The provision found in the Fifth Amendment to the federal Constitution . . . for just compensation for the property taken, is merely a limitation upon the use of the power. It is no part of the power itself, but a condition upon which the power may be exercised.[440]

Where state exercises of eminent domain have been challenged as infringing on constitutional rights such as the freedom of contract,[441] the Court has looked to international law to conclude that no constitutional right has been infringed. In *West River Bridge Co. v. Dix*, Justice Daniel contended that the right to contract was qualified by the sovereign power of eminent domain,[442] which derived from

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assemble, to bear arms, and to life and liberty were preexisting rights that were not granted by the Constitution, but were natural and inalienable rights of man, which the Constitution simply recognized and explicitly guaranteed against state encroachment); Ogden v. Saunders, 25 U.S. (1 Wheat.) 213, 266 (1827) (holding that Constitution prohibits ex post facto laws because "laws of this character are oppressive, unjust, and tyrannical; and, as such, are condemned by the universal sentence of civilized man"); *cf.* Alden v. Maine, 527 U.S. 706, 713, 728-29 (1999) (holding that sovereign immunity preexisted the Constitution and was confirmed, rather than established, by the Eleventh Amendment).

438. *See* DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 15 (2002) (history of the Just Compensation Clause suggests that drafters "were simply constitutionalizng the legal status quo," including the understanding of publicists such as Pufenforf and Vattel).

439. Kohl v. United States, 91 U.S. 367, 372-73 (1875).

440. 109 U.S. 513, 518 (1883); *see also* Pollard v. Hagan, 44 U.S. (3 How.) 212, 223 (1845) (citing Vattel) (The right of eminent domain "is, in certain cases, necessary to him who governs, and is, consequently, a part of . . . sovereign power.").

441. U.S. CONST. art. I, § 10, cl. 1.

442. 47 U.S. (6 How.) 507, 531-32 (1848) ("[I]n every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. . . . This power, denominated the *eminent domain* of the State, is, as its name imports, paramount to all private rights vested under the government.").

the law of nations, and that its exercise accordingly did not violate the right to contract protected by the Constitution.[443] "[I]nto all contracts . . . there enter conditions which . . . are superinduced by the preexisting and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed."[444] Justice McLean agreed with Daniel that the power of a state to take private property was "an incident to sovereignty,"[445] which McLean viewed as incorporated into the national government's powers through the Fifth Amendment Takings Clause.[446] Justice Woodbury looked to international law publicists in support of the rule that all property in a state derives from the government and is therefore subject to public uses,[447] and cited Vattel for the proposition that payment of compensation for public takings of property was the prevailing modern practice.[448]

b. *Just Compensation*

International law also has been employed to inform various aspects of the Fifth Amendment Takings Clause. Although it is unclear that the drafters of the Takings Clause intended the concept of "public use" to impose a substantive restriction on the power of eminent domain, in the early nineteenth century lower courts began construing that language in light of the writings of Grotius, Pufendorf, Vattel, and others in an attempt to restrain increased use of the eminent domain power.[449] The Supreme Court itself has looked to international law to deny just compensation for the taking of Indian lands, as noted previously,[450] and to inform construction of the Just Compensation Clause in cases implicating war and conquest.

United States v. Pacific R.R.,[451] for example, recognized that under international law, the government was not obligated to pay compensation for takings of private property resulting from extreme exigencies in wartime. Writing for the Court, Justice Field observed that under the international laws of war, no compensation could be claimed against a government for injuries and destruction

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443. *Id.* at 532-33.

444. *Id.* at 532.

445. *Id.* at 536 (McLean, J., concurring).

446. *Id.* at 538.

447. *Id.* at 539 (Woodbury, J., concurring) (citing to Vattel and Grotius, as well as American cases and other commentaries).

448. *Id.* at 540; *accord* Cincinnati v. Louisville & Nashville R.R. Co., 223 U.S. 390, 404 (1912) (upholding state power of eminent domain against impairment of contract challenge); *cf.* Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 641-42 (1837) (Story, J., dissenting) (citing Vattel for the definition and scope of state governmental power of eminent domain in impairment of contract challenge).

449. Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings Clause,"* 53 HASTINGS L.J. 1245, 1248-55 (2002); *see also* Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, MICH. ST. L. REV. 877, 892-94 (2004) (discussing the concept of public use in the writings of Grotius, Pufendorf, Bynkershoek, and Vattel). Gratitude is due to Thomas Merrill for bringing this point to my attention.

450. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955); Nw. Bands of Shoshone Indians v. United States, 324 U.S. 335, 354 (1945); United States v. Santa Fe Pac. R.R., 314 U.S. 339, 347 (1941); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902). *See* discussion *supra* Part II.B.2.b.ii.

451. 120 U.S. 227 (1887).

that were the result of essential military operations.[452] Field quoted Vattel's distinction between wartime damages committed deliberately by the state and those "caused by inevitable necessity,"[453] in which latter case, no compensation was owed. The Court noted that Congress and the President had also recognized this distinction in reliance on international law,[454] and observed that although the government had compensated some claims for takings arising from military necessity in the past, such practices "may not be within the terms of the constitutional clause."[455] In other words, international law and the Just Compensation Clause did not mandate compensation, even if the government had awarded it in practice.[456]

Juragua Iron Co. v. United States[457] built upon this principle, looking to the international laws of war to establish that the plaintiff was an enemy whose property could be destroyed without just compensation in wartime. The litigant owned mining operations in Cuba that were destroyed by the U.S. military during the Spanish-American War.[458] The Court held that the Fifth Amendment just compensation principle did not apply even to U.S.-owned property in the "enemy's country," since such property was "subject under the laws of war to be destroyed whenever [militarily necessary]."[459] The Court observed that the U.S. military was obligated to "observe the rules governing the conduct of independent nations when engaged in war," and that, having presumably done so, it owed no obligation to pay compensation under the Constitution.[460]

Thus, at least in some circumstances, the Just Compensation Clause has been understood as referencing concepts operative under international law, and international rules have been employed to define the scope of both governmental authority and individual rights under the Takings Clause. International law,

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452. *Id.* at 234 ("For all injuries and destruction which followed necessarily . . . no compensation could be claimed from the government. By the well-settled doctrines of public law it was not responsible for them.").

453. *Id.* at 234-35.

454. In vetoing a bill to compensate a loyal citizen whose house had been destroyed to prevent its use by the enemy, the President observed that "[i]t is a general principle of both international and municipal law that all property is held subject" to be used or destroyed "in times of great public danger, when the public safety demands it; and in this latter case governments do not admit a legal obligation on their part to compensate the owner." *Id.* at 238. Congress subsequently declined to pay such claims, leading the court to conclude that "[t]he principle that . . . the government is not responsible [for private damage arising from military necessity] is thus considered established." *Id.* at 239.

455. *Id.* The Court attempted to reconcile the international rule with its prior holdings by providing that properties taken from loyal citizens to support and transport armies were not acts of necessity and were entitled to compensation. *Id.* at 239-40.

456. The Court held that the actual conduct challenged was not an act of military necessity, and thus the government must bear the cost. *Id.* at 240.

457. 212 U.S. 297 (1909).

458. *Id.* at 301.

459. *Id.* at 305-06. *Juragua Iron* quotes extensively from *Miller v. United States*, 78 U.S. (11 Wall.) 268 (1870), *Lamar v. Browne*, 92 U.S. 187 (1875), *Young v. United States*, 97 U.S. 39 (1877), and *United States v. Pacific R.R.*, 120 U.S. 227 (1887), for the point that the laws of war do not require compensation for destruction resulting from military necessity, and cites Vattel and Burlamaqui. 212 U.S. at 306-07. The Court also quotes Hall's *International Law* for the proposition that a person's property in enemy territory may be treated as enemy property. *Id.* at 307-08. Furthermore, the Court relied on the laws of war to establish that Cuba was enemy territory and all persons residing there were enemies. *Id.* at 305-06.

460. *Id.* at 308.

however, apparently has been utilized by the Court more frequently to deny compensation than to grant it.

2. *Involuntary Servitude*

International law played a prominent role in constitutional debates over the domestic abolition of slavery.[461] Although *Robertson v. Baldwin*[462] did not explicitly invoke that heritage, the Court considered historical and contemporary international practice to hold that the Thirteenth Amendment's prohibition on involuntary servitude did not bar the forcible return of seamen to their vessel. Writing for the Court, Justice Brown urged that the Amendment was intended specifically to eliminate chattel slavery and should not be read to bar forms of service that had been treated as exceptional "from time immemorial."[463] Brown devoted four pages to discussion of foreign sources—both ancient and contemporary—to argue that treatment of seamen constituted such an exception, and that sailors had often been imprisoned or forced to pay fines for unauthorized absence from their vessel.[464]

In dissent, Justice Harlan argued that the plain language of the Thirteenth Amendment prohibited the coerced employment of seamen, and objected to the Court's resort to foreign and historical usages to evade this clear constitutional mandate.[465] Harlan did not contend that use of international sources was inappropriate per se in constitutional analysis; he instead challenged both the majority's choice of sources and the application of those sources to alter plain constitutional text. In particular, Harlan criticized the majority's invocation of archaic practices, such as the laws of the ancient Rhodians, which involved the conduct of despotic governments with no concept of modern individual rights.[466] Harlan further objected to the Court's reliance on the practices of modern states whose laws did not prohibit involuntary servitude.[467] In short, Harlan argued that the constitutional protection should not be undermined by resort to foreign examples from countries where involuntary servitude was *legal*. *Baldwin* thus illustrates the importance of both appropriate methodology in identifying international practice and the need to preserve respect for constitutional design in applying international standards.

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461. For a discussion of the role of international law regarding slavery and the slave trade in the years leading to *Dred Scott*, see generally Janis, *supra* note 165; William M. Wiecek, *Slavery and Abolition Before the United States Supreme Court, 1820-1860*, 65 J. AM. HIST. 34 (1978).

462. 165 U.S. 275, 283-86 (1897).

463. *Id.* at 282.

464. *Id.* at 282-86.

465. *Id.* at 297 (Harlan, J., dissenting) (arguing that if the Thirteenth Amendment forbid the practice, the laws of other countries were "of no consequence whatever"); *see also id.* at 301 (Harlan, J., dissenting).

466. *Id.* at 293-94, 302 (Harlan, J., dissenting). Harlan noted that some of the ancient laws cited by the Court allowed imprisonment with only bread and water for one year, or for a person to be branded on the face—acts which would not be tolerated in the modern United States. *Id.* at 294 (Harlan, J., dissenting). Harlan also noted that the Massachusetts colonial law and the 1780 statute cited by the Court had been in place at a time when slavery was lawful. *Id.* (Harlan, J., dissenting).

467. *Id.* at 296-97 (Harlan, J., dissenting).

3. *Governmental Interests Created by International Law*

A number of cases addressed above have involved international law in the construction of individual rights. One distinct context in which international law has been used in construing individual rights provisions of the Constitution, however, involves cases in which the United States's own international law obligations have been asserted as creating governmental interests warranting infringement, or protection, of civil liberties. The most prominent example of this approach arose in *Boos v. Barry*,[468] in which the Supreme Court invalidated a District of Columbia law prohibiting the display of signs near foreign embassies that tended to bring the foreign government into "public disrepute."[469] The D.C. Circuit had previously upheld the law, based on its conclusion that the United States's international diplomatic obligations created a compelling governmental interest.[470] The Supreme Court declined to determine whether this interest was compelling, finding instead that the law was not narrowly tailored.[471] But the Court recognized that U.S. obligations under treaties and customary international law gave the United States a "vital national interest" in protecting the "dignity" of foreign embassies.[472] The opinion appeared to assume that international obligations could establish governmental interests under the First Amendment,[473] and raised, but did not answer, the question whether such an international interest could warrant "adjust[ing]" First Amendment analysis.[474] Like constitutional due process, the First Amendment does not textually invite consideration of international sources. Yet *Boos v. Barry* suggests that in some contexts it would be difficult to conduct even First Amendment analysis without considering international law.

Nor is this approach novel. Although not itself a constitutional case, a case currently pending before the Supreme Court, *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*,[475] involves an analogous effort to use U.S. international law obligations to establish a compelling governmental interest in a claim under the Religious Freedom Restoration Act (RFRA).[476] The United States, in *O Centro*, is arguing that U.S. drug trafficking treaties establish a

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468. 485 U.S. 312 (1988).

469. *Id.* at 334.

470. Finzer v. Barry, 798 F.2d 1450, 1452-53 (D.C. Cir. 1986).

471. *Boos*, 485 U.S. at 329. The Court also noted that Congress had enacted a narrower statute protecting embassies outside of the District of Columbia, and reasoned that this provision represented the judgment of Congress, as "the body primarily responsible for implementing our [treaty] obligations," that the narrower provision fulfilled the United States's international obligations toward diplomats. *Id.* at 324-26 (citing 18 U.S.C. § 112(b)(2)).

472. *Id.* at 322-23. The *Boos* opinion notes that Article 22 of the Vienna Convention on Diplomatic Relations imposes on host states a "special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity." *Id.* at 322-23 (discussing treaty and customary international law obligations toward diplomats and citing Vattel).

473. *Id.* at 324 (noting that recognition of an interest under international law does not automatically make the interest "compelling" under the First Amendment).

474. *Id.* ("We need not decide today whether, or to what extent, the dictates of international law could ever require that First Amendment analysis be adjusted to accommodate the interests of foreign officials.").

475. 389 F.3d 973 (10th Cir. 2004), *cert. granted*, 125 S. Ct. 1846 (U.S. Apr. 18, 2005) (No. 04-1084).

476. 42 U.S.C. § 2000 bb-1 (2000).

compelling governmental interest in prohibiting drug use that justifies a generally applicable statute that infringes on religious freedom.[477]

While *Boos v. Barry* invoked U.S. international law obligations to argue that the Constitution should not prohibit a regulatory measure, U.S. international legal obligations could also be offered as a justification for recognizing constitutional rights. This approach was prominent in racial discrimination cases in the late 1940s and early 1950s, after the UN Charter was signed. In its briefs to the Court on questions ranging from racially restrictive covenants to discrimination in railroad dining cars, the government invoked its obligations under the Charter and other international instruments in support of invalidating the legislation.[478] The Supreme Court usually did not specifically acknowledge the arguments from international law in its opinions,[479] other than in *Oyama v. State of California*,[480] in which four concurring justices invoked U.S. obligations under the UN Charter in support of the Court's finding that a California land law denied aliens equal protection.[481] Neither the Court nor the U.S. government were clear about how the treaty obligations related to the constitutional questions before the Court, and by *Brown v. Board of Education* the struggle over the Bricker Amendment appears to have chilled the government's practice.[482] But the cases stand as an example of

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477. Brief for Petitioners at 41-44, Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal, 125 S. Ct. 1846 (U.S. Apr. 18, 2005) (No. 04-1084); *cf.* Gibson v. Babbitt, 223 F.3d 1256, 1258 (11th Cir. 2000) (finding, in RFRA case, that government has a compelling interest in fulfilling its treaty commitments to Indian tribes).

478. The government's amicus brief supporting invalidation of racially restrictive covenants in *Shelley v. Kraemer*, for example, invoked at length international agreements and resolutions to which the U.S. was a party, including obligations set forth under the UN Charter, UN General Assembly resolutions on racial discrimination, and resolutions on equal protection adopted by international conferences. Brief for the United States as Amicus Curiae Supporting Petitioners at 97-100, Shelley v. Kraemer, 334 U.S. 1 (1947) (No. 72) (available on microfiche; also on file with author); *see also* Brief of Respondent the United States at 62, Henderson v. United States, 339 U.S. 816 (1950) (No. 25).

479. *But see* Hurd v. Hodge, 334 U.S. 24, 28 n.4 (1948) (finding no reason to reach petitioner's claim that judicial enforcement of racially restrictive covenants was contrary to U.S. treaty obligations under the UN Charter).

480. 332 U.S. 633 (1948). As Mary Dudziak has noted, the Court also did not explicitly acknowledge the Cold War foreign relations concerns advanced by the U.S. government, although those concerns appear to have formed an important backdrop to the Court's decisions. Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 103-13 (1988). For additional discussion of the role of international human rights in the post-World War II civil rights litigation, see generally CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944-55 (2003); Bert B. Lockwood, Jr., *The United Nations Charter and United States Civil Rights Litigation, 1946-1955*, 69 IOWA L. REV. 901 (1984); Resnik, *supra* note 25.

481. Justices Black and Douglas referenced the UN Charter as follows: "[W]e have recently pledged ourselves to cooperate with the United Nations to 'promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.' How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?" 332 U.S. at 649-50 & n.4 (Black & Douglas, JJ., concurring) (citation omitted). Justices Murphy and Rutledge likewise observed that "[i]ts inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned." *Id.* at 673 (Murphy & Rutledge, JJ., concurring).

482. Between 1950 and 1955, Senator Bricker led an unsuccessful movement to amend the Constitution to ensure that U.S. racial discrimination and segregation policies could not be eliminated through international treaty. Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 348 (1995). In 1954, the amendment came within one vote of passing the Senate. DUANE TANANBAUM, THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP 180-81 (1988).

the role that international legal obligations could play in informing governmental interests implicated by constitutional rights.[483]

Another recent case suggesting possibilities for the role of U.S. international obligations in constitutional analysis is *United States v. Balsys*,[484] which addressed whether the Fifth Amendment privilege against self-incrimination protected an alien from making statements in a deportation proceeding that might be used in a criminal prosecution by a foreign state. Although the majority, per Justice Souter, rejected the claim, the Court noted that the United States had "assumed an interest in foreign prosecution" through an international agreement to cooperate in prosecuting war crimes,[485] and left open the possibility that a deeper level of international cooperation in prosecution could result in application of the Fifth Amendment to such cases in the future.[486] In dissent, Justices Breyer and Ginsburg found the United States's increasing international commitments for combating crime sufficient to bring the case within the scope of the privilege.[487]

The role of international law in this constitutional context is relatively undeveloped. *Boos v. Barry*'s acknowledgment that international obligations might create a compelling governmental interest justifying restrictions on constitutional rights suggests that despite the well-established rule that treaties cannot override express constitutional provisions, they might nevertheless inform the analysis of a particular provision. Even this approach is not necessarily problematic. Treaties are federal law, and like other forms of federal laws, they may (but do not necessarily) serve important governmental interests. Indeed, treaties may create stronger interests than many domestic laws, since their breach implicates U.S. relations with other nations. On the other hand, the practice could be subject to abuse, to the extent that the government merely entered a bilateral treaty in order to increase its authority in relation to individual rights.

4. *Cruel and Unusual Punishment*

The precise meaning of the Constitution's prohibition against cruel and unusual punishment is not established by either constitutional text or Supreme Court doctrine.[488] The constitutional text, however, is reasonably read as inviting consideration of international values. What is "cruel" under the Eighth Amendment may warrant consideration of what practices have been outlawed under international treaties and customary international law. What is "unusual" on its face requires consideration of how common, or uncommon, a particular

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483. *See* Richard Lillich, *International Human Rights Law in U.S. Courts*, 2 J. TRANSNAT'L L. & POL'Y 1, 19-20 (1993) (discussing *Oyama* as a possible model for indirect incorporation of international law into constitutional analysis).

484. 524 U.S. 666 (1998).

485. *Id.* at 699 & n.19.

486. *Id.* at 698-99. The Court also noted, in a footnote, the possibility that the existence of an international law obligation on the foreign state analogous to the privilege against self-incrimination could warrant application of the Fifth Amendment privilege in this context. *Id.* at 695 n.16.

487. United States v. Balsys, 524 U.S. 666, 714-15 (1997) (Breyer, J., dissenting).

488. *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 99 (1958) (plurality opinion) ("The exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court.").

practice is,[489] and the Court has understood practices in both the United States and the global community to be relevant to this inquiry.

The Court's established approach to construing the clause also is open to being informed by international norms. In the 1910 case of *Weems v. United States*, the Court recognized that the scope of the Clause was not limited to eighteenth-century conceptions of cruelty, but "may be . . . progressive, and . . . acquire meaning as public opinion becomes enlightened by a humane justice."[490] Chief Justice Warren's plurality opinion in *Trop v. Dulles* accordingly asserted that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . . The Amendment must draw its meaning from *the evolving standards of decency that mark the progress of a maturing society*."[491] Thus the Court's modern Eighth Amendment analysis examines any particular punishment "in light of the basic prohibition against inhuman treatment."[492] The question is what punishments are disproportionate—"barbaric" or "excessive in relation to the crime committed"[493]—based on the "broad and idealistic concepts of dignity, civilized standards, humanity, and decency" that the Amendment embodies.[494] These touchstones for analyzing the Eighth Amendment focus on the values of "*a* maturing society,"[495] not *this* society, and on the principles of "humane justice."[496] The scope of this inquiry may be limited to core human rights and the comparative values of liberal democratic societies, as Justice Scalia noted in dissent in *Thompson v. Oklahoma*.[497] But nothing on its face limits the inquiry to potentially parochial American views, to the exclusion of more universal international values.

Of all the Eighth Amendment cases discussed here, the *Trop* plurality placed the greatest reliance on international perspectives. In concluding that the Eighth Amendment barred Congress from denationalizing citizens as punishment for a crime, the *Trop* plurality looked to the consequences of denationalization, observing that statelessness was "a condition deplored in the international community of democracies,"[498] and that statelessness may lead to banishment, "a fate universally decried by civilized people."[499] The plurality noted that "[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be

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489. *See* Stanford v. Kentucky, 492 U.S. 361, 369 (1989) (indicating the Court's approach to the Clause is dictated by textual requirement that punishments be "both 'cruel and *unusual*'"); Thompson v. Oklahoma, 487 U.S. 815, 822 n.7 (1988) (plurality opinion) (noting that reference to contemporary standards as an index of constitutional value "lies in the very language of the construed clause: whether an action is 'unusual' depends, in common usage, upon the frequency of its occurrence or the magnitude of its acceptance"); *Trop*, 356 U.S. at 100 n.32 (plurality opinion) ("If the word 'unusual' is to have any meaning apart from the word 'cruel' . . . the meaning should be the ordinary one, signifying *something different from that which is generally done*." (emphasis added).

490. Weems v. United States, 217 U.S. 349, 378 (1910).

491. *Trop*, 356 U.S. at 101 (plurality opinion) (emphasis added).

492. *Id.* at 100 n.32.

493. Coker v. Georgia, 433 US. 584, 592 (1977) (plurality opinion).

494. Estelle v. Gamble, 429 US 97, 102 (1976) (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)); *see also* Ford v. Wainwright, 477 U.S. 399, 409 (1986) (invalidating execution of the insane and invoking "the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity").

495. *Trop*, 356 U.S. at 101 (plurality opinion).

496. *Id.* at 127 (quoting *Weems*, 217 U.S. at 378).

497. *See* 487 U.S. 815, 864-65 (1988) (Scalia, J., dissenting).

498. 356 U.S. at 102.

499. *Id.*

imposed as a punishment for a crime," and that of eighty-four countries surveyed by the United Nations, only two imposed denationalization as a penalty for desertion.[500] "In this country," the opinion concluded, "the Eighth Amendment forbids this to be done."[501] The case involved an exclusive federal power, and the Court did not consider jury practices or the practices of the several states.

Trop's extensive reliance on international practice recently has been dismissed as the view of a minority of the Court.[502] The dissenting Justices, however, did not condemn the majority's consideration of international practice. Justice Frankfurter, who authored the dissent, elsewhere had condoned interpreting the Eighth Amendment in light of "standards of decency more or less universally accepted."[503] The dissent instead disagreed with the majority's interpretation of international opinion. Citing the same authorities as the plurality, the dissent asserted that "[m]any civilized nations impose loss of citizenship for indulgence in designated prohibited activities" and that some countries had made wartime desertion the basis for denationalization.[504] The dissent concluded that denationalization could not "be deemed so at variance with enlightened concepts of 'humane justice'" as to violate the Cruel and Unusual Punishment Clause.[505] Thus, it appears that at least eight of the nine Justices in *Trop* agreed that international opinion was relevant to the constitutional analysis.

Subsequent Eighth Amendment cases have granted a weaker role to international law. In holding that imposition of the death penalty for rape violated the Cruel and Unusual Punishment Clause, the plurality in *Coker v. Georgia* observed that Eighth Amendment judgments "should be informed by objective factors to the maximum possible extent."[506] These included attention "to the public attitudes . . . history and precedent, legislative attitudes, and the response of juries."[507] The plurality accordingly observed that state practice and jury verdicts rarely imposed the sentence of death for rape.[508] The opinion limited its consideration of international practice to a footnote, which noted *Trop*'s reliance on international opinion and concluded that "[i]t is thus not irrelevant here that out of 60 major nations in the world . . . only 3 retained the death penalty for rape where death did not ensue."[509] The plurality also looked to international opinion to rebut the state's claim of a compelling interest in imposing the death penalty for rape: "[I]n light of the legislative decisions in almost all of the States and in most of the countries around the world, it would be difficult to support a claim that the

500. *Id.* at 102-03 & nn.37, 38.

501. *Id.* at 103.

502. Atkins v. Virginia, 536 U.S. 304, 325 (2002) (Rehnquist, C.J., dissenting); *see also infra* notes 546-547 and accompanying text.

503. Francis v. Resweber, 329 U.S. 459, 469 (1947) (Frankfurter, J., concurring).

504. *Trop*, 356 U.S. at 126 (Frankfurter, J., dissenting).

505. *Id.* at 126-27 (quoting Weems v. United States, 217 U.S. 349, 378 (1910)).

506. 433 U.S. 584, 592 (1977) (plurality opinion).

507. *Id.* at 592.

508. *Id.* at 596.

509. *Id.* at 596 n.10 (citing UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT 40, 86 (1968)); *see also* Rudolph v. Alabama, 375 U.S. 889 (1963) (Goldberg, J., dissenting from denial of certiorari) (arguing, based on "the trend both in this country and throughout the world," that the Court should consider whether imposition of the death penalty for rape constitutes cruel and unusual punishment).

death penalty for rape is an indispensable part of the States' criminal justice system."[510]

Enmund v. Florida,[511] the Court's first majority opinion in this line of cases, invalidated the death penalty for vicarious felony murder. Following the methodology suggested in *Coker*, the Court engaged in an extensive survey of practices of state legislatures, juries, and prosecutors, and concluded that at least the first two of these sources weighed heavily in favor of rejecting the penalty at issue.[512] In a footnote, and relying on *Coker*, the majority also observed that "'[t]he climate of international opinion concerning the acceptability of a particular punishment' is an additional consideration which is 'not irrelevant'" to the Eighth Amendment analysis.[513] The Court noted that "the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe."[514]

Thompson v. Oklahoma[515] made clear that the relevance of foreign authority to the Eighth Amendment cases was dependent on the justices' underlying philosophy regarding the meaning and construction of the Eighth Amendment. In invalidating the death penalty for persons under sixteen at the time of the crime in that case, five members of the Court appeared to consider both international treaties and widespread comparative practice relevant to the Eighth Amendment inquiry.[516] Justice Stevens's plurality opinion began by observing that the Court should consider the actions of legislatures and juries, as well as "the reasons why a civilized society may accept or reject" the practice.[517] Stevens concluded that state statutes and the behavior of juries, as well as the reduced culpability of juveniles, supported the finding that it would offend "civilized standards of decency"[518] to execute Thompson. Invoking the *Trop* line of cases for the relevance of international opinion, Stevens then observed that the Court's conclusion was consistent with the views held by "other nations that share our Anglo-American heritage, and by the leading members of the Western European community."[519] He also noted that the juvenile death penalty was prohibited by three major human rights treaties: the International Covenant on Civil and Political Rights, the American Convention on Human Rights, and the Fourth

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510. *Coker*, 433 U.S. at 592 n.4.

511. 458 U.S. 782 (1982).

512. *Id.* at 788-96.

513. *Id.* at 796-97 n.22 (quoting *Coker*, 433 U.S. at 596 n.10).

514. *Id.* The Court also observed that death sentences for such murders were frequently commuted (citing Marvin Wolfgang et al., *Comparison of the Executed and Commuted Among Admissions to Death Row*, 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 301, 310 (1962)).

515. 487 U.S. 815 (1988).

516. Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 46-47 (1994) (noting that "[b]oth the plurality and Justice O'Connor's concurrence found it significant that three major international human rights treaties explicitly prohibited juvenile death penalties and that one of these instruments—Article 68 of the Geneva Convention—had been ratified by the United States").

517. *Thompson*, 487 U.S. at 822 (plurality opinion).

518. *Id.* at 830.

519. *Id.* The opinion observed that the United Kingdom, New Zealand, Australia, West Germany, France, Portugal, the Netherlands, all Scandinavian countries, Canada, Italy, Spain, Switzerland, and the Soviet Union either prohibited juvenile executions or had abolished the death penalty altogether. Justice Stevens also found relevant the views of professional organizations.

Geneva Convention, the latter of which had been ratified by the United States.[520] Justice O'Connor's opinion concurring in the judgment also cited these treaties.[521]

For the first time in the Eighth Amendment cases examined here, the dissenters objected to the reliance on international law. Joined by Chief Justice Rehnquist and Justice White, Justice Scalia's dissent disagreed sharply with the plurality's finding of a U.S. consensus prohibiting the execution of juveniles. In a footnote, Scalia also condemned as "totally inappropriate" the plurality's resort to international sources.[522] Scalia maintained that

> The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores but, text permitting, in our Constitution as well. . . . But where *there is not first a settled consensus among our own people*, the views of other nations . . . cannot be imposed upon Americans through the Constitution.[523]

Justice Scalia's apparent acceptance in *Thompson* of a role for international values in confirming an identified national consensus is significant because that is generally the manner in which the Court has considered international sources in the Eighth Amendment context. With the notable exception of *Trop*, cases looking to an international consensus have first found a national consensus, based on an exhaustive inquiry. The plurality opinion in *Thompson* was no different. The Justices had not looked to international practice to override, or *contradict*, the perceived national position, contrary to Scalia's suggestion. They simply had disagreed with Scalia by finding that a national consensus was present. In this context, the plurality's resort to international practice was perfectly consistent with Scalia's own statement regarding when resort to foreign opinion was appropriate. Justice Scalia's complaint with the plurality accordingly should have been with its analysis of domestic, rather than foreign, attitudes.

The following year, in *Stanford v. Kentucky*,[524] Justice Scalia wrote for the majority to reject the claim that the Eighth Amendment prohibited capital punishment for persons aged sixteen or older at the time of the crime. Scalia found no national consensus prohibiting the practice and took the opportunity to reaffirm, in a footnote, his assertion from *Thompson* regarding the irrelevance of international practice.[525] The relevant standards of decency, he argued, were those of "modern *American* society."[526]

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520. *Id.* at 831 n.34.

521. *Id.* at 851 (O'Connor, J., concurring in judgment) (citing the Fourth Geneva Convention's prohibition on the execution of juveniles and other treaties cited by the majority as evidence that the U.S. Congress had not authorized the practice). Justice O'Connor would have invalidated the death sentence on the narrower grounds that Oklahoma had not specified a minimum age and may not have carefully considered the death eligibility of juveniles.

522. *Id.* at 868 n.4 (Scalia, J. dissenting) ("That 40% of our States do not rule out capital punishment for 15-year-old felons is determinative of the question before us here, even if that position contradicts the uniform view of the rest of the world. We must never forget that it is a Constitution for the United States of America that we are expounding.")

523. *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)) (emphasis added).

524. 492 U.S. 361 (1989).

525. *Id.* at 369 n.1 ("We emphasize that it is *American* conceptions of decency that are dispositive. . . . While [t]he practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely an historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores, but text

Stanford made clear that Justice Scalia's position that international practice could not be used to establish an "American" consensus formed part of a broader attack on the Court's approach to Eighth Amendment cases. While facially accepting *Trop*'s "evolving standards of decency" test, Scalia sought to limit the relevant judicial inquiry to the actions of juries and state legislatures. This approach, he suggested, was dictated both by the text of the Cruel and Unusual Punishment Clause and by the deference owed state legislatures under the federal system.[527] Any broader inquiry under the Eighth Amendment would leave judgments under the Amendment to the "subjective views of individual judges."[528]

Justice Brennan dissented for the four members of the *Thompson* plurality. Brennan challenged the majority's "revisionist view" of the Eighth Amendment,[529] arguing that while the opinions of legislatures and juries *informed* the Court's analysis, the accepted constitutional inquiry was much more wide-ranging. This included consideration of "the choices of governments elsewhere in the world,"[530] and an independent judicial inquiry into whether a punishment was proportionate and satisfied its acceptable penal goals.[531] Justice Scalia's contrary approach, Brennan argued, would abandon the Eighth Amendment's protective role as a check on political majorities.[532]

With respect to foreign opinion, Justice Brennan urged that "objective indicators of contemporary standards of decency in the form of legislation in other countries is also of relevance to Eighth Amendment analysis."[533] After finding that abolition of the juvenile death penalty was supported by trends among state legislatures and juries and by the views of professional organizations,[534] Brennan additionally observed that "[w]ithin the world community, the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disapproved."[535] In the previous decade, only eight executions of juvenile offenders had been recorded worldwide, three of them in the United States. And like Justice Stevens in *Thompson*, Brennan acknowledged that three major human rights treaties, as well as UN resolutions, prohibited the juvenile death penalty.[536]

Atkins v. Virginia[537] resurrected the *Thompson* Court's overall approach to Eighth Amendment analysis, including restoring the relevance of international practice. In holding that execution of the intellectually disabled constituted cruel

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permitting, in our Constitution as well, . . . they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.").

526. *Id.* at 369 (emphasis added).

527. *Id.* at 369-70.

528. *Id.* at 369 (citing Coker v. Georgia, 433 U.S. 384, 592 (1977)).

529. *Id.* at 391 (Brennan, J., dissenting).

530. *Id.* at 384 (Brennan, J., dissenting).

531. *Id.* at 390-91 (Brennan, J., dissenting).

532. *Id.* at 391-92 (Brennan, J., dissenting).

533. *Id.* at 389 (Brennan, J., dissenting).

534. *Id.* at 390 (Brennan, J., dissenting).

535. *Id* (Brennan, J., dissenting). Brennan noted that over fifty countries had abolished the death penalty entirely; twenty-seven no longer imposed it in practice, and among the world's retentionist countries, sixty-five prohibited the execution of juveniles. In addition, some of the sixty-one countries that retained the death penalty and had provisions exempting juveniles had ratified international treaties prohibiting the juvenile death penalty.

536. *Id.* at 389-90 & n.10 (Brennan, J., dissenting).

537. 536 U.S. 304 (2002).

and unusual punishment, Justice Stevens noted that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."[538] Such evidence was not conclusive, however, since the Constitution also obligated the Court to independently examine "whether there is reason to disagree with the judgment reached by the citizenry and its legislators."[539]

Applying this approach, the majority found a consistent trend among state legislatures toward abolishing the execution of the mentally disabled. In a footnote that also discussed the views of professional and religious organizations and public opinion polls, Justice Stevens noted that "within the world community, the imposition of the death penalty for crimes committed by mentally disabled offenders is overwhelmingly disapproved."[540] The opinion urged that while such "[a]dditional evidence" lent "further support" to the conclusion that the legislative trend reflected "a much broader social and professional consensus," such evidence was "by no means dispositive."[541]

Despite the relatively inconsequential role of international practice in the majority's analysis, that invocation provoked an exasperated rebuke from the three dissenters. Chief Justice Rehnquist and Justices Scalia and Thomas strenuously disagreed with the majority's finding of a national legislative trend toward abolishing the execution of the mentally disabled. Chief Justice Rehnquist wrote to criticize "the Court's decision to place weight on foreign laws" and other sources, which he viewed as unsupported by precedent and antithetical to principles of federalism.[542] Rehnquist reiterated Scalia's view from *Stanford* that the opinions of state legislatures and juries were the only relevant considerations.[543] In particular, Rehnquist wrote, "I fail to see . . . how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination."[544] The Chief Justice viewed *Stanford* as a "sound rejection" of the idea that such information was relevant to establishing a *national* consensus.[545] Rehnquist also challenged the doctrinal pedigree of resort to international practice. The decisions in *Thompson*, *Enmund*, and *Coker* had relied "only on the bare citation of international laws by the *Trop* plurality," and the *Trop* plurality "represent[ed] the view of only a minority of the Court [and] offered no explanation for its own citation."[546] "[T]here [was] no reason to resurrect this view" given the Court's rejection of it in *Stanford*.[547]

Justice Scalia dissented separately, condemning the majority decision as lacking support in either the text or history of the Eighth Amendment or in current public attitudes.[548] "Seldom," he criticized, "has the opinion of this Court rested

538. *Id.* at 312 (citing Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).
539. *Id.* at 313.
540. *Id.* at 316-17 n.21 (citing Brief for the European Union as Amicus Curiae Supporting Petitioner at 4, McCarver v. North Carolina, 533 U.S. 975 (2001) (No. 00-8727)).
541. *Id.*
542. *Id.* at 322 (Rehnquist, C.J., dissenting).
543. *Id.* (Rehnquist, C.J., dissenting).
544. *Id.* at 324 (Rehnquist, C.J., dissenting).
545. *Id.* at 325 (Rehnquist, C.J., dissenting).
546. *Id.* (Rehnquist, C.J., dissenting).
547. *Id.* (Rehnquist, C.J., dissenting).
548. *Id.* at 337 (Scalia, J., dissenting).

so obviously upon nothing but the personal views of its members."[549] After attacking various aspects of the Court's "embarrassingly feeble evidence of 'consensus,'" Scalia concluded that "the Prize for the Court's Most Feeble Effort to fabricate 'national consensus' must go to its appeal (deservedly relegated to a footnote) to the views of . . . members of the so-called 'world community.'"[550] "Equally irrelevant," he wrote, "are the practices of the 'world community,' whose notions of justice are (thankfully) not always those of our people."[551]

The dissenters' vehemence over the citation to international practice is surprising for at least three reasons. First, as in *Thompson*, the *Atkins* majority appeared to agree substantially with Justice Scalia's stated view in *Thompson* that international practice should not determine the existence of a national consensus, but could help establish that that consensus reflects fundamental values.[552] Second, Chief Justice Rehnquist's attack on the doctrinal provenance of resort to international practice was unfounded. As noted above, although Chief Justice Warren's opinion in *Trop* was a plurality, the dissenters in that case also accepted the relevance of international opinion and resorted to such opinion in their own analysis.

Finally, all members of the Court claimed to accept that the relevant test under the Eighth Amendment was the "evolving standards of decency that mark the progress of a maturing society" and fundamental views of "humane justice."[553] Nothing in this test appears to limit the appropriate judicial inquiry to American views on this subject, and no opponent of resort to international practice on the current Court has ever attempted to justify *their* view (other than simply by stating their own personal opinions) that this Eighth Amendment test is limited to exclusively *American* conceptions.[554]

In *Roper v. Simmons*,[555] the majority finally robustly recommitted itself to consideration of international law and simultaneously reaffirmed a role for an independent judicial determination of what constitutes cruel and unusual punishment. *Roper* addressed the constitutionality of executing juveniles who

549. *Id.* at 338 (Scalia, J., dissenting).

550. *Id.* at 347 (Scalia, J., dissenting).

551. *Id.* at 347-8 (Scalia, J., dissenting).

552. *See supra* notes 525-526 and accompanying text.

553. Weems v. United States, 217 U.S. 349, 378 (1910).

554. Perhaps not surprisingly, the battle over the relevance of foreign practice has extended to the Court's recent denials of certiorari. In *Knight v. Florida*, 528 U.S. 990 (1999), Justice Breyer argued that the Court should grant certiorari to consider the claim that a delay of two decades or more on death row, due to the State's own failure to comply with constitutional requirements, constituted cruel and unusual punishment. Justice Breyer noted that a growing number of courts outside the United States had concluded that long delays on death row could render a death sentence unlawful. *Id.* at 995-96 (Breyer, J., dissenting from denial of cert.) (citing decisions of the Privy Council, the Supreme Courts of India and Zimbabwe, and the European Court of Human Rights). Justice Breyer conceded that there was no foreign consensus on this question, and that "[o]bviously . . . foreign authority does not bind us." *Id.* at 996. He nevertheless urged that "this Court has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances." *Id.* at 997. Justice Breyer reasserted this view in objecting to the Court's denial of certiorari in *Foster v. Florida*, 537 U.S. 990 (2002), and noted that the Supreme Court of Canada had now joined the list of foreign courts expressing concern over the issue. *Id.* at 992-93 (Breyer, J., dissenting from denial of cert.). Justice Thomas, in turn, chastised Breyer for failing to rely on any "American" authority, and argued that "this Court's Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans." *Id.* at 990 n.* (Thomas, J., concurring).

555. 125 S. Ct. 1183 (2005).

were under eighteen at the time of the crime. Consistent with the approach in *Atkins*, the Court first identified a national consensus toward abolishing the juvenile death penalty, noting that only a minority of states kept the penalty on the books and that the punishment was imposed with even less frequency. In this analysis, the Court rejected the suggestion that the United States's entry of a reservation to Article 6(5) of the International Covenant on Civil and Political Rights, which prohibits the execution of juveniles, constituted meaningful evidence of a lack of national consensus on the question. The Court noted that since the treaty was ratified, five U.S. states had abandoned the practice, and Congress had declined to extend the federal death penalty to juveniles.[556] The Court also identified a number of characteristics of youth that rendered young people ineligible for the death penalty. Only then did the Court find "confirmation" of its conclusion that imposition of the death penalty on juveniles was a disproportionate punishment in "the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."[557] The Court relied on both international law and comparative state practice to support its analysis. The penalty was prohibited under international law by the Convention on the Rights of the Child, which every nation in the world had accepted except for the United States and Somalia.[558] Foreign state practice also supported the finding, since only seven countries other than the United States had imposed the penalty in the prior fifteen years. The Court finally offered a detailed consideration of developments in the United Kingdom, since the language of the Cruel and Unusual Punishment Clause derived from the 1689 English Declaration of Rights.[559]

The Court noted that "the opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation of our own conclusions"[560] and concluded: "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom."[561]

As in *Atkins*, the majority's use of international views to "confirm" the fundamental character of an American consensus was consistent with Justice Scalia's approach in *Thompson*.[562] Justice Scalia in dissent (joined by Justice Thomas and Chief Justice Rehnquist) nevertheless accused the majority of supplanting the views of U.S. citizens with foreign and international law. Scalia first criticized the majority's use of international law on the merits, arguing that

556. *Id.* at 1189.
557. *Id.* at 1198.
558. *Id.* at 1199.
559. *Id.* at 1199-1200.
560. *Id.* at 1200.
561. *Id.* at 1200.
562. *Compare Roper*, 125 S. Ct. at 1198 (majority opinion) (stating that the Court's analysis of domestic practices "finds confirmation" in international opinion, though that opinion is "not controlling"), *with* Thompson v. Oklahoma, 487 U.S. 815, 869 n.4 (Scalia, J., dissenting) ("[W]here there is not *first* a settled consensus among our own people, the views of other nations . . . cannot be imposed on Americans through the Constitution.") (emphasis added). Here, as in *Thompson*, Justice Scalia's criticism is more pertinent to the other Justices' analysis of domestic attitudes. The Court accordingly did not purport to use foreign practice to "expand the denominator" in identifying a national consensus. *Contra* Young, *supra* note 12, at 153-56.

the international instruments considered by the Court refuted the existence of a national consensus on the issue. "That the Senate and the President . . . have declined to join and ratify treaties prohibiting execution of under-18 offenders," Scalia wrote, "can only suggest that *our country* has either not reached a national consensus on the question, or has reached a consensus contrary to what the Court announces."[563] Scalia questioned whether foreign states actually complied with the international prohibition on the execution of juveniles, but did not offer data to contradict the majority's evidence. He then contended that comparative foreign practice was irrelevant since the U.S. death penalty system allows consideration of mitigating circumstances such as youth, while some other countries do not.[564]

Having concluded that the international sources did not support the majority's holding, Scalia then urged that "the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand."[565] Without differentiating international law from foreign practice, Scalia criticized the Court for selectively relying on foreign examples that supported positions it liked, while ignoring foreign practices in such areas as the exclusionary rule, the establishment of religion, abortion, double jeopardy, and the right to jury trial, which Scalia portrayed as much less protective than America's own.[566]

Cases such as *Roper*, where international law has clearly and uniformly articulated a position regarding the acceptability of punishment contrary to U.S. law, and where that international rule is supported by near-universal state practice, are extraordinarily rare. It is unusual for the international rule to be so brightly defined and so uniformly accepted, through both treaty ratifications and actual practice. Likewise, it thankfully is equally rare for United States penal practices to be so flatly out of step with an international rule.[567] Thus, cases where a widely established norm of international *law*, as opposed to selective foreign state practice, is both on all fours with the constitutional question and overwhelmingly persuasive, should be extraordinary. But where, as in *Roper*, such an international consensus exists, considering that consensus seems entirely consistent with the search for what is "cruel and unusual."

Where an international rule directly contrary to U.S. punishment practice does exist, international law could play a much more robust role in Eighth Amendment analysis, given the standard the Court has articulated. Under the *Atkins/Roper* test, rather than serve as evidence supporting a national consensus, international law could be considered in the "independent" judgment that the Court recognizes that judges should bring to bear in Eighth Amendment analysis. An overwhelming international consensus could reasonably constitute one "reason to disagree with the judgment reached by the citizenry and its

563. *Id.* at 1226 (Scalia, J., dissenting).
564. *Id.* (Scalia, J., dissenting).
565. *Id.* (Scalia, J., dissenting).
566. *Id.* at 1226-28 & n.9 (Scalia, J., dissenting).
567. But as Justice Scalia noted in *Roper*, the International Convention on the Rights of the Child also prohibits sentencing juvenile offenders to life imprisonment without parole. *Id.* at 1226; *see also* HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES: LIFE IMPRISONMENT FOR CHILD OFFENDERS (2005).

legislators."[568] This is what Justice Scalia's dissent in *Roper* accused the Court of doing, and what the *Trop* plurality approached.

But the *Roper* majority's view of the role of international law is much more modest. While *Roper* solidly confirmed a fifty-year tradition of resort to international law in the Court's Eighth Amendment analysis, like *Thompson* and *Atkins* before it, the decision also firmly relegated the use of international law to the secondary role of reaffirming a perceived national consensus—an approach, as noted before, that should be entirely consistent with Justice Scalia's stated views. Thus, it appears that the provocative question regarding the role of international law in Eighth Amendment jurisprudence is not whether it is appropriate for international law to support a national consensus, although that is the question that has preoccupied the Court. The deeper question is whether the *Trop* Court's approach, which gave a more robust role to international practice to invalidate a federal statute, is fundamentally illegitimate.

5. *"Liberty": Substantive Due Process*

The "liberty" protected by substantive due process is both "the least specific and most comprehensive protection of liberties" in the Constitution.[569] Judicial decisions construing the Fifth and Fourteenth Amendment Due Process Clauses accordingly have looked to principles "implicit in the concept of ordered liberty"[570] to define the substantive limits that due process imposes on government action. The Court's substantive due process analysis has resorted to international opinion for common standards of liberty both in determining what provisions of the Bill of Rights are sufficiently fundamental to "principles of ordered liberty" to warrant incorporation against the states and in prohibiting arbitrary and conscience-shocking government behavior. Traditionally, however, the Court has made greater use of comparative examples from Western democracies than from international law.

The Court's analysis has taken two approaches to the question of *whose* conception of liberty is relevant. In some cases, the Court has invoked Anglo-American traditions, while in others the Court has considered traditions fundamental to *all* free societies. And at times the Court has appeared to equate

568. Atkins v. Virginia, 536 U.S. 304, 313 (2002).

569. Rochin v. California, 342 U.S. 165, 170 (1952). As Justice Story observed, "The Ninth Amendment acknowledges that the 'Bill of Rights presumes the existence of a substantial body of rights not specifically enumerated but easily perceived in the broad concept of liberty and so numerous and so obvious as to preclude listing them.'" 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (3d ed. 2000) (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 715-16 (1883)). The Court at times has located the unenumerated liberty protected by the Constitution in the penumbras of the First, Third, Fourth, Fifth, and Ninth amendments. *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965); *see also id.* at 486-87 (Goldberg, J., concurring) (invoking the Ninth Amendment as recognizing a "concept of liberty" protected by the Constitution); *id.* at 500 (Harlan, J., concurring in judgment) (noting that the Constitution protects "basic values 'implicit in the concept of ordered liberty'"). Other possible loci are the Privileges and Immunities Clause and equal protection, though the Court most consistently has lodged the protection of unenumerated fundamental rights in the "liberty" protected by due process.

570. Palko v. Connecticut, 302 U.S. 319, 328 (1937) (holding that the Fourteenth Amendment does not incorporate the Fifth Amendment prohibition against double jeopardy against the states).

the two.[571] Laurence Tribe accordingly has observed that "[t]he effort to identify the 'indispensable conditions of an open society'" under substantive due process "proves inseparable from the much larger enterprise of identifying the elements of being human" and requires "a wider conception of what human beings require."[572] The search for substantive due process, in short, is a search for fundamental "human rights."[573] Like the Court's inquiry under the Eighth Amendment, this approach invites consideration of international values—at least those of "free" societies—and the Court has invoked such authorities.

a. *The Incorporation Doctrine*

The doctrine of substantive due process has roots in the nation's early natural law tradition.[574] In *Loan Association v. Topeka*, the Court invalidated a municipal ordinance on the grounds that "[t]here are such rights in every free government beyond the control of the State" and "limitations on such [state] power which grow out of the essential nature of all free governments."[575] By the latter 1800s, the Court began looking to common law principles for the limits on state authority imposed by substantive due process.[576]

Hurtado v. California[577] expressly recognized the relevance of foreign practices to this constitutional inquiry. *Hurtado* addressed whether Fourteenth Amendment due process encompassed the Fifth Amendment's requirement of grand jury indictment in capital cases.[578] The majority rejected this claim based on both text and history.[579] The Court defined due process as embodying the limits of "original justice"[580] on "arbitrary power."[581] Due process, in other words, constituted not "a particular mode of procedure in judicial proceedings" but "the

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571. *Id.* at 325 (equating principles "so rooted in the tradition and conscience of *our* people as to be ranked as fundamental" with principles more generally "implicit in the concept of ordered liberty"); *see also id.* at 326 (stating that due process is "dictated . . . [by] the essential implications, of liberty itself"). *Duncan v. Louisiana*, 391 U.S. 145 (1968), later modified this approach, noting that while it might be appropriate to consider whether "a civilized system could be imagined that would not accord the particular protection," a court must also examine whether a procedure was nevertheless fundamental to the particular system of justice established in the United States. *Id.* at 150 n.14; *see also* Moore v. East Cleveland, 431 U.S. 494, 503-04 & n.12 (1977) (applying *Duncan* approach to substantive due process).

572. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 778-79 (2d ed. 1988).

573. *Rochin*, 342 U.S. at 169.

574. *See, e.g.*, Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 52 (1815) (holding that state law divesting church property violated "principles of natural justice, . . . the fundamental laws of every free government, . . . [and] the spirit and the letter of the [C]onstitution"); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 139 (1810) (Marshall, C.J.) (finding state law invalid "either by general principles which are common to our free institutions, *or* by the particular provisions of the Constitution") (emphasis added). For further discussion, see TRIBE, *supra* note 572, at 1338.

575. 87 U.S. (20 Wall.) 655, 662-63 (1874).

576. *See, e.g.*, Barbier v. Connolly, 113 U.S. 27, 31 (1885) (holding that the Due Process Clause protects against arbitrary deprivations of common law liberty).

577. 110 U.S. 516 (1884) (holding that murder prosecution by information rather than indictment does not violate due process). *See* Neuman, *supra* note 25, at 83.

578. U.S. CONST. amend. V. ("No person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury. . . .").

579. Textually, the Court concluded that the Fifth Amendment's consideration of "due process of law" and grand jury indictment indicated that the former did not itself embrace the latter requirement. *Hurtado*, 110 U.S. at 534-35. The Court also concluded that trial by information had been recognized at common law. *Id.*

580. *Id.* at 532.

581. *Id.* at 536.

general principles of public liberty and private right, which lie at the foundation of all free government."[582] While common law traditions were relevant to identifying these principles, so were the fundamental practices of other societies:

> The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, *we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown.* Due process of law . . . is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice *suum cuique tribuere. There is nothing in* Magna Charta, *rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted.*[583]

Thus, the Court recognized that "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" were properly informed by "the best ideas of all systems and of every age."[584]

Palko v. Connecticut[585] expanded upon *Hurtado*'s recognition of the relevance of foreign sources in the due process inquiry. Justice Cardozo acknowledged that liberty was an evolving concept[586] and viewed foundational American principles as informed by those of other free societies. Thus, Cardozo equated those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"[587] with principles so fundamental "that a fair and enlightened system of justice would be impossible without them."[588] Due process barred only practices that reasonable people believed were "repugnant to the conscience of mankind."[589] Cardozo invoked comparative foreign practice in support of this analysis,[590] but did not rely on international law.

b. *Protection Against Arbitrary Government Action*

The Court has followed a similar approach in determining the inherent limits that due process imposes on all "arbitrary . . . and purposeless restraints."[591] Such fundamental rights cannot be infringed by governmental action absent a compelling state interest. In *Rochin v. California*, for example, Justice Frankfurter

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582. *Id.* at 520-1 (emphasis added); *see also id.* at 536 ("[T]here are such rights in every free government beyond the control of the State.") (citation omitted).

583. *Id.* at 530-31 (emphasis added).

584. *Id.* at 531. Justice Harlan argued in dissent that the question should be answered based on "settled usages" of the common law and concluded that the right to grand jury indictment had always been a fundamental component of due process. *Id.* at 542 (Harlan, J., dissenting).

585. 302 U.S. 319 (1937).

586. 302 U.S. at 324-25 (discussing the evolution of freedom of thought and speech protected through the Fourteenth Amendment).

587. *Id.* at 328 (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)).

588. 302 U.S. at 325.

589. *Id.* at 323.

590. "Double jeopardy . . . is not everywhere forbidden." *Id.* at 326 n.3 (noting that compulsory self-incrimination was a routine practice in continental Europe and the practices of France, Roman law traditions, and treatises).

591. Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

famously defined due process as prohibiting "conduct that shocks the conscience."[592] But whose conscience?

Although principles "implicit in the concept of ordered liberty" could be identified through resort to international law, and particularly international human rights law, the Court has rarely utilized these sources. As discussed below, the Court instead tends to limit its consideration to comparative foreign examples or to generic assertions that a practice is accepted by all free countries or throughout Western Civilization. But the analysis is open to the use of international law in appropriate cases.

International legal sources can also play a variety of roles in these cases. They may be used to support or reject a claim that a right is implicit in ordered liberty or to support or rebut a claim of a compelling state regulatory interest. In *Block v. Hirsh*,[593] for example, Justice Holmes rejected a claim that emergency rent control legislation imposed during World War I constituted an arbitrary taking of property without due process of law by invoking uniform foreign practice to support the *reasonableness* of the governmental action. Without identifying his international sources, Holmes observed that in declaring a public emergency, "Congress stated a publicly notorious and almost world-wide fact. . . . [Thus,] the question is whether Congress was incompetent to meet it in the way in which it has been met by most of the civilized countries of the world."[594] Holmes found that the Court had no basis for concluding "that legislation that has been resorted to for the same purpose all over the world," was unreasonable.[595] A similar approach scrutinizing foreign (European) practice for the reasonableness of a policy subject to due process challenge was offered by Justice John Marshall Harlan's dissent in *Lochner v. New York*,[596] and by the majority in *Muller v. Oregon*.[597] The foreign taxation cases addressed previously also looked to international law to reject a claim that a governmental action was unreasonable.[598]

Chief Justice Burger's concurrence in *Bowers v. Hardwick*[599] is an example of resort to foreign practice to deny a claim of fundamental right. Burger asserted that state regulation of sodomy had "very ancient roots" throughout the history of Western civilization, was "firmly rooted in Judeo-Christian moral and ethical standards," and that homosexuality had been a capital crime under Roman law.[600]

On the other hand, the Court in *Roe v. Wade*[601] looked to foreign practice to support the claim that conduct should be protected. Justice Blackmun engaged in a lengthy analysis of foreign historical abortion practices, ranging from the Greeks

592. 342 U.S. 165, 172 (1952); *see also* County of Sacramento v. Lewis, 523 U.S. 833, 846-47 (1998) ("[E]xecutive abuse of power . . . which shocks the conscience . . . is 'arbitrary . . . in a constitutional sense.'" (quoting Collins v. Harker Heights, 503 U.S. 115, 128 (1992)).

593. 256 U.S. 135 (1921). I am grateful to Thomas Merrill for bringing this case to my attention.

594. *Id.* at 154-55.

595. *Id.* at 158.

596. 198 U.S. 45, 71-72 (1905) (Harlan, J., dissenting).

597. 208 U.S. 412, 419 n.1 (1908); *see* Calabresi & Zimdahl, *supra* note 25.

598. *See supra* Part II.B.2.a.ii.

599. 478 U.S. 186 (1986) (holding that substantive due process does not provide a fundamental right for homosexuals to engage in consensual sodomy).

600. *Id.* at 196 (Burger, C.J., concurring). In *Lawrence v. State*, 41 S.W.3d 349, 361 (2001), the Texas appellate court likewise justified its reaffirmation of *Bowers* with references to Roman law and Blackstone; *see* Koh, *supra* note 25, at 51.

601. 410 U.S. 113, 130-38 (1973).

and Romans through English and American practice, to conclude that "at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century . . . a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today."[602] The claim was not that foreign practice established that reproductive choice was a fundamental liberty. Instead, historical and foreign practice were used to reject the contention that these matters were inherently subject to state regulation.

Lawrence v. Texas[603] invoked international practice for two purposes: to rebut the suggestion in *Bowers* that criminalization of homosexual sodomy was supported by Western civilization and Anglo-American tradition, and to reject the state's claim of a compelling state interest. Justice Kennedy observed that Chief Justice Burger's reliance in his *Bowers* concurrence on the practices of Western civilization had failed to consider "other authorities pointing in an opposite direction,"[604] including Britain's repeal of laws punishing homosexual conduct, and the European Court of Human Rights's invalidation of a law proscribing homosexual conduct under the European Convention on Human Rights.[605] "Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now)," Kennedy wrote, "the [*Dudgeon*] decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization."[606] These international examples supported Kennedy's assertion of an "emerging awareness" even when *Bowers* was decided that liberty protected fundamental decisions about private consensual sexual conduct.[607]

Justice Kennedy again looked to international practice to assert that the reasoning of *Bowers* subsequently had been rejected both domestically and abroad. Kennedy noted that the European Court of Human Rights in later cases had followed its reasoning in *Dudgeon*[608] and that "[o]ther nations . . . ha[d] taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct."[609] Based on this information, Kennedy concluded that "[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent."[610] Accordingly, Kennedy concluded that the state had demonstrated no legitimate interest that would justify its intrusion into individual privacy.[611]

Writing in dissent, Justice Scalia condemned the majority generally for relying on an "emerging awareness" to find a right "deeply rooted" in the nation's traditions, and in particular for relying on "*foreign nations[']*" decriminali[zation of the] conduct.[612] Scalia concluded that "[t]he Court's discussion of these foreign

602. *Id.* at 140.
603. 539 U.S. 558 (2003).
604. *Id.* at 572.
605. *Id.* at 573 (citing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. sec. A, para. 52 (1981)).
606. *Id.*
607. *Id.* at 572.
608. *Id.* at 576.
609. *Id.* at 576-77 (citing Brief for Mary Robinson et al. as Amici Curiae at 11-12, 539 U.S. 558 (2003) (No. 02-102)).
610. *Id.* at 577.
611. *Id.* at 578.
612. *Id.* at 598 (Scalia, J., dissenting).

views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is . . . meaningless [and dangerous] dicta."[613] Even Scalia, however, ultimately could not resist resort to foreign examples, and warned that the Court's decision would result in "judicial imposition of homosexual marriage, as has recently occurred in Canada."[614]

The *Lawrence* decision in some ways falls into a grey area between resort to international law and resort to comparative law, since the decisions of the European Court of Human Rights may be viewed as those of a regional international court, or as the equivalent of a comparative constitutional authority. Reliance on regional international norms does raise some of the selectivity concerns in the choice of foreign authorities that are not present with invocations of more universally applicable international rules.[615] But regardless whether the citation to the European Court of Human Rights constitutes the use of international or comparative law, the consideration of European practice is appropriate, given the Court's long tradition of looking to European practice as paradigmatic of "free" societies, and its explicit invocation of Western civilization in the *Bowers* case.

The use of international law to identify a compelling governmental interest is different here than in *Boos v. Barry*,[616] where the United States's *own* international obligations were invoked as establishing a governmental interest. Here international law is considered, not due to its legally binding character, but due to the persuasive force of the common understandings of other states. If the international democratic community does not recognize a governmental interest in criminalizing sodomy, or some other claimed governmental interest, the burden is that much greater on the U.S. government or the several states to demonstrate that their own interest is compelling. International law in this context is relevant both for what it prohibits, and for what it allows. International rules allowing derogation from, or suspension of, a protected right under certain circumstances would also be relevant to identifying a compelling governmental interest.[617] Thus, Louis Henkin has suggested that treaty exceptions allowing governments to override human rights protections in contexts of public emergency might be relevant to determining the existence of a governmental interest.[618]

In short, international *law* (as distinguished from comparative practice from the Western European tradition) has played a limited role in substantive due process analysis, to date. This likely is due, at least in part, to the fact that the international human rights regime is a relatively recent development.[619] But as in the Eighth Amendment context, its role could be more robust. To the extent that the substantive due process inquiry attempts to discern values of liberty fundamental to all free societies, the terms of widely ratified international treaties

613. *Id.* at 598 (Scalia, J., dissenting).

614. *Id.* at 604 (Scalia, J., dissenting).

615. *See* discussion *infra* Part V.B.

616. 485 U.S. 312 (1988).

617. United States v. Balsys, 524 U.S. 666, 695 n.16 (1998) (noting that the concept of an international privilege against self-incrimination is derogable under certain conditions).

618. Louis Henkin, *International Human Rights Standards in National Law: The Jurisprudence of the United States*, *in* ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS 189, 198 & n.39 (Benedetto Conforti & Francesco Francioni eds., 1997).

619. *See infra* note 684.

establishing basic rules for governmental treatment of people, such as the International Covenant on Civil and Political Rights and the Torture, Genocide, and Geneva Conventions, should be an appropriate sounding board. Widely ratified human rights conventions reflect a baseline of acceptable behavior for liberal and non-liberal states alike. Conversely, the circumstances in which such international treaties recognize exceptions to limits on governmental conduct should also be relevant to identifying the existence of governmental interests. But in neither case would international law be determinative of the question.

Furthermore, controversy over the Court's substantive due process analysis reaches far beyond the citation of foreign authority. As with the Eighth Amendment cases, to a large extent, the dispute over resort to foreign sources is simply one element in a larger dispute over the appropriate judicial role in these contexts. The Supreme Court recently reiterated its "reluctan[ce] to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended."[620] This Article does not urge an expansion of the Court's resort to substantive due process analysis. The point is simply that to the extent that the Court attempts to resolve whether a particular form of conduct "shocks the conscience" or is "implicit in the concept of ordered liberty," international human rights norms regarding the most basic obligations of the state toward the individual should be relevant to determining both what liberties the Constitution protects and what may constitute a compelling state interest.

6. *Procedural Due Process*

Finally, procedural protections—and especially the question of what process is "due" in both civil and criminal law contexts[621]—have also been informed by international rules and uniform foreign practice. We already have seen this in decisions addressing the procedural due process rights of immigrants, where the Court looked to sovereign power over aliens under international law to conclude that summary and unreviewable immigration determinations satisfied constitutional due process.[622] Dissents in two recent immigration cases suggest that at least some members of the Court continue to view international rules, and even "soft law" international norms, as relevant to the question of what process is due in the immigration context.[623] The Court has also looked to international rules regarding consular courts[624] and war powers[625] to reject claims of constitutional

620. Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) (holding that substantive due process does not obligate government to provide a safe workplace).

621. *Cf.* Twining v. New Jersey, 211 U.S. 78, 110-11 (1908) (observing that jurisdiction and notice were the "two fundamental conditions [of due process], which seem to be universally prescribed in all systems of law established by civilized countries").

622. *See* discussion *supra* Part II.B.2.b.i.

623. Demore v. Kim, 538 U.S. 510, 555 n.10 (2003) (Souter, J., dissenting) (invoking the United Nations High Commissioner for Refugees detention guidelines to argue that aliens were entitled a "minimum procedural guarantee"); Zadvydas v. Davis, 533 U.S. 678, 721-22 (2001) (Kennedy, J., dissenting) (citing guidelines for detention by the United Nations High Commissioner for Refugees to conclude that the procedural safeguards afforded by Congress went "far toward th[e] objective" of satisfying procedural due process).

624. *In re* Ross, 140 U.S. 453 (1891).

625. *Ex parte* Quirin, 317 U.S. 1 (1942). *See* discussion *supra* Part II.A.2.a.iii.

procedural protection in those contexts. The approach also was considered in the recent enemy combatant detention cases. The *Hamdi* plurality suggested that the due process right of an alleged citizen enemy combatant might be satisfied through a process akin to that provided for determining prisoner of war status under the Third Geneva Convention. In oral argument in *Rasul v. Bush*, Justice Breyer suggested a similar approach to the relationship between the basic Geneva Convention requirements and procedural due process.[626]

* * * * *

From the perspective of legitimacy, the Court's approach to the individual rights cases is consistent with the other uses of international law considered in this Article. The Court's approach in these cases comports with both constitutional text and the Court's longstanding interpretation of that text. Its willingness to look to international standards in this context is somewhat analogous to that of the "background principle" cases discussed in Part II.B; the Court reads constitutional terms ("just compensation," "involuntary servitude," "due process," or "liberty") as embodying, in part, a background international conception regarding the basic rights of human beings which is either universal, or is keyed to understandings of liberty in other mature liberal democracies. The Court's reliance on international law as an evolving standard in the Eighth Amendment and substantive due process cases is also consistent with its interpretive tests for those provisions, which are themselves evolutionary, as well as with its evolutionary approach to international law in other areas.

The Eighth Amendment and substantive due process cases are the most controversial in current scholarly debates regarding the relationship between international law and constitutional interpretation, and include *Roper*, *Atkins*, and *Lawrence*. However, unlike many of the cases addressed above, including the federalism and inherent powers cases, in which international law provided a significant part, if not all, of the rule of decision, international law in these cases is generally invoked secondarily to bolster a conclusion that the Court already finds warranted based on a domestic consensus. Comparative law is employed more frequently, at least in the due process cases, and with the possible exception of *Trop v. Dulles*,[627] the Eighth Amendment and substantive due process cases have looked to international and comparative law as a very supplemental source of authority. Far from providing the rule of decision, international authority in both contexts largely has been limited to supporting a perceived domestic consensus. This practice appears to be consistent with Justice Scalia's stated views on the subject, as discussed above. Thus, ironically, it is the context in which international law plays perhaps the weakest role in constitutional analysis that has provoked the greatest present controversy.

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626. Transcript of Oral Argument at *14, Rasul v. Bush, 542 U.S. 466 (2004) (Nos. 03-334 and 03-343), 2004 WL 943637 (Breyer, J.) (suggesting that the due process protections available to persons detained as enemy combatants should be informed by the tribunal proceedings for determining POW status contemplated by the Geneva Conventions). Thus, he reasoned, "the Geneva Convention comes in to inform the content of that due process." *Id.*

627. *See supra* Part II.C.4.

III. LESSONS FROM THE INTERNATIONAL CASES

This Part considers the implications of the cases examined above for the legitimacy of the use of international law in constitutional interpretation. As set forth more fully below, I argue as a threshold matter that the cases demonstrate a longstanding tradition of resort to international law to provide substantive meaning to constitutional provisions. The Court has looked to international law in various contexts throughout the nation's history. The cases firmly rebut the recent assertions that international law has nothing to say in constitutional interpretation and that resort to international law in this area is "new." They also indicate that international law has entered constitutional law through the traditional tools of constitutional analysis.

The cases also offer some guidelines regarding the relationship between international law and constitutional interpretation. They refute, for example, the contention of some scholars that resort to international law can be meaningfully limited by the subject matter of particular constitutional provisions. They indicate that the Court at times has looked to international law as binding, rather than merely persuasive, authority. The Court has also generally viewed international law as an evolving concept and often has applied contemporary rules of international law, rather than limiting the role of international law to norms prevailing at the nation's founding.

However, the cases pose a number of difficulties for current advocates of international law in constitutional analysis. The cases do not reveal any particular conscious methodology regarding when resort to international law is appropriate, and the Court's application of international law is, at times, sloppy or opportunistic. Furthermore, and contrary to the views of some proponents of the practice, resort to international law in constitutional analysis does not invariably promote individual rights. The Court frequently has invoked international law to expand governmental power and at times has employed international law to distort or deny constitutional protections. The cases, in short, underscore the relevance of international law while raising significant questions about its appropriate use.

A. *Longstanding Resort to International Law*

The cases considered in Part II demonstrate a longstanding tradition of relying on international law to inform constitutional meaning. Throughout the nation's history, Supreme Court majorities have resorted to international law as a source of constitutional authority and have found that enterprise legitimate, even if not entirely without controversy. Justices prior to those on the current Court who have resorted to international law include John Marshall, Joseph Story, Roger Taney, Stephen Field, Samuel Miller, Joseph Bradley, John Marshall Harlan, Horace Gray, Melville Fuller, Henry Brown, Edward White, George Sutherland, Charles Evans Hughes, Benjamin Cardozo, Hugo Black, Felix Frankfurter, Robert Jackson, Earl Warren, and William Brennan. The Court has invoked international law in contexts ranging far beyond those Eighth Amendment and substantive due process cases that have been the focus of current debates—including cases limiting the extraterritorial scope of constitutional

protections, as well as those involving the treaty and war powers, citizenship, immigration, authority over Native Americans, the powers to borrow money, to tax, and to exercise eminent domain, the definition of involuntary servitude, and state sovereign immunity, personal jurisdiction and full faith and credit.

1. *Modes of Constitutional Interpretation*

The Court's invocation of international norms does not appear to turn on any particular approach to constitutional interpretation. Nor is the use of international law some newly developed additional tool of constitutional analysis, such as "transjudicialism."[628] Instead, international authority has entered constitutional analysis through the ordinary modes of constitutional construction: original understanding, text, structure, history, doctrine, and prudentialism. Each of these methodologies has led the Court to look to international law in certain cases, but no particular constitutional approach is predominant. In other words, international law has functioned in constitutional analysis much like the use of history or the common law.

Thus, at times, *original understanding* may suggest resort to a particular international rule, as the Court implied in upholding prosecution before consular courts abroad in *In re Ross*[629] or in invoking public law choice of law principles in the full faith and credit context.[630] *Structure* appeared to play a role in the Court's approach in deriving an inherent national power to exclude aliens in *Chae Chan Ping*,[631] since the Court concluded that the national government's possession of "all" the constitutional foreign affairs powers necessarily implied that the government would also enjoy immigration powers recognized by international law. The Court invoked both *text* and *doctrine* in the Eighth Amendment and substantive due process cases to invite consideration of international standards in identifying protected normative values of cruel and unusual punishment and liberty. *Prudential* considerations and *originalism* supported resort to the laws of war in construing the President's power to seize enemy property in *Brown v. United States*,[632] as did *history* in the decision upholding the use of military tribunals in *Ex parte Quirin*. On other occasions, the Court does not attempt to justify its resort to international authority through any traditional mode of constitutional analysis, but appears to take for granted the legitimacy of the enterprise.

2. *Subject Matter*

The cases demonstrate that the *subject matter* of constitutional provisions does not offer a meaningful basis for determining when resort to international law is legitimate. Some participants in the current debate have suggested that international and foreign authority may be relevant only where a constitutional provision textually invites consideration of international law or where the Court is

628. *See supra* note 15.
629. 140 U.S. 453 (1891).
630. *See supra* Part II.B.3.b.
631. 130 U.S. 581 (1889).
632. 12 U.S. (8 Cranch) 110 (1814).

construing a "foreign," rather than "domestic" constitutional clause.[633] This approach is unsatisfactory for several reasons.

First, "textual invitation" has been a justification for all the Court's applications of international law other than in the inherent powers cases. Whether the text directly references a concept of international law, or invites consideration of international law as a background interpretive tool, as in the federalism cases, text has formed part of the justification for considering international rules. Concepts such as "liberty" and "cruel and unusual" punishment likewise reasonably invite consideration of fundamental values of the international community, particularly given the Framers' natural law orientation. Resort to international law in interpreting individual rights provisions is consistent with the conception of the Constitution as a depository for fundamental rights. Thus, overtly "foreign" clauses are not the only constitutional provisions that invite reference to international law, and the relevance of international law is not limited to such contexts.

Second, it is not obvious from the text and purpose of the Constitution that even foreign affairs clauses invariably should be construed in light of international rules. The treaty power is an obvious candidate for application of international rules, since treaties are themselves principal instruments and repositories of international law and necessarily address U.S. interaction with foreign nations. It would be more than odd, therefore, to approach questions relating to the treaty power with domestic rules utterly uninformed by international standards, and such an approach could raise diplomatic conflicts with other nations. Because wars generally involve conflicts with foreign states, the war powers also are an area where resort to international rules might seem particularly appropriate to ensure that the U.S. warmaking authority comports with that of other nations.

Even with respect to the treaty and war powers, however, resort to international standards is not invariably appropriate, given the Framers' overt desire to constrain foreign relations powers recognized under then-existing standards of international and public law. As noted above, provisions such as the Suspension Clause and the Third Amendment's prohibition against quartering of soldiers in peacetime[634] were designed to limit sovereign prerogatives in warmaking, as were structural distributions of authority between the President, Congress, and the courts. Likewise, constitutional structural and individual rights provisions may limit the substantive scope of the U.S. treaty making and war powers to some subset of the areas allowable under international law. An interpretive approach that presumes that U.S. governmental authority in warmaking and elsewhere comports with powers allowable under international law and exercised by other nations thus could employ international law to systematically bias constitutional interpretation in favor of governmental power at the expense of individual rights.

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633. *See supra* note 33.

634. U.S. CONST. amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."). The amendment may have pushed forward an evolving international norm. *See* VATTEL *supra* note 46, at 296 ("When the soldier is not in the field, he must necessarily be provided with quarters. The burden, in such case, naturally falls on housekeepers: but as that is with many inconveniences, and proves very distressing to the citizen, it becomes . . . a wise and equitable government, to ease them of it as far as possible."); Lee, *supra* note 318, at 1065.

Third, efforts to limit the application of international law to "foreign" clauses also can be questioned on their face, given the longstanding debate over whether constitutional authorities can be meaningfully categorized as "domestic" or "foreign."[635] Many "local" actions may be informed by international norms[636] or may have significant foreign affairs implications, as the Court's recent jurisprudence suggests.[637]

Finally, the Supreme Court has not confined its resort to international law to clauses that overtly reference foreign relations. To the contrary, in addition to the Eighth Amendment and substantive due process cases, the Court has looked to international law in construing provisions such as the First Amendment in *Boos v. Barry*, the Thirteenth Amendment in *Robertson v. Baldwin*, and the Just Compensation Clause, none of which facially invite resort to international law. The decisions in *Juilliard v. Greenman* and *Kohl v. United States*[638] looked to the sovereign authority of states for a power to borrow money and the power of eminent domain.[639] The most interesting line of decisions for this discussion may be the federalism cases, in which the Court analogized from international rules regarding relations among sovereigns to define structural relationships among the several states and with the national government.

One would not have to agree with the use of international law in all the areas addressed in the Court's cases to acknowledge that in at least some unpredictable areas, the approach seemed appropriate. Nevertheless, constitutional provisions that do not implicate foreign relations but have been construed in light of international law raise provocative questions regarding appropriate use. How is one to determine whether a particular constitutional provision invites consideration of international law or establishes a distinctly domestic rule? Determining the relationship between international law and constitutional text becomes even more complex as both international law and constitutional traditions evolve. The cases suggest that in the early nineteenth

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635. Ernest Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 184 (2001) (discussing potential impact of state activities for foreign relations). The question also was of concern to the Framers. Alexander Hamilton observed "the immense difficulty, if not impossibility" of distinguishing "between cases arising upon treaties and the laws of nations and those which may stand merely on the footing of municipal law." THE FEDERALIST NO. 80 (Alexander Hamilton).

636. *See generally* Resnik, *supra* note 25 (examining the "domestication" of international and foreign norms in local U.S. policies and movements).

637. *See, e.g.*, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003) (invalidating California Holocaust Victim Insurance Relief Act as infringing on U.S. foreign relations); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000) (invalidating Massachusetts's law regarding Burma as infringing on foreign relations); Zschernig v. Miller, 389 U.S. 429 (1968) (invalidating Oregon inheritance law as infringing on foreign relations). Certain U.S. death penalty practices, for example, have significant foreign relations implications. Foreign states consistently have objected to certain death penalty practices, such as the execution of juveniles, and have refused to share intelligence, cooperate with U.S. anti-terrorism operations, and extradite individuals facing capital charges to the United States. U.S. treatment of foreign nationals on death row has resulted in three suits against the United States in the International Court of Justice. *See* Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 1 (Mar. 31); LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27); Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 426 (Nov. 10). On the other hand, the Court has downplayed the foreign affairs implications of some local actions that directly impact foreign relations, such as State taxation of foreign corporations. *See* Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298 (1994).

638. 91 U.S. 367 (1875).

639. *Id.* at 371-72.

century the Commerce and Contract Clauses were understood as embodying concepts of international law, but that tradition faded as domestic concerns became predominant in these areas. Longstanding international law rules nevertheless continue to address questions such as territoriality, international commercial relations, war and treaty powers, the rights of aliens and indigenous peoples, and slavery. Moreover, international law has evolved to address new areas of domestic economic, social, and political life. Louis Henkin has argued that international human rights law may be relevant to determining the meaning of a wide range of constitutional rights, including equal protection, unreasonable searches and seizures, due process and fair trials, as well as to determining the permissible limitations that governments may impose on such principles and the possible scope of governmental interests.[640] Thus, international law now is arguably relevant to more, and different, constitutional questions than in the past. There will, of course, be many constitutional issues on which international law does not speak, particularly those regulating the internal processes of the national government. But where it does, subject matter does not provide simple categorical answers to the question of when resort to international law is appropriate, and determining whether a constitutional provision addresses a concept of international law or "invites" consideration of international law is an increasingly elusive task.

In short, the cases indicate that resort to international law in constitutional interpretation has a lengthy doctrinal pedigree. The cases firmly rebut two arguments predominant in contemporary debates: that international law has nothing to say about constitutional analysis, and that resort to international law is new. They also demonstrate, at a minimum, that the Constitution is not a per se barrier to consideration of international law and that resort to international law historically has not been limited either to particular subject matters or to any particular mode of constitutional analysis. Instead, the cases affirm that international law is part of our constitutional canon, and may properly inform our founding document in a variety of circumstances, based on the range of traditional modes of constitutional construction.

B. *International Law as Binding*

One striking aspect of the Court's approach to constitutional interpretation is the extent to which the Court has based its consideration of international law on the binding character of that law. Most modern commentators who support consideration of international law in constitutional analysis underscore that the relevance of international law does not depend on that law's character as imposing binding legal obligations on the United States. The authority of international law derives instead from its persuasive force.[641] Certainly, this has been true in the Court's most recent decisions in *Roper*, *Lawrence*, and *Atkins* and the plurality in *Grutter*. The Court's historical practice, however, demonstrates that one justification for looking to international law *has* been the binding legal obligations international law imposes. This is most explicitly the situation in cases

640. Henkin, *supra* note 618, at 198.

641. *See, e.g.*, Jackson, *supra* note 25, at 114.

where international law creates a governmental interest—where international law is implicated because of the obligations it imposes on domestic governmental actors, as in *Boos v. Barry*.[642] Cases involving the Offenses, Treaty, and War Clauses also are motivated in part by the facts that the United States is party to mutually obligatory rules in the international community, and that failure to respect those legal obligations can provoke trauma and strife in the international system. The role of international law as binding is more ambiguous in the inherent powers and federalism cases, which are motivated in part by the assumption that the national and state governments are bearers of sovereign rights and duties. The inherent powers cases could also be understood, however, as looking to international rules and practices as purely persuasive authority regarding the powers of nation-states, and the more lasting justification for consideration of international law in the federalism cases appears to proceed from a similar analogy: international rules and particularly non-binding principles of public law are employed to the extent that they are a persuasive model for organizing interstate relations. Finally, most of the individual rights cases look to international law and foreign practice as purely persuasive evidence of fundamental human values.

C. *International Law as Evolving*

The cases also are notable for applying international law as an evolving body of doctrine, rather than simply looking to international rules prevailing at the nation's founding. The Court often appears to view contemporary international rules as the appropriate normative reference and purports to adopt those prevailing international rules.[643] *Trop v. Dulles* and the other Eighth Amendment cases read the Cruel and Unusual Punishment Clause as establishing an evolving standard that requires consideration of contemporary norms. But the Court consistently applies international law as an evolving body of doctrine in other contexts as well. Cases addressing the government's war powers, for example, reliably invoke the contemporary rules of war.[644] The inherent powers immigration and territory cases applied late nineteenth-century principles regarding authority over aliens[645] and acquired territories,[646] and in *United States v. California*,[647] Justice Black expressly applied modern international rules regarding the three-mile territorial sea zone, which had evolved after the Constitution was drafted.

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642. 485 U.S. 312 (1988); *see supra* Part II.C.3.

643. *See, e.g.*, Cunard S.S. v. Mellon, 262 U.S. 100, 122 (1923) ("[The definition of territorial jurisdiction] *now* is settled in the United States and recognized elsewhere . . . .") (emphasis added).

644. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507 (2004); *Ex parte* Quirin, 317 U.S. 1 (1942); Arver v. United States, 245 U.S. 366 (1918); Prize Cases, 67 U.S. (2 Black) 635 (1863). Justices at times have expressly recognized the evolving nature of the international norm being applied. In *Brown v. United States*, for example, Chief Justice Marshall argued that modern international law had "mitigated" the traditional rule of wartime seizures, and that the power under the Constitution should be construed to comport with this evolving standard. Brown v. United States, 12 U.S. (8 Cranch) 110, 122 (1814) (relying on "mitigations" of the laws of war); *accord id.* at 145-47 (Story, J., dissenting) (applying "the modern law of nations").

645. *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698 (1893); Chae Chan Ping v. U.S., 130 U.S. 581 (1889).

646. Jones v. United States, 137 U.S. 202, 212 (1890).

647. 332 U.S. 19, 32-35 (1947).

Treating international law as an evolving concept is consistent with the fact that the Court has not consistently relied on strict originalist justifications for its resort to international law. An originalist approach would contend that the Framers understood a particular constitutional provision to incorporate international norms. This argument has appeared, with greater or less force, in many decisions, including those involving the Full Faith and Credit Clause and the Supreme Court's original jurisdiction.[648] A *static* originalist approach might also seek to confine the constitutional doctrine to whatever international rule existed at the founding. In one of the few explicit examples of this approach to international law in the Court's decisions, Chief Justice Taney argued in *Dred Scott* that at the framing, slaves and their descendents had been understood throughout the civilized world as persons who could not be citizens of any sovereign. He further maintained that the role of international opinion was fixed at the founding: no subsequent change in values, either in the United States or abroad, could alter the constitutional rule.[649]

An alternative, *organic* originalist conception, however, would view the Framers as having understood that the United States would be a member of the international community and governed by its rules, that the Constitution and other U.S. laws should be construed against a backdrop of international law (either generally or with respect to particular clauses), and that those international norms would evolve as international law developed. In other words, an organic originalism would view the Framers as understanding that the Constitution should be interpreted in light of an evolving body of international law.[650]

To the extent that the Court is inspired by an originalist conception in its invocation of international law, it appears to have adopted the latter, organic approach. The Court has made almost no effort to limit its analysis to the international rules that prevailed at the framing. Even when the Court has expressly offered an originalist justification for looking to international law, as it did in cases ranging from the power to establish consular courts abroad in *In re Ross*[651] and the power to issue legal tender in *Juilliard v. Greenman*,[652] the Court generally appears to assume that international law has carried the rule forward

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648. *See, e.g.*, Johnson v. Eisentrager, 339 U.S. 763 (1950) (addressing habeas corpus rights); Dorr v. United States, 195 U.S. 138 (1904) (addressing the Territory Clause); Juilliard v. Greenman, 110 U.S. 421 (1884) (addressing the power to borrow money); Holmes v. Jennison, 39 U.S. (14 Pet.) 540 (1840) (addressing the Compact Clause); Brown v. United States, 12 U.S. (8 Cranch) 110 (1814) (addressing the War Declaration Clause).

649. Scott v. Sandford, 60 U.S. (19 How.) 393, 410 (1857); *see supra* Part II.A.2.c. Justice Ginsburg has criticized this approach as "frozen-in-time." Ginsburg, A Decent Respect, *supra* note 6, at 14.

650. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004) (recognizing international law as evolving); Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 43 (1934) ("The framers of the Constitution did not contemplate that the maritime law should remain unalterable."); *cf. Discussion of William Hurst, The Role of History, in* SUPREME COURT AND SUPREME LAW 59, 61 (Edmond Cahn ed., 1954) (statement of Paul A. Freund) (observing that constitutional interpretation should recognize that institutions such as habeas corpus involve an evolutionary or "dynamic element which itself was adopted by the framers"); Henry Paul Monaghan, *Doing Originalism*, 104 COLUM. L. REV. 32, 37-38 (2004) (recognizing, in the common law context, the evolutionary nature of the common law and noting that accordingly "[e]ven a strict form of originalism . . . must acknowledge that the original understanding of some clauses could be fairly read to have included a background assumption of further judicial development").

651. 140 U.S. 453 (1891).

652. 110 U.S. 421 (1884).

unchanged to the date of the case, and may cite contemporary practice in support of this point.[653] The older Full Faith and Credit Clause cases likewise purport to apply the rule prevailing at the time of the framing, but the Court also assumes this remains the established international rule. In other cases, the Court simply invokes the modern international law rule, as it did in *Hamdi*[654] and other war powers cases, treaty cases, admiralty cases, and the original jurisdiction case of *United States v. California.*[655]

Gerald Neuman has observed that citations to Vattel in the Court's jurisprudence could suggest an originalist basis for invoking international law, since Vattel was the most influential international law publicist during the founding era.[656] The Court generally accompanies citations to Vattel with citations to more contemporary international law writers, however, as it did in *Jones v. United States*,[657] *Ekiu*,[658] and *Fong Yue Ting*.[659] In upholding the draft in *Arver v. United States*,[660] for example, the Court cited Vattel for the proposition that the right to compel military service lay at "the very conception of a just government,"[661] but also concluded that this remained the contemporary rule, as indicated by nearly universal modern practice.[662]

Moreover, the Court has not consistently attempted to justify its practice in terms of original understanding with respect to the specific constitutional clause at issue. As frequently, the Court appears to have operated against a general background understanding that international norms can inform constitutional meaning unless some aspect of the constitutional design (text, longstanding interpretation, etc.) clearly differentiates the United States from international norms.

In other words, the Court consistently has resorted to contemporary international rules when it looks to international law in cases across the constitutional spectrum. This tradition suggests that the Court's approach in the individual rights cases is consistent both with its understanding of those particular constitutional provisions as embodying evolving norms, and with its overall approach to international law. It suggests that the Court's use of contemporary international rules in the Eighth Amendment and substantive due process cases does not reflect so much a peculiar effort by certain Justices to remake American society according to their particular social vision, as it reflects more deeply rooted assumptions about the propriety of resort to contemporary international rules.

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653. *See also, e.g.*, Johnson v. Eisentrager, 339 U.S. 763 (1950).

654. 542 U.S. 507 (2004)

655. 332 U.S. 19 (1947).

656. *See* Neuman, *supra* note 25, at 83.

657. 137 U.S. 202, 212 (1890) (citing Vattel, Wheaton, Halleck, Phillimore, and Calvo for the authority to govern acquired territory).

658. 142 U.S. 651 (1892).

659. 149 U.S. 698 (1893); *see also* Kohl v. United States, 91 U.S. 367, 371-372 (1875) (citing Vattel for the proposition that "[t]he right [of eminent domain] is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law").

660. 245 U.S. 366 (1918). The case construed the powers to declare war and raise armies. U.S. CONST. art. I, § 8, cls. 11, 12.

661. 245 U.S. at 378.

662. *Id.* at 378 n.1 (citing the practices of thirty-six countries). For other cases citing both Vattel and later writers, see Grover & Baker Sewing Maching Co. v. Radcliffe, 137 U.S. 287 (1890); United States v. Pac. R.R., 120 U.S. 227 (1887); Prize Cases, 67 U.S. (2 Black) 635 (1863).

D. *Opportunistic Use of International Law*

Even if one accepts the general proposition that international law can and should legitimately inform constitutional analysis in appropriate circumstances, aspects of the Court's approach to international law raise cautionary flags. The use of international law can be sloppy, misguided, and even opportunistic. At times, the Court's identification of the international rule simply has been incorrect. A number of commentators, for example, have noted that the strongest version of the discovery doctrine asserted by Chief Justice Marshall in *Johnson v. M'Intosh*[663] was no longer recognized as legitimate when that case was decided (if acquisition of territory by discovery alone was ever clearly accepted under international law).[664] It is unclear whether the Court properly invoked international law in the immigration cases, since a number of international writers recognized greater protections for denizens and long term residents that the Court failed to acknowledge.[665] Commentators also have noted that the principle of strict territorial limits applied in *Pennoyer*[666] had eroded by the time of that decision.[667]

At other times, the Court's methodology in identifying relevant international authority appears flawed. Here, perhaps, the most egregious example is Justice Brown's analysis of whether coercing work from seamen constituted a longstanding exception to the Thirteenth Amendment. Brown did not err in considering international standards. There is nothing patently incorrect about examining international practice in determining the meaning of involuntary servitude. Indeed, because the prohibitions on slavery and the slave trade largely developed first as norms of international law, such consideration could be particularly appropriate. Justice Brown may even have been correct in concluding that, due to the peculiar necessities of employment at sea, restrictions on sailors' ability to terminate their employment might constitute a legitimate exception to involuntary servitude. Instead, Brown failed by looking to the practices of states where slavery was *lawful* to try to identify a commonly held exception to involuntary servitude. He failed in his choice of sources. The proper inquiry should have focused on the extent to which countries with analogous prohibitions on involuntary servitude recognized an exception for coercing labor from seamen. Even Brown's modern examples suggested that foreign countries did not recognize the exception that he sought.[668] The case thus illustrates the importance of determining what constitutes valid international authority, and what authority is appropriate for consideration regarding any particular question. Just as prior U.S. practice may not be relevant to the construction of a constitutional rule that was

663. 21 U.S. (8 Wheat.) 543 (1823).

664. *See supra* note 263.

665. *See supra* note 249.

666. 95 U.S. 174 (1877).

667. *See* Burnham v. Superior Ct. of Cal., 495 U.S. 604, 609 (1990) (plurality opinion); Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956); Geoffrey C. Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 253-60; Juenger, *supra* note 325, at 1029 (noting that "long before Justice Field decided *Pennoyer*, the English . . . had already given up on requiring service in the forum").

668. Some of the states offered as modern examples, such as France, no longer allowed seamen who abandoned ship to be imprisoned, or only allowed for imposition of damages.

adopted to alter that practice, a constitutional provision that was intended to establish a rule *contrary* to practices commonly pursued by despotic states should not be read to comply with those practices.

The Court's methodology for identifying international norms is also deeply flawed to the extent that it selectively invokes the practices of individual foreign states as reflecting an international or universal consensus, as it did in upholding the power to borrow money in *Juilliard v. Greenman*.[669] To the extent that the Court finds a norm persuasive as embodying a uniform international consensus, it should make reasonable efforts to substantiate that claim. Likewise, to the extent that the Court invokes the views of some subset of the international community as international or comparative law, it should acknowledge the geographic limits of that consensus, as the *Lawrence* Court did when it invoked the law in force within the Council of Europe.[670]

Finally, at times it appears that although the Court may have properly construed the international rule, its constitutional methodology in applying the rule is problematic. The Court's assumption in the later *Insular Cases* that the Framers intended the Territory Clause to allow territories to be governed as colonies under international law,[671] for example, seems improbable given the Founders' desire to reject the authoritarian colonialism of England[672] and the decades of contrary doctrine.[673] Nor is it clear that international and public law principles were always the appropriate model for the personal jurisdiction and other federalism cases.

The fact that international law can be abused in constitutional analysis does not distinguish it from other tools of constitutional interpretation. But, here, as with other interpretive mechanisms, it should go without saying that legitimate resort to international standards in constitutional analysis should involve a determined effort to accurately construe and apply international law and to meaningfully validate claims of widespread state practice.

E. *International Law and Limiting Individual Rights*

In sharp contrast to the assumptions of both supporters and opponents of using international law in constitutional analysis, international law has played a decidedly mixed role with respect to advancing individual rights. Certainly, international law does not invariably promote individual rights. To the contrary, international law has been applied both to enhance governmental authority and to limit the scope of individual constitutional protections.

The Court's jurisprudence has undermined individual rights in four ways. First, at times international principles of territorial jurisdiction have been read into

669. 110 U.S. 421 (1884).

670. Lawrence v. Texas, 539 U.S. 559, 573 (2003).

671. Dorr v. United States, 195 U.S. 138, 145-46 (1904).

672. Gouverneur Morris did later express such an opinion, but noted that his view was not necessarily shared by the other drafters. *See* Letter from Gouverneur Morris to Henry W. Livingston (Dec. 4, 1803), *in* 2 JARED SPARKS, THE LIFE OF GOUVERNEUR MORRIS 192 (1832); *see also* Cleveland, *supra* note 66, at 167 n.1148.

673. *See, e.g.*, Scott v. Sandford, 60 U.S. (19 How.) 393, 446 (1857) ("There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies . . . . [N]o power is given to acquire a Territory to be held and governed permanently in that character.").

the Constitution to limit the extraterritorial application of individual rights, while not limiting the extraterritorial operation of governmental powers. Such a practice systematically employs international law to skew the Constitution against protection of rights when the government acts abroad.[674]

Second, in cases in which the Court has looked to international law to define the scope of governmental power, the Court on occasion has failed to recognize and apply limits that international law also imposed. This approach particularly characterized the inherent powers cases. In holding that the government had absolute authority under international law to exclude or deport aliens in *Chae Chan Ping*[675] and *Fong Yue Ting*,[676] for example, the Court refused to acknowledge the limitations that international law placed on the exercise of this authority over denizens and other long-term resident aliens.[677]

Third, to the extent that the Court has invoked international law to support broad governmental power, the Court at times has construed that power as narrowing or overriding other constitutional protections. In such cases, invocation of international law has been accompanied by a parallel unwillingness to respect or enforce constitutional rights. The approach is visible in some war powers cases as well as in the immigration and Indian inherent powers cases. In these areas, the Court at times elevated international authority to a power so plenary that it appeared largely unlimited by due process, equal protection, just compensation, or other constitutional rights. Likewise, in the *Insular Cases*, although the Court ultimately held that fundamental constitutional rights applied to territorial governance, the Court nevertheless employed international rules regarding power over territories to severely limit those constitutional protections.

Finally, where the Court has invoked international law and practice directly in construing individual rights provisions, rather than in construing governmental powers, the effect frequently has been to deny protection. One example is Justice Brown's construction of the Thirteenth Amendment in *Robertson v. Baldwin*.[678] *In re Ross*[679] upheld application of the treaty power to establish consular courts abroad, and then applied international principles of territoriality and international practice to deny Fifth and Sixth Amendment protections. In the Takings cases, international law has been applied to deny payment of just compensation.[680] In *Boos v. Barry*,[681] the government's claim was that U.S. international obligations could warrant dilution of traditional First Amendment protections. Even in the substantive due process cases, international and comparative practice has been invoked to deny claimed individual rights as well as to protect them.[682] This is due in part to the Court's search for principles fundamental to free societies as the

674. *See supra* Part II.B.1.
675. Chae Chan Ping v. United States, 130 U.S. 581 (1889).
676. Fong Yue Ting v. United States, 149 U.S. 698 (1893).
677. *See supra* note 249.
678. 165 U.S. 275 (1897).
679. 140 U.S. 453 (1891).
680. *See supra* Part II.C.1.b.
681. 485 U.S. 312 (1988).
682. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986) (Burger, C.J., concurring); Palko v. Connecticut, 302 U.S. 319 (1937); Hurtado v. California, 110 U.S. 516 (1884); *cf.* Reynolds v. United States, 98 U.S. 145, 164 (1878) ("Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.").

touchstone for defining due process rights. If the question whether a right is fundamental turns on whether *no* fair system of government denies that right, as suggested in *Palko*,[683] then the existence of only a few contrary foreign examples can undermine a claim of right, while near-uniform acceptance would be required for the right to be recognized. The Court's substantive due process test, in other words, places a finger on the scale in favor of denying rights.

The observation that the Court's approach to international law has frequently been rights-diluting is subject to the caveat that many of the cases examined here were decided when neither international law nor the constitutional provisions at issue were understood to impose robust limits on governmental power. The Court's older decisions, and particularly those decided before the rise of the modern international human rights regime,[684] were adopted during a time when international law imposed substantially fewer limits on sovereign authority over individuals than are recognized today. The older cases also were decided during a period when the imposition of *constitutional* individual rights to constrain governmental action was rare—outside the right of freedom of contract.[685] The modern development of concepts such as equal protection and due process was still decades away. Thus, the older cases may reflect, not so much abuse of international norms to dilute constitutional rights, as the overall weaker state of individual rights in the era.

The observation is also qualified by the fact that, in some cases, Justices have recognized the limitations imposed by international law and have enforced those limits. *Holmes v. Jennison*[686] and *De Geoffrey v. Riggs*[687] portrayed international norms as limiting the scope of the federal treaty power. *Brown v. United States*[688] employed international law to limit executive war powers, at least in the absence of specific authorization from Congress. Justice Story's dissent in *Brown* likewise asserted in dicta that while the President could exercise all powers authorized by the law of nations, he could not confiscate enemy *debts*, since this was not allowed by international law.[689] In short, the war powers imputed to the President from international law were limited to the scope of those international rules. The *Cunard* majority construed the Eighteenth Amendment in light of international law principles of territoriality to deny the application of prohibition

683. Palko v. Connecticut, 302 U.S. 319, 325-26 (1937).

684. It is important to note that international human rights are not a new endeavor, and that international law has always imposed limits on governments' ability to act with regard to individuals, particularly foreign nationals. However, the proliferation of international regulation in general, and of international human rights norms in particular, in the post-World War II period have expanded the constraints imposed by international treaties and customary rules on sovereign authority in a wide range of areas, including treatment of a country's own nationals.

685. Justice Brown's opinion in *Robertson v. Baldwin*, 165 U.S. 275 (1897), for example, becomes less surprising in light of the fact that Brown also was the author of *Plessy v. Ferguson*, 163 U.S. 537 (1896), and declined to find any applicable constitutional protections in *Downes v. Bidwell*, 182 U.S. 244 (1901). Thus, Brown's tortuous interpretive approach in that case may have had less to do with his theory of the relationship between international law and constitutional protection than with his consistently restrictive view of the scope of individual liberties.

686. 39 U.S. (14 Pet.) 540 (1840).

687. 133 U.S. 258 (1890).

688. 12 U.S. (8 Cranch) 110 (1814).

689. *Id.* at 145-46 (Story, J., dissenting).

rules to U.S. vessels outside of U.S. territorial waters.[690] *Perry v. United States*[691] looked to international rules to conclude that the national government could not disavow its debts. Among the federalism cases, *Pennoyer v. Neff*[692] notably limited the scope of state judicial authority based on international rules of sovereign territorial jurisdiction.[693] Courts have suggested that the concept of "public use" under international law could limit the government's power to take property.[694] Other individual rights cases such as *Trop v. Dulles*,[695] *Thompson v. Oklahoma*,[696] *Lawrence*,[697] and *Roper*[698] invoked international rules and practice in support of constitutional constraints on governmental power. The inherent powers cases rarely acknowledged limits on governmental power. However, in *Worcester v. Georgia*,[699] Chief Justice Marshall retreated from his broad articulation of the discovery doctrine in *Johnson v. M'Intosh*[700] and emphasized the limits that international rules imposed—through the constitutional structure—on Georgia's authority over the Native Americans.

To the extent that recognition of a rule in international law is used to legitimate a parallel constitutional norm, principled application of international law in constitutional analysis requires that a court also recognize the limitations imposed by international law when it looks to international rules to derive constitutional power. It also requires that international law should not be employed to undermine or distort the individual rights and structural protections that the Constitution was designed to preserve. These questions will be explored further in Part V.

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In sum, the Supreme Court's historical practices provide lengthy doctrinal support for the relevance of international law to constitutional adjudication. Given the Court's extensive reliance on international authority in certain areas, such as war powers, it would be difficult to consider many modern constitutional questions without resort to international norms. The content of other governmental powers, such as modern powers over immigrants and Indians, also substantially derives from international law. The cases also indicate that international law has been treated as an evolving body of doctrine, in a manner consistent with the Court's approach in the Eighth Amendment and substantive due process cases.

However, the cases reveal no overarching principle governing when the Court should resort to international law as an authoritative interpretive tool. Other

690. Cunard S.S. Co. v. Mellon, 262 U.S. 100 (1923). In *Cunard*, Justice Sutherland would have applied international law under the Eighteenth Amendment to limit the government's authority to subject foreign vessels to U.S. prohibition laws. *See id.* at 132 (Sutherland, J. dissenting).

691. 294 U.S. 330 (1935).

692. 95 U.S. 714 (1877).

693. *See* discussion *supra* Part II.B.3.a.

694. *See* discussion *supra* Part II.C.1.

695. 356 U.S. 86 (1958).

696. 487 U.S. 815 (1988).

697. 539 U.S. 559 (2003).

698. 125 S. Ct. 1183 (2005).

699. 31 U.S. (6 Pet.) 515 (1832).

700. 21 U.S. (8 Wheat.) 543 (1823).

than the justifications for the use of international law considered in Part II, the cases also make no effort to reconcile the Court's use of international law with principles of democratic governance. They leave unanswered the question of *when* resort to international law is appropriate, and *how* relevant international law principles should be properly reconciled with the nature, structure, and terms of our domestic constitution. The remainder of this Article begins to address these difficult normative questions by considering countermajoritarian criticisms of the use of international law. It then offers four tentative principles to guide the application of international law in constitutional interpretation, and illustrates the operation of those principles with examples from *Hamdi v. Rumsfeld* and *Roper v. Simmons*.

IV. LEGITIMACY AND THE DEMOCRACY DEFICIT

The Court's decisions involving the use of international law make little or no effort to explore concerns about the countermajoritarian implications of the practice. A number of objections have been posed recently to the use of foreign, *comparative* law sources in constitutional analysis, such as the difficulty of drawing accurate comparisons across nations and concerns about selectivity and expanding discretion in judicial decisionmaking. However, the primary objection raised to consideration of *international* law in constitutional interpretation is that the practice suffers from a democracy deficit.

This objection appears to have two dimensions: The first raises the classic countermajoritarian concern, voiced prominently by Alexander Bickel, that constitutional adjudication violates principles of democratic governance by supplanting the majoritarian wishes of the people—expressed through their duly elected representatives—with the views of unelected and unaccountable judges.[701] Defenders of the domestic enforcement of international law through the common law have bowed to this concern by emphasizing that judicial decisions enforcing international law as federal common law may be overturned by the legislature.[702] A congressional fix, however, is not available when courts rely on international law in constitutional analysis. Nonetheless, this general countermajoritarian concern is readily rebutted, since to the extent that the Constitution imposes limits on legislative decisionmaking through individual rights provisions and the structures of federalism and separation of powers, judicial enforcement of those rights and relationships is necessarily nonmajoritarian. Courts engage in constitutional analysis with caution, since their decisions bind the political branches. But in this sense, constitutional analysis that considers international law is no more, or less, countermajoritarian than any other. Moreover, the fact that judicial review is nonmajoritarian does not mean it is undemocratic. As John Hart

701. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 20 (1962) (describing judicial review as the power to interpret the Constitution "against the wishes of a legislative majority").

702. *See, e.g.*, Anupam Chander, *Globalization and Distrust*, 114 YALE L.J. 1193, 1210 (2005) ("[I]t remains open to Congress to disagree with any judicial pronouncement of international law."); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 383-84 (1997) (responding to concerns about the undemocratic character of customary international law by arguing that "federal common law decisions can be overturned by Congress").

Ely explained, structural divisions of governmental authority and protections for individual rights are designed precisely to constrain raw majoritarianism to ensure more effective democratic governance.[703]

The second aspect of the "democratic deficit" concern regarding the use of international law is more on point, but ultimately is equally unsatisfying. This is the objection that international law is neither a product of American democratic processes nor a part of American "traditions." Instead, so the argument goes, it is created by foreigners through undemocratic processes and thus is alien to the American constitutional tradition.[704] The response to this concern is threefold.

First, emphasis on the "foreign" origins of international law overlooks the fact that the United States is a major and active participant in the creation, development, and interpretation of international law. The United States was the primary instigator behind the establishment of the UN system and the creation of modern international treaties ranging from human rights[705] and humanitarian law to international intellectual property and international trade.[706] In the post-9/11 world, the United States has maintained that the adoption of the Bush preemption doctrine does not breach, but rather alters, traditional rules regarding the international use of force. The familiar quip that 'other nations violate international law while the United States just creates precedent' may overstate the case, but it contains an important kernel of truth regarding the significance of U.S. influence over the international legal system. Moreover, treaties that the United States has ratified are consistent with any plausible theory of U.S. popular sovereignty, since they are made by the President and Senate according to constitutionally mandated procedures.

Second, the concern that international law is not the product of democratic institutions, to the extent that it is correct, is a red herring, which rests on a fundamental misconception of American lawmaking as purely majoritarian. Justice Scalia perhaps stated the mischaracterization most succinctly in his opinion in *Sosa v. Alvarez-Machain*, in which he unfavorably contrasted international law with "American law—the law made by the people's

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703. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

704. *See, e.g.*, Bradley & Goldsmith, *supra* note 41, at 857; Paul B. Stephan, *International Governance and American Democracy*, 1 CHI. J. INT'L L. 237 (2000); Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 721 (1986) ("[I]f customary international law can be made by practice wholly outside the United States it has no basis in popular sovereignty at all. Many foreign governments are not responsive to their own people, let alone to the American people."). Chief Justice John Roberts objected to the use of foreign law on these grounds in his confirmation hearings: "If we're relying on a decision from a German judge about what our Constitution means, no president accountable to the people appointed that judge and no Senate accountable to the people confirmed that judge. And yet he's playing a role in shaping the law that binds the people in this country." Bazelon, *supra* note 18; *see also* Mark Sherman, *Attorney General: Justices Are Wrong To Cite International Law*, ASSOCIATED PRESS, Oct. 15, 2005, *available at* www.law.com/jsp/article.jsp?id=1129626313552.

705. NATALIE KAUFMAN, HUMAN RIGHTS TREATIES AND THE SENATE 93 (1990) (discussing U.S. influence over the drafting of the Human Rights Covenants and concluding that U.S. "proposals were for the most part accepted, and on the rare occasions when they were not, compromises protective of the U.S. system were reached").

706. Chander, *supra* note 702, at 1227 (reviewing national influence over international economic law and concluding that "international law permits the people (at least those of economically powerful states) to review, revise, and reject its rules").

democratically elected representatives."[707] But many forms of "American" law are not made by elected representatives, notably including the common law and federal and most state constitutional decisions. Furthermore, many sources that jurists legitimately rely upon in interpreting the Constitution are not created through democratic decisionmaking. Prominent examples include consideration of the common law, historical sources, social science and scientific data, law and economics theory, pragmatic policy concerns, and judge-made rules of construction, including principles of *stare decisis*. All of these are interpretive sources that are not produced by democratic lawmaking. Thus, it cannot be the nondemocratic (or nonmajoritarian) process that creates international law that renders it ineligible for use in constitutional analysis, when American judges provide the filter for its domestication.

Ultimately, the democratic deficit criticism seems to boil down to a third concern: that American law developed autonomously from the international community and that international law simply is not part of American traditions. As Jed Rubenfeld has urged, "the U.S. Constitution is supposed to reflect *our own* fundamental legal and political commitments . . . . It is the self-givenness of the Constitution . . . that gives it authority as law."[708] Under this concern, reliance on examples from history, Anglo-American traditions, and practices under the common law all could be distinguished from the use of international law on the grounds that the former are at least the products of "We the People" and their progeny, and reflect uniquely American values. International law, by contrast, is viewed as an alien "other," which is not part of the American tradition.

The historical record regarding the use of international law in constitutional interpretation, however, belies this final legitimacy concern. The record of constitutional decisionmaking demonstrates that resort to international law to inform constitutional meaning is one of many longstanding and accepted U.S. interpretive traditions, and that international law has been considered a legitimate source of law in constitutional analysis throughout the course of the nation's history. International law has entered constitutional construction both as part of the common law and as an independent source of interpretive authority. The judicial practice of considering international rules, in other words, historically has been a legitimate "rule of recognition" of the American legal system.[709] Indeed, a nineteenth-century judge would find the modern objection quite baffling, since in the last century, international and public law was assumed to inform the meaning

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707. Sosa v. Alvarez-Machain, 542 U.S. 692, 751 (2004) (Scalia, J., concurring in part and dissenting in part); *see also* Young, supra note 12, at 162 (objecting to *Roper* on the grounds that "[t]he Court's Eighth Amendment jurisprudence is meant to ground constitutional doctrine in evolving democratic commitments.").

708. Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 2006 (2004) (emphasis added).

709. H.L.A. HART, THE CONCEPT OF LAW 116 (2d ed. 1994) ("[R]ules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials."); *see also* Richard Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1805-1806 (2005). While Hart spoke of one ultimate rule of recognition, Joseph Raz has recognized that a legal system may have many subordinate rules of recognition, such as the principle of *stare decisis* in the Anglo-American tradition. JOSEPH RAZ, PRACTICAL REASON AND NORMS 146-47 (1990). *But see* Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 654-58 (1987) (exploring the difficulty of applying the concept of rules of recognition to interpretive standards).

of many constitutional concepts that are now presumed "domestic," including concepts of commerce, freedom of contract, and eminent domain.[710] This does not mean, of course, that a tradition once legitimate may not be later rejected or unraveled, and the current challenge to the use of international authorities may be seeking to accomplish just that. But the tradition does mean that the current attack on the use of international sources cannot begin from the premise that the practice is illegitimate because it is new. It must instead demonstrate why an *accepted* practice of judges within the legal system should no longer be considered valid.

It is possible to imagine a relationship between international law and constitutional interpretation that would raise valid concerns about popular sovereignty and domestic control of the law-making process. If, for example, the Supreme Court decided that U.S. constitutional law regarding a certain topic should be determined entirely by international rules made by an international body, without any intervening filtering through domestic U.S. legislative or judicial processes, then, to paraphrase Attorney General Alberto Gonzales, "that foreign judge . . . [*would*] bind[] us on key constitutional issues."[711] That would constitute a basic abdication of the judicial function.[712]

But considering international values as one element in the test for identifying cruel and unusual punishments under the Eighth Amendment, or even the Court's more robust use of international law to effectively provide the rule of decision in constitutional contexts ranging from war to personal jurisdiction, does not rise to this level. Ultimately, it is duly appointed domestic judges who make the decisions about the Constitution's meaning and the relevance of international law thereto. Democratic deficit objections accordingly appear to be based on mistaken assumptions regarding both the nature of judicial lawmaking and the role of international law in U.S. traditions.

V. TOWARD A PRINCIPLED ROLE FOR INTERNATIONAL LAW

So what is the appropriate role of international law in constitutional interpretation? A complete exploration of this general topic is well beyond the scope of this article. I instead offer here some threshold principles, as a preliminary exploration of the considerations a court should confront in examining the relationship between international law and any constitutional question. These principles are informed by the problems with the Court's prior application of international law in constitutional interpretation identified in Parts II and III, and the democratic legitimacy considerations confronted in Part IV. I do not here, however, purport to resolve the appropriate application of international law to any particular constitutional question, since that relationship must be determined on a case-by-case basis by the specific constitutional provision and

710. Waldron, *supra* note 46, at 132.

711. Sherman, *supra* note 704 (quoting Attorney General Gonzales).

712. T. Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 TEX. L. REV. 1989, 2002 (2004) (observing that a decision by Congress to transfer lawmaking power to Brazil "would be so inconsistent with the U.S. plan of government" as to be constitutionally invalid).

international rule at issue. Rather, I offer tentative preconditions for the objective and normatively legitimate application of international law.[713]

Under any constitutional regime, received international law principles are necessarily filtered through the constitution's established distribution of powers and prohibitions. As the nineteenth-century international law publicist Henry W. Halleck observed, the fact that international law addresses an issue says little about that norm's operation within the constitutional system. Instead, "[t]he determination of these questions depends upon the institutions and laws of the . . . sovereign, which . . . affect the construction and application of that [international law] rule to particular cases."[714] Accordingly, although an international rule may be relevant to a constitutional question, it is domestic law that determines the extent to which any received international law principle operates within that structure. International law alone cannot itself determine its relationship to constitutional analysis, since even international law principles that are binding on the United States do not compel their observance at the constitutional, as opposed to sub-constitutional, level.

The point that it is the Constitution that determines the operation of international law within our structure has often been missed by American jurists on both sides of this issue. In the immigration inherent powers cases, for example, the Supreme Court upheld a plenary federal power to exclude and expel aliens based entirely on a perceived international law rule, but utterly failed to consider whether, and how, that international authority had been incorporated into the Constitution's structure. The Court simply assumed that because the rule existed under international law, it must also exist, in its entirety, as a power under the Constitution.[715]

On the other hand, in *Dred Scott*, Chief Justice Taney made the opposite mistake in rejecting the relevance of international law to the question whether slaves constituted a property interest under the Due Process Clause.[716] "[I]n considering the question before us," Taney wrote:

> [I]t must be borne in mind that there is no law of nations standing between the people of the United States and their Government, and interfering with their relation to each other. . . . [N]o laws or usages of other nations . . . can enlarge the powers of the Government, or take from the citizens the rights they have reserved.[717]

Taney's argument that the law of nations should not "enlarge" the powers of the government, however, begged the question of the proper relationship between international law and the Constitution on the specific issue before the Court.

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713. Michelman, *supra* note 39, at 270 (arguing that in the American political system, "objectivity" is "a *necessary* condition of legitimacy").

714. H. W. HALLECK, INTERNATIONAL LAW; OR RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR 825 (1861) (emphasis added). Halleck was rejecting Chief Justice Marshall's suggestion in *American Insurance Co. v. 356 Bales of Cotton* that international law rules of conquest might definitively resolve the question of the Constitution's application to newly acquired territories.

715. *See* discussion *supra* Part II.B.2.b.i.

716. Counsel for Scott apparently had relied on "the laws and usages of nations, and the writings of eminent jurists" to argue "that there is a difference between property in a slave and other property, and that different rules may be applied to it in expounding the Constitution of the United States." Scott v. Sandford, 60 U.S. (19 How.) 393, 451 (1857).

717. *Id.*

Arguing that constitutional powers should not be "enlarged" assumes that the constitutional powers have a preexisting content that international law is *altering*. It does not resolve the question of whether the constitutional rights and powers themselves are informed by international norms.

Taney himself elsewhere recognized that international law could provide substantive content for constitutional powers and that the Constitution determined the operation of such international rules.[718] In *Holmes v. Jennison*, for example, he correctly argued that the scope of the Treaty Clause was defined by international law, to the extent that the international rule was "consistent with the nature of our institutions, and the distribution of powers between the general and state governments."[719] The view asserted by Taney,[720] John Marshall Harlan,[721] Field,[722] and others that the national government did not enjoy the full panoply of powers held by sovereign nations, given the "peculiar" limited sovereignty of the national government, also is fully consistent with this approach. Conceding that the Constitution limits the national government powers to less than those enjoyed by other eighteenth-century governments, even if true, says nothing about the extent to which the powers conferred by the Constitution, or the limits imposed by that instrument, remain informed by international rules. It simply recognizes that the operation, if any, of the international rule is filtered through principles established by the government's founding document.

Determining when it is appropriate to consider international sources and what role they legitimately should play in relation to a given constitutional regime raises difficult questions in any constitutional system. As Gerald Neuman has observed, modern constitutions around the globe have taken a variety of approaches to answering this question.[723] Some constitutions, such as that of Argentina,[724] Venezuela, Austria,[725] and the Netherlands,[726] explicitly allow

718. Taney invoked international opinion to deny citizenship status to Dred Scott, and looked to sovereign international powers to recognize sweeping federal constitutional authority over Native Americans in dicta in United States v. Rogers, 45 U.S. (4 How.) 567 (1846). *See supra* Parts II.A.2.c & II.B.2.b.ii.

719. Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 569 (1840).

720. *Scott*, 60 U.S. (19 How.) at 401 ("[A]lthough [the national government] is sovereign and supreme in its appropriate sphere of action, yet it does not possess all the powers which usually belong to the sovereignty of a nation. *Certain specified powers*, enumerated in the Constitution, have been conferred upon it; and neither the legislative, executive, nor judicial departments of the Government can lawfully exercise any authority beyond the limits marked out by the Constitution.") (emphasis added).

721. *See supra* note 465.

722. *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 757-58 (1893) (Field, J., dissenting) ("The government of the United States is one of limited and delegated powers. It takes nothing from the usages or the former action of European governments.").

723. Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1890-97 (2003).

724. The current constitution of Argentina establishes eleven specified human rights treaties as having constitutional status, and authorizes the addition of other human rights treaties to this rank through a supermajority vote in the legislature. CONSTITUCIÓN [CONST. ARG.] [CONSTITUTION] art. 75, § 22. For an illuminating discussion of this provision and its application by the Argentine courts, see Janet Koven Levit, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?*, 37 COLUM. J. TRANSNAT'L L. 281 (1999).

725. The Austrian constitution allows treaties to become part of the constitution if ratified by the same supermajority required for constitutional amendment. Austria has given the European Human Rights Convention constitutional status through this mechanism. *See* Neuman, *supra* note 723, at 1892 & n.88.

726. The constitution of the Netherlands allows the government to enter treaties inconsistent with the constitution by supermajority vote in Parliament. *Id.* at 1891 n.82.

certain international obligations to be given constitutional status. Others, such as the constitutions of Spain[727] and South Africa,[728] expressly provide that international law must be considered in interpreting fundamental constitutional rights. In South Africa, for example, courts must examine the international norms relevant to constitutional individual rights questions, even if the international norms are not directly binding on South Africa.[729] But the courts are not obligated to follow the international rule.

The foregoing constitutional systems address the relationship between some international norms and constitutional principles more explicitly than does the U.S. Constitution, which leaves the role of international law in constitutional analysis largely to judicial interpretation. But even constitutions that expressly address the question cannot avoid interpretive difficulties. In "consider[ing] international law," for example, a South African court would confront the same question as a court in the United States: how should a court decide what weight to give the international norm, and how should that norm be related to the terms of the domestic constitution?[730] And while many constitutions require resort to international law in construing individual rights, they too may leave it to the courts to determine when international rules are relevant to other constitutional questions. Discerning the appropriate role of international law in constitutional interpretation in any of these contexts, accordingly, requires both a careful examination of the international rule and an intensive, context-specific study of the domestic constitutional question to which it relates.

The remainder of this section offers four principles for evaluating the appropriate role of international law in constitutional analysis. This discussion is premised on the threshold existence of a rule of international law—whether based in treaty or customary international law[731]—that is relevant to the constitutional question at issue. Many constitutional questions have no international legal parallel. In those cases which do, however, I argue that in sorting out this relationship, courts should consider the following general principles: (1) the receptiveness of the constitutional system to consideration of the particular international rule; (2) how well defined and universally accepted the international norm is, including whether states comply with it in practice; (3) the extent to which the international norm has been otherwise accepted or rejected by the

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727. The Spanish Constitution of 1978 provides that "[p]rovisions relating to fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain." CONSTITUCIÓN [C.E.] [Constitution] § 10(2) (Spain). Columbia, Portugal, and Romania similarly require that constitutional provisions involving fundamental rights be interpreted to be consistent with certain national treaty obligations. Neuman, *supra* note 723, at 1895 n.101.

728. Section 39(1) of the South African Constitution provides as follows: "When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) *must* consider international law; and (c) *may* consider foreign law." S. AFR. CONST. 1996 § 39(1) (emphasis added).

729. *South Africa v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.); *see also* Neuman, *supra* note 723, at 1897 & nn.107-08.

730. *See* Neuman, *supra* note 723, at 1897.

731. A complete exploration of this topic would include analysis of the operation of principles of general international law or public law, which formed the international source for a number of the cases examined in Part II. *See supra* note 44. However, both the under-development of modern principles of general international law and reasons of space preclude consideration of the operation of general law here.

United States; and (4) any limits that international law imposes on operation of the international rule. As noted previously, these principles cannot answer in the abstract the precise role international law should play with respect to any particular constitutional provision. They, instead, go to the threshold matter of the legitimacy of its use. A focus on these considerations will encourage courts to invoke valid international norms in a manner consistent with both the Constitution's structural requirements and the basic values it embodies.

A. *Constitutional Receptiveness*

Because it is the Constitution that governs the operation of international law in the domestic context, the first question a court must answer is whether, and to what extent, a specific international norm may plausibly inform the constitutional system. This inquiry breaks down into two separate considerations: the receptiveness of the specific constitutional provision at issue to the international rule, and whether some other aspect of the constitutional design, including structure and individual rights protections, limits or bars operation of the international rule. The existence of an international rule contrary to a domestic constitutional principle is a reason to consider the international rule and to inquire whether our own rules have become archaic. But it does not create an obligation to follow the international rule, which may be rejected if a court finds our own contrary tradition controlling. In short, international law should function in constitutional interpretation much like the use of history or the common law, and ordinary rules of constitutional analysis apply.

Sensitivity to the constitutional design is particularly important given the mixed attitude of the Framers themselves toward prevailing international norms. It is widely recognized that the Framers were "internationalists."[732] They had carefully studied other republics and federal systems, and they surely intended that the United States take its place among the community of nations by adhering to international law.[733] Indeed, compliance with international law was critical to help protect the fledgling nation from retaliation by powerful foreign states. The Framers' outlook toward international law thus was, in general, significantly more "monist," in assuming that international law functioned as a fluid part of domestic law, than the contemporary American view.

On the other hand, it is also true that the Constitution was deliberately designed to reject many of the customary international rules and sovereign prerogatives of the day—rules that had developed in the practices of authoritarian states. Traditional powers of sovereign prerogative, such as law making or warmaking, were constitutionally abrogated, or limited and redistributed.[734] The

732. *See* Koh, *supra* note 25, at 43-45 (discussing resorts to international authority in the founding era).

733. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793).

734. *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 641 (1952) (Jackson, J., concurring) ("The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt they were creating their new Executive in his image."); Fleming v. Page, 50 U.S. (9 How.) 603, 610 (1850) (Constitution grants international powers of territorial acquisition only to Congress); Henry Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 13-17 (1993) (observing that the Constitution transferred some traditional executive

right to jury trial rejected European inquisitorial systems. Many provisions of the Bill of Rights, such as the First Amendment's free speech provisions and the Third Amendment's prohibition against quartering of soldiers, were intended to impose limits on governmental authority that were uncommon, or even unknown, in the era. Some of the Constitution's federalism provisions, such as the Interstate Extradition Clause, altered international practices. Any effort to determine the appropriate relationship between international law and the Constitution accordingly must recognize that that instrument both accepted and rejected international rules.[735]

Determining the Constitution's receptiveness to any given international rule clearly requires consideration of a number of factors, including the specificity or generality of the relevant constitutional text; the historical interpretation given to the provision; the traditional role of international law in its construction; the extent to which the constitutional question is truly settled or unsettled; and the extent to which international norms depart from the established constitutional rule and thus would alter preexisting domestic interpretive approaches.

The textual inquiry would examine the specificity and clarity of the constitutional provision. Thus, general clauses such as due process would be more receptive to construction in light of international norms than more specific clauses, the extreme example of which is the requirement that the President be thirty-five years old and a resident of the United States for fourteen years.[736] Clear contrary text could bar consideration of an international norm. Thus, Chief Justice Taney reasoned in *Kentucky v. Dennison* that although international law allowed nations to decline extradition for political offenses, the words "treason" and "felony" in the Article IV, section 2 Interstate Extradition Clause were intended "to prevent this provision from being construed by the rules and usages of independent nations."[737] Constitutional text, in other words, eliminated the discretion traditionally recognized in international extradition and required extradition between the states for all crimes. The term "state" in the Constitution likewise has generally (though not always) been viewed as a term of art referring specifically to the several states that does not incorporate the definition of a "state" under international law.[738] Likewise, in *Robertson v. Baldwin*, Justice

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powers under the Crown, such as war-making and law-making, to Congress, and shared other such powers, such as making appointments and treaties, with the Senate).

735. *Cf.* Wilson v. McNamee, 102 U.S. 572, 574-75 (1880) (Swayne, J.) (citing Wheaton and Vattel for the proposition that under the law of nations, a nation's jurisdiction over its own vessels is the same at home port and at sea, but that the Constitution had modified this principle by granting Congress power over commerce and to define and punish felonies on the high seas).

736. U.S. CONST. art. II, § 1.

737. Kentucky v. Dennison, 65 U.S. (24 How.) 66, 99-100 (1860). As Chief Justice Taney observed: "[Because] the States of this Union, are . . . separate sovereignties [with respect to their internal governance] . . . it was obviously deemed necessary to show, by the terms used, that [the Article IV, section 2 Extradition Clause] was not to be regarded or construed as an ordinary treaty for extradition between nations altogether independent of each other, but was intended to embrace [all crimes] . . . . For this was not a compact of peace and comity between separate nations . . . but a compact binding them to give aid and assistance to each other in executing their laws." *Id.* at 100. Taney also relied on plain language, the underlying purpose of the Constitution in maintaining harmony among the states, colonial practice and experience under the Articles of Confederation to conclude that the Constitution had rejected the international rule. *Id.* at 100-02.

738. *Compare* Hepburn v. Ellzey, 6 U.S. (2 Cranch) 445, 452 (1805) (Marshall, C.J.) (noting that although Washington, D.C. was a distinct political society, and thus a "state," within the definition under general law, here the term was used as in the Constitution and referred only to the several states of

Harlan in dissent viewed the Thirteenth Amendment's ban on involuntary servitude as setting forth a textual mandate that barred consideration of contrary international practice.[739]

A longstanding and consistent judicial interpretation could raise barriers to domestication of an international rule. Other accepted methodologies of constitutional interpretation, such as history, doctrine, or prudential considerations, also may weigh toward or against recognizing persuasive force for an international rule in any given context. The fact that a constitutional clause originally departed from then-existing international practices, however, would not definitively resolve the question whether international law might have implications for its construction today. There may be circumstances in which international standards have caught up with U.S. practice, based, in part, on principles drawn from the United States's own constitutional values.[740] An interesting example here is freedom of speech. The Constitution's protection for free speech originally set the United States apart from global practices. Foreign understandings of freedom of speech have evolved significantly since the First Amendment was adopted, however, and contemporary international human rights law now recognizes fairly robust protection for free speech, which itself was drawn substantially from the American tradition. Nevertheless, U.S. and international rules continue to diverge over the regulation of hate speech, since international human rights treaties mandate governmental prohibition of hate speech[741] that is understood to be protected under the First Amendment.[742] It is possible to imagine a scenario in which the U.S. government would attempt to regulate hate speech more aggressively based on a claim that U.S. international obligations established a governmental interest warranting the regulation (similar to the government's assertion in *Boos v. Barry*[743]), or in which a litigant seeking to justify regulation of hate speech might point to the international rule as persuasive regarding the scope of the individual right at stake (similar to the Court's approach in *Lawrence*[744]). In either scenario, however, whether or not U.S. understandings of hate speech regulation under the First Amendment should be influenced by the international position would turn not on any textual "invitation" to consider international law, but on the extent to which the United States is understood as having a contrary doctrinal rule of longstanding and consistent judicial application, and the constitutional justifications for that distinct position.

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the Union), *with* De Geoffroy v. Riggs, 133 U.S. 258, 268 (1890) (Field, J.) ("state" in a treaty refers to a political sub-unit as understood under public international law, not a state of the United States).

739. 165 U.S. 275, 297 (1897) (noting that if the Thirteenth Amendment forbade the practice, the laws of other countries were "of no consequence whatever").

740. Richard Lillich, *The United States Constitution and International Human Rights Law*, 3 HARV. HUM. RTS. J. 53 (1990) (discussing contribution of U.S. Bill of Rights to human rights law).

741. International Covenant on Civil and Political Rights art. 20, *opened for signature* Dec. 19, 1966, 999 UNT.S. 171 [hereinafter ICCPR] (requiring that states legally prohibit "[a]ny propaganda for war" and "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility, or violence").

742. Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2341-48 (1989). For a discussion of U.S. opposition to the ICCPR's hate speech clause, see KAUFMAN, *supra* note 705, at 164-70.

743. 485 U.S. 312 (1988).

744. 539 U.S. 558 (2003).

Traditional modes of analysis may combine in some circumstances to distinguish U.S. positions from an international rule. In the Court's holding in *United States v. Wong Kim Ark*[745] that persons of Chinese descent could be natural born citizens under the Fourteenth Amendment, much of the debate between the majority and the dissent addressed questions of international law and original intent—whether the Amendment's drafters had intended to incorporate the British common law principle of citizenship based on place of birth (*jus soli*), or the principle of citizenship based on descent or blood (*jus sanguinis*), which the U.S. government urged was the dominant international rule.[746] The Court ultimately concluded that the Constitution's explicit textual grant of citizenship to "all persons" born "subject to the jurisdiction" of the United States, together with the history and purpose of the Fourteenth Amendment,[747] barred resort to the alleged international rule governing citizenship.[748]

The presence of an established contrary domestic interpretation creates a strong, but not wholly insurmountable, obstacle to domestication of an international rule. Principles of *stare decisis* support adherence to established doctrine. I say not wholly insurmountable, however, because judicial construction of constitutional provisions does evolve. It is, after all "a *constitution* we are expounding."[749] The persistent presence of a contrary international rule—such as the hate speech rule—thus could, and perhaps should, raise the question of whether a domestic practice should be reconsidered, though not definitively resolve it. The court nevertheless may find the reasons for the international rule unpersuasive and be more convinced by the justifications for the existing constitutional practice.

The inquiry into the Constitution's receptiveness to an international norm is concededly flexible. Jurists such as Justice Scalia who are widely understood to believe that international law should always be irrelevant to constitutional analysis

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745. 169 U.S. 649 (1898).

746. Brief for the United States at 7-8, United States v. Wong Kim Ark, 169 U.S. 649 (1898) (No. 904) (arguing that citizenship based on nationality was the prevailing international law rule); *see also* VATTEL, *supra* note 46, at 101 ("[N]atural-born citizens, are those born in the country, *of parents who are citizens*.") (emphasis added).

747. The Fourteenth Amendment's express application to all persons "born in the United States and subject to the jurisdiction thereof," on its face, appeared to preclude resort to any international rule favoring citizenship based on blood rather than place of birth, and the Court concluded that the Amendment's purpose of overruling the *Dred Scott* decision and eliminating the existence of classes with permanent, inherited status as non-citizens supported this analysis. *See Wong Kim Ark*, 169 U.S. at 675-76 (discussing the Amendment's text and purposes). The Court both concluded that the Amendment was intended to adopt the British common law rule, and denied the existence of any settled international rule based on *jus sanguinis*. *Id.* at 667 (finding "little ground for the theory that at the time of the adoption of the fourteenth amendment . . . there was any settled and definite rule of international law generally recognized by civilized nations, inconsistent with the ancient [common law] rule of citizenship by birth within the dominion").

748. Chief Justice Fuller and Justice Harlan dissented strenuously, arguing that nationality was a question of "public law" and that the Amendment should be construed according to "the more general principles of the law of nations." *Id.* at 708 (Fuller, C.J., dissenting) (quoting Shanks v. Dupont, 28 U.S. (3 Pet.) 242, 248 (1830) (Story, J.), and other international authorities). The dissenters justified their desire to resort to the claimed international law standard on the grounds that the nation's definition of citizenship implicated foreign relations. *Id.* at 707 (Fuller, C.J., dissenting) ("Obviously, where the constitution deals with common-law rights and deals with common-law phraseology, its language should be read in the light of the common law; but when the question arises as to what constitutes citizenship of the nation, involving, as it does, international relations . . . international principles must be considered . . . .").

749. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

presumably would also find that interpretive barriers precluded consideration of international norms in any particular circumstance. The question in *Printz v. United States*[750] was the relevance of comparative, rather than international, legal sources, but the debate there illustrates the difficulty in resolving the Constitution's receptiveness. The Constitution does not expressly address whether Congress may "commandeer" state officers to implement federal laws, but Justice Scalia concluded that structure, history, doctrine, and practice conclusively established that respect for state sovereignty constitutionally barred such action. For him, in other words, the constitutional question was settled. Justice Breyer, by contrast, found structure, history, doctrine, and practice completely silent on the question, and argued that in the face of such silence, the practices of other federal systems could be useful in informing the Court's analysis.[751]

The fact that determining constitutional receptiveness may lead different jurists to different conclusions—that constitutional interpretation is an art, not a science—however, does not mean that the effort is illegitimate or not worth pursuing. Instead, the influence of an international rule will necessarily depend to some degree on the ambiguity of a constitutional provision and its underlying interpretation. The Court could not legitimately have invoked international law to override the Fourteenth Amendment's guarantee of birthright citizenship, given the clarity and specificity of the constitutional text and the history and clear purpose of the citizenship provision. The question of commandeering may approach the other extreme of the spectrum in terms of constitutional ambiguity.

If a court concludes that a particular constitutional provision is open to being informed by an international principle, the court should then consider to what extent other aspects of the constitutional design may nevertheless constrain operation of the international rule. This is a standard question in constitutional analysis which I emphasize only because the Court has neglected it in past cases considering international law. It is entirely possible for other structural and individual rights considerations to limit the domestic influence of an international norm. Thus, the *Fong Yue Ting* dissenters contended that even if Congress possessed authority to deport aliens deduced from international law, that power must be exercised consistent with due process and other express protections in the Constitution.[752] Likewise, the Court in *Ex parte Milligan* concluded that whatever power the laws of war might recognize to try individuals in military tribunals, the Constitution prohibited exercise of that power over civilians in times when the Article III courts were open.[753] In *Hamdi*, the plurality understood the Constitution as both receiving and qualifying the powers to detain enemy combatants recognized under international law. Justices Scalia and Stevens, in turn, read the Suspension Clause and other constitutional limitations as precluding

750. 521 U.S. 898 (1997).

751. *Id.* at 977 (Breyer, J., dissenting) (observing that foreign sources "may nonetheless cast an empirical light" in constitutional interpretation, as one consideration among many). For an analysis of the relevance of Justice Breyer's European examples to American federalism, see Daniel Halberstam, *Comparative Federalism and the Issue of Commandeering*, *in* THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION 213 (K. Nicolaidis & R. Howse eds., 2001).

752. *See* Fong Yue Ting v. United States, 149 U.S. 698, 738-40 (1893) (Brewer, J., dissenting).

753. *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 29 (1866).

the detention of U.S. citizens on U.S. soil, regardless what international law authorized.[754]

Assuming the above analysis yields the conclusion that the Constitution is receptive to domestication of an international rule in some fashion, a court should also consider three aspects of the nature of the international rule: universal acceptance of the norm, U.S. acceptance of the norm, and any limitations that international law imposes.

B. *Norm Universality*

The second consideration in a principled approach to the relationship between constitutional law and an international standard is how clearly defined and universally accepted the standard is, and how widely actual state practice conforms to the rule. This goes, of course, to the persuasive force of the international rule. Clear definition helps ensure accurate application of the international rule,[755] and broad international support suggests a well-grounded reason for the norm.[756] Thus, a norm set forth in a treaty may be more or less persuasive depending upon how widely the treaty has been ratified and how consistently states have, in practice, respected that treaty as imposing a legal obligation. Widespread ratification that is also supported by near-universal state practice, as was the case with the juvenile death penalty in *Roper* and the general authority to detain combatants under the Geneva Conventions in *Hamdi*, accordingly would be entitled to greater persuasive weight than equally widespread ratification of a treaty norm to which states do not purport even formally to legally adhere.[757] Moreover, norms recognized as customary international law, which reflect widespread and consistent state practice taken under a sense of legal obligation, may have greater persuasive force than equally widespread state practice that reflects the overlapping sovereign choices of individual states rather than a binding legal obligation.

Regional international legal rules, such as those operative in the Inter-American system or in the European Union, and more discrete multi-party or bilateral agreements, raise special difficulties here. They reflect the consensus of only a subset of the international community, and, accordingly, are less persuasive than rules that have achieved more widespread acceptance. As noted with respect to *Lawrence*, they also raise an additional set of thorny questions regarding selectivity and cultural relevance in the use of international law. On the other

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754. Hamdi v. Rumsfeld, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting).

755. Sosa v. Alvarez-Machain, 542 U.S. 692, 736-37 (2004).

756. *Id. Cf.* Jeremy Waldron, *Foreign Law and the Modern* Jus Gentium, 119 HARV. L. REV. 129, 145 (2005) ("[A]s a dense and mutually reinforced consensus, [*jus gentium*] may have a pertinence to our law that its individual constituents do not have.").

757. *See* Oona Hathaway, *Do Human Rights Treaties Make a Difference?* 111 YALE L.J. 1935 (2002) (examining, and critiquing, state compliance with human rights treaties). On the other hand, states' failure to comply with a fundamental norm that they nevertheless accept as legally binding does not necessarily undermine the persuasiveness of the norm. Simma & Alston, *supra* note 44, at 102 ("[T]he concept of a 'recognized' general principle seems to conform more closely than the concept of custom to the situation where a norm invested with strong inherent authority is widely accepted even though widely violated."); *cf.* Filartiga v. Peña-Irala, 630 F.2d 876, 884 n.15 (2d Cir. 1980) ("The fact that the prohibition of torture is often honored in the breach does not diminish its binding effect as a norm of international law.").

hand, the persuasive force of international rules that reflect the consensus of only a subset of the international community is strengthened or weakened by whether the United States adheres to the international rule and by whether the nations adopting the rule share common characteristics with the United States (such as a commitment to democratic constitutional governance) that make the rule particularly persuasive. Thus, *Lawrence* followed a longstanding jurisprudential tradition of looking to practices in Western Europe to help illuminate U.S. understandings of "liberty."

Lack of international consensus on a particular question does not necessarily render resort to international values irrelevant, though it may reduce the persuasiveness of any particular rule. The United States's recognition of constitutional protection for "tag" or transient jurisdiction based solely on service with process in the forum[758] has been sharply criticized by European countries, for example, which generally require a more substantial relationship between the defendant and the forum for a court to exercise personal jurisdiction.[759] In other words, while there is a contrary regional rule, there is no established customary international law prohibition against tag jurisdiction, except perhaps in its most extreme form, and the practice is accepted by some Commonwealth countries. The principle thus does not enjoy *uniform* acceptance by states. Although reasons may exist to consider modifying the Court's approach to tag jurisdiction to comport more closely with the regional foreign practice, the presence of universal adherence to a contrary international rule would offer a more compelling case.

International norms regarding reproductive choice offer an additional example. Justice Scalia and some scholars have observed that measuring U.S. privacy protections against foreign practices could undermine domestic constitutional protection for reproductive choice, since abortion is more strictly regulated practically everywhere else in the world.[760] There is, however, no international legal *consensus* on this point. The American Convention on Human Rights states that life begins at conception,[761] but the United States is not a party to that Convention and other more widely ratified human rights conventions, such as the Convention on the Rights of the Child and the Convention To Eliminate All Forms of Discrimination Against Women, are silent or agnostic on the question.

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758. Burnham v. Superior Court of Cal., 495 U.S. 604, 619 (1990).

759. Juenger, *supra* note 325, at 1037-39 (discussing European practice under the Brussels Convention).

760. Roper v. Simmons, 125 S. Ct. 1183, 1227 (2005) (Scalia, J., dissenting); *see also* Alford, *supra* note 12; Larsen, *supra* note 12, at 1320; Christopher McCrudden, *A Part of the Main? The Physician-Assisted Suicide Cases and Comparative Law Methodology in the United States Supreme Court*, *in* LAW AT THE END OF LIFE: THE SUPREME COURT AND ASSISTED SUICIDE 129-30 (Carl Schneider et al. eds., 2000) (discussing citation of foreign authority by the executive branch in efforts to overturn *Roe v. Wade* during the 1980s). The comparative claim that the United States is an outlier, however, should not be exaggerated. While few European governments impose as few restrictions as the United States, reproductive choice remains robust in most advanced industrial democracies. *See* Leslie Pickering Francis, *Virtue and the American Family: Abortion and Divorce in Western Law*, 102 HARV. L. REV. 469 (1988) (examining arguments about abortion practices in advanced industrial democracies); *see also* Center for Reproductive Rights, The World's Abortion Laws, http://www.reproductiverights.org/pub_fac_abortion_laws.html (last visited Dec. 18, 2005) (noting that 54 countries, with 40.5 percent of the world's population, allow abortion without restriction as to reason).

761. American Convention on Human Rights art. 4(1), Nov. 22, 1969, 1144 UNT.S. 123 (stating that the right to life "shall be protected by law and, in general, from the moment of conception").

While a court would be entitled to consider both regional rules and the *absence* of any international consensus, for both tag jurisdiction and reproductive choice, international law does not offer any universally accepted answer to the question.

C. *Acceptance by the United States*

In addition to questions of universal acceptance, the persuasiveness of an international rule will turn on whether that rule has been accepted or rejected by the United States. Acceptance could be expressed through a number of means, including (1) treaty ratifications; (2) explicit acceptance of treaty rules as customary international law (as the United States has done with the Vienna Convention on the Law of Treaties and aspects of the Law of the Sea Convention); (3) principles of customary international law to which the United States has not persistently objected; and (4) *jus cogens*, or peremptory rules of international law which a state may not avoid through either persistent objection or ratification of a contrary treaty.[762] I would add here that a U.S. signature to a treaty that has not yet been ratified does not constitute full U.S. consent to be bound by the treaty, but does obligate the United States to refrain from acts that would defeat the object and purpose of the treaty, unless and until the United States formally expresses its intent not to ratify.[763] A U.S. signature thus indicates some level of support for the treaty, although it suggests something considerably weaker than full acceptance.

Conversely, U.S. rejection of an international rule may be accomplished either through (1) U.S. adoption of an effective reservation, declaration, or understanding to a treaty provision that rejects or modifies the United States's acceptance of the particular rule, or (2) the United States's persistent objection to a norm of customary international law. The United States's failure to sign or ratify a treaty, as with the Convention on the Rights of the Child in *Roper*,[764] would be a mixed factor in this context. It would, of course, indicate that the United States had not consented to be bound by the treaty, and to that extent would count against the treaty's use as an interpretive source. But failure to ratify would not necessarily establish that the United States had rejected principles of customary international law implicated by the treaty, at least absent other evidence that the United States had persistently objected to the customary international law rule.[765] The treaty would also retain persuasive force as embodying the consensus of the ratifying states.

United States acceptance of an international principle is relevant to a court's analysis for three reasons. First, U.S. international legal obligations may create important governmental interests relevant to constitutional inquiry, as the Court

762. Vienna Convention on the Law of Treaties art. 64, May 23, 1969, 1155 UNT.S. 331, 347 ("If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.").

763. *Id.* art. 18(a); *see also* Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061 (2003).

764. *See* Roper v. Simmons, 125 S. Ct. 1183, 1199 (2005) (citing the ratification status of the United Nations Convention on the Rights of the Child).

765. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, at intro. note (1987), ("Even after codification . . . custom maintains its authority, particularly as regards states that do not adhere to the codifying treaty.").

indicated in *Boos v. Barry*.[766] The government may, therefore, invoke its obligations as a treaty partner, or to the broader international community under customary international rules, to support a claim that an exercise of power is constitutionally legitimate. International law, however, would not automatically establish the existence of a compelling governmental interest,[767] nor would it automatically constitutionally legitimate the exercise of government power. U.S. international law obligations nevertheless are likely to be relevant to constitutional analysis in such contexts.

Second, U.S. acceptance of an international legal principle strengthens prudential reasons for respecting that norm. As the Court recognized in several cases discussed in Part II, promoting U.S. compliance with and respect for the international system, avoiding tensions with the international community, and promoting parity of treatment for U.S. interests weigh in favor of aligning constitutional construction with international rules.[768] Accordingly, the fact that a rule is binding on the United States does not compel incorporation of the rule at the constitutional level, as discussed previously, but it does bolster the rule's persuasiveness.

Finally, as discussed below, U.S. acceptance reduces possible concerns that a court might improperly impose an international obligation on the United States contrary to the views of the political branches. Consistent with the discussion in Part IV, *supra*, U.S. acceptance significantly reduces any objections to consideration of international law based on popular sovereignty.

On the other hand, U.S. rejection of an international norm, whether through a treaty reservation, refusal to ratify, or persistent objection to a customary international norm, weighs against relying upon the rule's persuasiveness in constitutional analysis for reasons related to democractic governance, separation of powers, and federalism. Under our constitutional system, both treaties and customary international law enjoy sub-constitutional status.[769] While norms from both sources are binding on the states and subject to judicial construction, Congress has the power to override customary international law and treaties through positive legislation.[770] This legislative check is removed, however, when international norms inform constitutional analysis. Respect for the determinations of the political branches thus acknowledges the legitimate role of the political branches in shaping the extent to which the United States will accept international norms into the domestic legal structure. It responds to the countermajoritarian objection.

Taking into consideration the conduct of the political branches is also consistent with the recognition that the executive branch and Congress, as well as the courts, are interpreters of constitutional rules. Rejection of a norm by those

766. 485 U.S. 312 (1988).

767. *See, e.g.*, Boos v. Barry, 485 U.S. 312 (1988). *See supra* notes 468-474.

768. Thus, in *United States v. California*, 332 U.S. 19, 33-34 (1947), Justice Black invoked the fact that U.S. government officials had embraced the international rule regarding the three-mile territorial sea as support for considering the rule in his constitutional analysis. In *United States v. Pacific R.R.*, 120 U.S. 227 (1887), Justice Field noted that the President and Congress had acknowledged the international rule that acts of military necessity did not require just compensation.

769. *See* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (discussing status of customary international law as federal common law).

770. For a critical analysis of this principle, see Henkin, *supra* note 56.

branches suggests that they believed that the norm should not be considered part of U.S. constitutional obligations, and a court should consider the reasons for that conclusion. Finally, prudential arguments for placing the United States in compliance with international rules are weaker when the political branches have made a deliberate choice to place the United States in conflict with those rules.

Consideration of the views of the political branches in this context, however, must be tempered by a competing separation of powers concern: the courts' independent authority both to interpret international law and to determine constitutional meaning. The Constitution invests the federal courts with authority to construe that instrument, as well as treaties, statutes and federal common law. In fulfilling this obligation, federal courts have the power to be informed by international rules,[771] and have exercised this power for more than two centuries. Principles of statutory construction, such as the *Charming Betsy* rule, explicitly recognize this obligation.[772] And while the national political branches have authority to override judicial constructions of international law (by overriding those interpretations with later-in-time statutes or otherwise terminating U.S. treaty obligations), they do not have authority to override the courts' constitutional determinations. Respect for judicial independence and principles of separation of powers thus establish that while international law determinations by the political branches are entitled to some weight, they are not determinative when the judiciary engages in constitutional analysis.

Reconciling the competing separation of powers concerns in this context suggests that greater deference is owed to the political branches' rejection of international rules that would grant governmental powers, while less deference is owed in the construction of constitutional limits on governmental authority and individual rights. If the political branches have declined to accept a power allowed under international law, judicial deference to the political branches' decision supports principles of separation of powers.[773] The political branches, of course, remain free to embrace the international rule in the future, barring some other constitutional obstacle.

Judicial deference to the political branches, however, is less appropriate in construing limits on governmental power, including individual rights. Individual rights provisions are generally understood as countermajoritarian constraints on the political branches, and, as discussed in Part IV, *supra*, their construction necessarily involves judicial second-guessing of actions of the political branches. It is reasonable for a court to consider determinations by the political branches and the reasons underlying their decision. But to the extent that the judicial role in constitutional construction is to protect individuals from majoritarian action, or even to protect one branch of government from another, deference to the political branches is inappropriate.

The cruel and unusual punishment cases fall somewhere between these two positions. Under *Roper* and *Atkins*, at least, the question whether a practice violates "evolving standards of decency" requires judicial consideration of both

771. *See, e.g.*, The Paquete Habana, 175 U.S. 677 (1900).

772. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

773. An example of such a situation might include the United States's recognition of absolute immunity for sitting foreign heads of state, despite the fact that international law does not require such immunity.

(1) the extent to which the practice has been rejected by legislatures, juries, and other expressions of the public sentiment, and (2) an independent judicial determination of whether the practice is cruel and unusual. Persistent rejection of an international norm by the political branches is clearly pertinent to the first question, as Justice Scalia argued in *Roper*.[774] If customary international and treaty law prohibit a punishment, but the political branches have clearly rejected the international rule, their determination is entitled to deference in identifying a national consensus under the first half of the Eighth Amendment analysis. That determination is not controlling, however, when a court is independently obligated to decide what is cruel and unusual.

Two forms of modification of U.S. treaty obligations—non-self-executing treaties, and reservations, declarations, and understandings—warrant further exploration here, since both raise complex questions regarding U.S. "rejection" of an international rule and how it should play out in constitutional analysis. Non-self-executing treaties are international obligations that the United States has accepted but that are not domestically judicially enforceable without legislative sanction.[775] They are less problematic for our purposes than substantive reservations, declarations, and understandings, because the fact that a treaty is not self-executing does not qualify the United States's international obligations under the treaty. To the contrary, such a treaty clearly has been "accepted" by the United States and imposes binding international legal obligations. Non-self-executing treaties also are domestically effective in the sense that they can be the basis for congressional implementing legislation, executive orders interpreting the treaty, or the construing of a statute to comport with the United States's international obligations.[776] The question such treaties raise, then, is whether the fact that they are not *directly* judicially enforceable affects their validity as an interpretive source in constitutional analysis.

Senate declarations that a treaty is not self-executing[777] could be read as an attempt to prevent U.S. international legal obligations from influencing domestic law in any manner. The more generous interpretation of such declarations, however (and the position commonly asserted by the United States in adopting such measures), is that other provisions of U.S. domestic law already comport with the treaty obligations, and thus, direct enforcement of the treaty itself is unnecessary.[778] To put it another way, because the United States has a fully

774. 125 S. Ct. 1183, 1226 (2005) (Scalia, J., dissenting).

775. The term is applied inconsistently with sufficient frequency to warrant definition here. *See, e.g.*, Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995) (arguing that courts have applied four distinct interpretations to the concept of self-execution). A finding of non-self-execution may mean anything from the view that the treaty, while creating private rights, does not create a private right of action, to a conclusion that the terms of the treaty are too vague or precatory to establish a judicially enforceable right. By non-self-executing, I refer to treaties or treaty provisions that do not create a private right of action enforceable in domestic courts absent congressional implementation.

776. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) at 118.

777. I assume, for the purposes here, that such reservations are constitutionally effective. For further discussion of U.S. treaty ratification practices, see Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399 (2000) (offering arguments in support of U.S. reservation practices); Henkin, *supra* note 482, at 346-48 (critiquing, inter alia, U.S. declarations that treaties are non-self-executing).

778. *See, e.g.*, S. REP. NO. 102-23, at 19 (1992) (Exec. Rep.) (noting that "existing U.S. law generally complies with the [ICCPR]; hence, implementing legislation is not contemplated").

developed domestic regime of protection, it does not need to adopt a new and different legal vocabulary for accomplishing the same purposes. Furthermore, regardless of the intended domestic effect of a non-self-executing treaty, the United States intends to be bound by such treaties and affirmatively seeks for U.S. law to influence their development. None of this suggests that non-self-execution should be an obstacle to consideration of the treaty in constitutional interpretation for either its persuasive or its legally binding character, although a court in construing such a treaty should be sensitive to the reasons why the political branches might have wanted to limit its domestic effect.[779] Treaties contain many provisions, and a Senate declaration that a treaty is not self-executing may exist for any number of reasons. Consistent with this approach, the *Hamdi* Justices considered norms established by the Geneva Convention in defining both constitutional powers and limits,[780] despite the aggressive argument of the government, and findings in some lower courts, that the Geneva Conventions are not self-executing.[781]

Reservations, declarations, and understandings that control U.S. acceptance of the substantive meaning of a particular treaty provision give rise to greater interpretive difficulties. Unlike declarations that a treaty is not self-executing, these provisions restrict the international obligations that the United States has undertaken. They therefore constitute rejection of the international principle by the political branches for the purposes of that treaty.

The United States's ratification of the Convention Against Torture is a pertinent example. The concept of "cruel, inhuman and degrading treatment" under international law would appear highly relevant to judicial construction of both the Eighth Amendment Cruel and Unusual Punishment Clause[782] and the concept of liberty under substantive due process. In consenting to the Torture Convention, however, the U.S. Senate adopted a reservation providing that that the United States understood "cruel, inhuman and degrading treatment" under the treaty to be limited to practices prohibited under the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution.[783] Such a pronouncement indicates that the United States has accepted the treaty obligation only to the extent that it mirrors

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779. *Cf.* Waldron, *supra* note 46, at 141 (noting that the fact that *Erie* may have altered the positive law status of the law of nations "says nothing about its status as a critical resource").

780. Hamdi v. Rumsfeld, 542 U.S. 507, 520-21, 538 (2004) (plurality opinion); *id.* at 549-51 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

781. *See, e.g.*, Hamdan v. Rumsfeld, 415 F.3d 33, 39 (D.C. Cir. 2004) (Third Geneva Convention does not create individual rights enforceable in court); Brief for the Respondents at 23, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696).

782. The Eighth Amendment has long been understood as prohibiting torture and related forms of abuse. *See* Estelle v. Gamble, 429 U.S. 97, 102 (1976) (noting that "the primary concern of the drafters was to proscribe 'torture(s)' and other 'barbar(ous)' methods of punishment"); Weems v. United States, 217 U.S. 349, 370 (1910) (affirming that "punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that Amendment"); *In re* Kemmler, 136 U.S. 436, 447 (1890) ("Punishments are cruel when they involve torture . . . .").

783. *See* 136 CONG. REC. S17486-01 (daily ed. Oct. 27, 1990), *available at* http://www1.umn.edu/humanrts/usdocs/tortres.html ("[T]he United States considers itself bound by the obligation . . . to prevent 'cruel, inhuman or degrading treatment or punishment,' only insofar as the term . . . means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."). For a critical analysis of this and other reservation practices, see Henkin, *supra* note 482, at 341. For an argument generally supporting the practice, see Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 485 (2002).

the constitutional meaning, and a court would be bound by any such valid reservation in construing the treaty. The reservation might also be interpreted more broadly as reflecting the sense of the Senate that U.S. constitutional doctrine should inform the meaning of the treaty obligation, rather than vice versa. As a matter of constitutional interpretation, the reservation would prevent the Court from considering any principle under the treaty broader than the constitutional prohibition as a *legal* obligation binding on the United States. The reservation would not, however, obligate the Court to ignore the persuasive force of any extant international consensus regarding what constitutes cruel, inhuman, and degrading treatment.[784] The Court's analysis should include consideration of why the political branches imposed this definitional limitation on the Treaty Clause. But it would also be entitled to look to the broader international understanding when engaging in independent judicial construction of the constitutional protection.

Moreover, neither reservations nor non-self-executing treaties alter rights and obligations under other treaties, or rights and obligations that enjoy independent status as customary international law (although a reservation can be evidence of persistent objection). To the extent that the United States has not persistently objected to the customary norm, efforts to limit or modify U.S. treaty obligations do not bar judicial consideration, or constitutional absorption, of a *customary* international law rule regarding cruel, inhuman, and degrading treatment, or any other. As the Supreme Court recently indicated in *Sosa v. Alvarez-Machain*, a declaration of non-self-execution may render a treaty judicially unenforceable directly, but no reason exists to interpret such Senate actions as obliterating whatever independent force widely accepted customary international norms related to that treaty may have or even the role of that treaty in contributing to the development of the customary international rule.[785]

Finally, the question of whether or not the United States is subject to a customary international law rule or has rejected the rule through persistent objection is not always clear-cut. As the Court observed in *Roper*, in ratifying the International Covenant on Civil and Political Rights, the United States entered a reservation to Article 6(5), which prohibits the execution of persons under 18 at the time of the crime. This reservation expresses a clear intent by the United States not to be bound by Article 6(5) of the treaty.[786] It is less clear, however, whether the United States is nevertheless bound by a customary international law

784. *Cf.* Republic of Ireland v. United Kingdom, 2 Eur. Ct. H.R. 25 (1978) (finding that "disorientation" techniques such as hooding and sleep deprivation constituted cruel, inhuman and degrading treatment within the meaning of the European Convention on Human Rights).

785. In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Court observed that a treaty declared non-self-executing could not be relied on *vel non* as the source of an applicable rule of international law regarding arbitrary detention for purposes of litigation under the Alien Tort Claims Act. The Court nevertheless examined the status of arbitrary detention under customary international law, and concluded simply that the facts presented did not present a violation of the customary international law rule. *Id.* at 734-38.

786. A significant controversy nevertheless exists regarding the validity of the reservation under international law. *See* UN Human Rights Committee, *General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declaration Under Article 41 of the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.6 (Apr. 11, 1994).

prohibition on the execution of juveniles.[787] The treaty reservation may be evidence that the United States has persistently objected to the customary international rule. But the United States embraced the prohibition on the execution of juveniles in wartime by ratifying the Geneva Conventions, and federal criminal and military law conforms to the international norm. So the record on persistent objection is not uniform. Furthermore, the United States is a party to the American Declaration on the Rights of Man and a signatory to the American Convention on Human Rights, both of which the Inter-American Commission on Human Rights has construed as prohibiting the execution of juveniles as a *jus cogens* norm.[788] If the norm in fact enjoys *jus cogens* status, neither the United States nor any other country can opt out of the international law obligation through persistent objection.[789]

It is interesting, though not surprising, that the *Roper* Court did not attempt to confront these questions. The *Roper* majority has been criticized for considering treaty provisions that the United States had either not ratified or had affirmatively rejected.[790] The *Roper* Court, however, did not argue that the international prohibition on the execution of juveniles should be respected because it was binding on the United States, by either treaty or customary international law. The Court instead relied upon treaties such as the Convention on the Rights of the Child and the ICCPR as evidence of the *foreign* consensus on the question. The Court also found, consistent with the discussion above, that the reservation to Article 6(5) of the ICCPR did not undermine the Court's finding that a national consensus *now* exists against the execution of juveniles, since the reservation had been entered a decade ago, and subsequent state and national practice reflected a trend toward abolishing the practice.[791]

The relationship between U.S. acceptance of international law and judicial resort to international law in constitutional interpretation raises one final question, which is what effect, if any, the practice will have on the United States's role in international lawmaking and its future willingness to ratify international agreements. Arguably, concern that treaty terms may subsequently inform constitutional analysis could lead the executive branch to ratify fewer treaties, enter more reservations, or even to aggressively oppose adoption by other states of treaty provisions that any particular administration views as contrary to U.S. interests (since the Court is willing to consider even treaty provisions that the United States has not accepted). Such practices, of course, are already evident in

787. Evidence of the customary international law prohibition derives, inter alia, from the prohibition on the execution of juveniles set forth in the International Convention on the Rights of the Child, which has been accepted without reservation by every government in the world except the United States and Somalia, and the fact that every state except the United States and Iran prohibits the practice. For further discussion, see Brief of the European Union and Members of the International Community as Amici Curiae Supporting Respondent, Roper v. Simmons, 125 S. Ct. 1183 (2005) (No. 03-633).

788. Michael Domingues v. United States, Case 12.285, Inter-Am. C.H.R., Report No. 62/02, OEA/Ser. L./V/II.177, doc.1 (2002), *available at* http://cidh.org/annualrep/2002eng/USA.12285.htm.

789. For competing views on the status of the prohibition on the execution of juveniles, compare Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085 (2002), *and* Joan F. Hartman, *"Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, U. CIN. L. REV. 655 (1983), *with* Bradley, *supra* note 64.

790. *See* Roper v. Simmons, 125 S. Ct. 1183, 1225-26 (2005) (Scalia, J., dissenting).

791. *Id.* at 1194.

U.S. treaty making, particularly in ratification practices that seek to insulate domestic law from international instruments. It is not clear that the remote possibility that a treaty norm would some day find its way into constitutional analysis will further chill U.S. treaty making practices. It seems more likely that the U.S. interests that are served by participation in the international system would outweigh such concerns. Nevertheless, it is important to acknowledge that a decision like *Roper* could spur at least the current administration to oppose some future treaties.

D. *International Law Limits Accompany International Powers*

The last requirement for a principled approach to employment of international law in constitutional analysis is that consideration of international rules should include relevant limitations that international law imposes on the same rule and should take into consideration adaptations in the international rule as it evolves. Although the Court has recognized this obligation in principle, it has not always complied with it.

A principled application of international law should generally require taking powers with the accompanying constraints. The primary legitimating value that international law brings to constitutional interpretation is the weight of the considered judgment of the international community. But that legitimacy is lost if powers deduced from international law are accepted into the domestic system without the constraints that the same considered international judgment has found it appropriate to impose. In the immigration example, if the government's *constitutional* authority over aliens is based on powers allowed under international law, then the government's constitutional authority logically also should be limited by the constraints that international law imposes.

This argument necessarily raises questions regarding *which* limitations under international law should accompany the constitutional embrace of powers allowable under international law. A given exercise of state authority may implicate many international rules, and it would be implausible to argue that consideration of international law in construction of a particular constitutional power should bring the entire body of international law with it. A complete exploration of this question is beyond the scope of this Article. At a minimum, however, a court should consider international limits that are directly linked to the governmental power at issue. In the context of the power to detain enemy combatants recognized by the Third Geneva Convention, this would include the duty to provide a minimal proceeding to determine the status of individuals detained. Justice Souter thus properly criticized the government in *Hamdi* for invoking detention powers recognized in international law without respecting this constraint.

Constitutional absorption of international norms also raises the question of how the resulting constitutional principles should evolve as international law develops. Where clauses of the Constitution have been read as incorporating common law principles, some originalists have argued that the provisions must be understood according to common law rules that prevailed when the Constitution was adopted. As discussed above, however, the Court has adopted an organic and evolutionary approach to international law. To the extent that it has embraced

international law norms, it generally has embraced the *evolved* contemporary norm, rather than the norm prevailing in 1789. An approach that did not allow constitutional rules incorporating international norms to evolve over time would freeze U.S. constitutional analysis in whatever particular moment the Court ruled.

Pennoyer and its successor cases underscore this point. The late nineteenth-century international law principle of absolute territorial sovereignty adopted in *Pennoyer* continues to influence, and complicate, U.S. personal jurisdiction analysis. The international territorial norm incorporated in that case, however, has evolved significantly. Indeed, the principle of absolute territorial sovereignty had begun to erode even before *Pennoyer* was decided. The international law source of the principle of territorial sovereignty in *Pennoyer* has been forgotten, however, and the constitutional principle of jurisdiction has developed subsequently without reference to the international rule. Likewise, in the immigration context, after constitutionally ratifying (and likely overstating) a late nineteenth-century principle of sovereign power over aliens, the Court declined to acknowledge or accommodate later developments in international law regarding the rights of aliens, preferring to "leave the law on the subject as we find it."[792]

The better approach, it would seem, would allow a constitutional principle to evolve with the international rule it embodies. When an international norm has informed constitutional analysis, a court revisiting constitutional doctrine thus should also take into account any evolution in the international rule. The constitutional authority or limitation therefore could be allowed to evolve as international law continued to develop.[793] Such an evolution may raise objections that tying constitutional analysis to a changing international doctrine violates U.S. sovereignty, separation of powers, or other independent constitutional limits. The argument has force. But domestic courts would retain control over this process, and a court would not be obligated to rigidly follow any development in the international rule. The court would also need to reconsider any evolved international rule in light of all four principles set forth here. The point is simply that where a constitutional principle has been construed in light of an international rule, courts should remain conscious of those international origins and sensitive to the rule's evolution.

Both the *Roper* and *Hamdi* majorities employed this approach. The *Roper* majority was sensitive to changes in both national and international opinion regarding the juvenile death penalty that had occurred since the Court had addressed the question in *Stanford*.[794] The *Hamdi* plurality, and the opinion of Justices Souter and Ginsburg, suggested in dicta that both the President's war powers and constitutional due process could be informed, and limited, by the 1949 Geneva Conventions and other modern developments in the customary laws of armed conflict.[795] Although Justice Souter would have gone further in applying the constraints that international law imposed on powers deduced from

792. Harisiades v. Shaughnessy, 342 U.S. 580, 588 (1952).

793. *Cf.* Sun Oil Co. v. Wortman, 486 U.S. 717 (1988). As Justice Scalia wrote for the Court, "It is not our point that the content of the Full Faith and Credit Clause is governed by international conflicts law, but only . . . that its original content was properly derived from that source. The conflicts law embodied in the Full Faith and Credit Clause allows room for common-law development, just as did the international conflicts law that it originally embodied." *Id.* at 723 n.1.

794. Stanford v. Kentucky, 492 U.S. 361 (1989).

795. *See supra* note 780.

international law, O'Connor's opinion also recognized that the powers recognized by the laws of war were limited by modern law of war principles. To the extent that the President enjoyed powers derived from international law, in other words, the Court suggested that he must take the bitter with the sweet.

VI. CONCLUSION

The public debate over the role of international law in constitutional interpretation has focused on the threshold question of whether international authorities can ever be relevant to constitutional analysis. This Article demonstrates that that conversation is both ahistorical and misguided. Specifically, the Supreme Court's historical record regarding the use of international law refutes many of the objections raised to the use of international law in the recent individual rights cases. Objection to the decisions in *Roper*, *Lawrence*, and *Atkins* cannot be based on the irrelevance of international law to the Constitution, given the rich historical relationship between the Constitution and international law. Consideration of international law in the individual rights cases also cannot be dismissed on the grounds that international law is appropriate only for use in constitutional questions explicitly implicating foreign relations, or that international law cannot legitimately limit governmental power or define individual rights. Invocation of international norms in all of these contexts has a lengthy historical provenance. The objection to the use of international law also cannot rest on the fact that international law is not domestically or democratically created, since many sources of law and interpretive tools are not the product of majoritarian processes. Instead, objection to the use of international law in the recent cases must turn on some aspect of the constitutional design that is specific to cruel and unusual punishment or substantive due process. But the Court's longstanding and accepted tests in both contexts are fully consistent with giving some consideration to international values.

More broadly, the cases considered here require reconsideration of some of our modern assumptions about the uniqueness of the American legal order. Domestic conversations about the Constitution frequently emphasize its distinctiveness, and both the fact and content of our written Constitution historically has rendered the United States exceptional in many respects. But the current debate also has failed to recognize the many respects in which the Supreme Court traditionally has viewed the Constitution as incorporating, and reflecting, common values drawn from the international legal system. Like the common law, international law is given no explicit constitutional status in interpretation of that document. And yet, just as "[t]he language of the Constitution . . . could not be understood without reference to the common law,"[796] much constitutional language cannot not be fully understood without reference to international law.

The historical record establishes that our constitutional tradition is significantly more receptive to international norms than is understood in the current scholarly and judicial debate. It is the critics and detractors from the practice, in other words, who are departing from tradition here. The rich dialogue

796. Kansas v. Colorado, 206 U.S. 46, 95 (1907).

between international and constitutional norms, however, has been largely forgotten in contemporary constitutional discourse. A more complete and accurate historical understanding suggests that U.S. constitutional doctrines should be applied with greater sensitivity regarding international law. Justice Scalia has argued that it is "a Constitution for the United States of America that we are expounding."[797] The cases demonstrate, however, that international law has been a part of U.S. constitutional interpretation from the beginning and a principled resort to international law is fully part of the American tradition.

797. Thompson v. Oklahoma, 487 U.S. 815, 869 n.4 (1988) (Scalia, J., dissenting).